Translatability Potential of Legal Discourse Viewed from the Philosophical Perspective

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Abstract

The aim of the paper is to introduce the notion of translatability potential, which can be viewed from the philosophical perspective, as it aligns with the problem of untranslatability raised by several philosophers who referred to translation in general in their works. For instance, Hadamer, Heidegger, Derrida used to speak and meditate the mentioned issue in their works, they were concerned with the potential possibility to express ideas in another language, transfer them to other cultures, and placing them in a new language environment. The paper considers this problem from the point of a legal discourse translation field, as it is a complicated system including multiple aspects presenting challenges for translators, which in the process of translation determines the correlation between the object and the subject. Translatability potential is suggested as a starting point to identify if a text or a linguistic unit is possible to render using another language. The paper also studies how much the interpretation of the source of a legal text affects the fulfillment of its translatability potential.

Keywords: translatability potential, untranslatability, knowledge, legal discourse, philosophical perspective

INTRODUCTION

Translation as a cognitive process involves a certain research process and gaining new knowledge, and its result depends considerably on the translator's decisions based on his/her knowledge of the subject and ability to penetrate into the depths of the field.

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However, a text itself and its linguistic level means to bear some characteristics which either make them translatable or not, it means some of them can potentially be translated in full and without considerable changes in meaning, while others require great semantic changes to make the translated text perform the same function as the original. Thus, a text as a whole, with its lexical and even grammatical parts has a translatability potential of a certain level, which affects the translator's choice of linguistic means and the degree inaccuracy of the translation process.

While philosophy is speaking about untranslatability as a main problem of translation and suggests not translating key philosophical terms, but keep them untranslated and explained, legal discourse does not accept such an approach, as its main text is a type of document, which needs a proper translation in a new language environment according to its purpose.

The translation of legal discourse viewed from the philosophical perspective brings a new vision to the problems of legal terms translatability, overcoming the challenges of rendering differences in legal notions of various law systems and the position a translator in the process of international legal communication. In the paper the translatability of legal terms will be questioned, the legal discourse will be considered from the translator's perspective and the necessity to deal with the untranslatability of legal discourse will be discussed. The paper also contains some assumptions about the level of the interpretation affection on the target language document.

Using "Meditative Thinking" to Consider Legal Translation from the Philosophical Perspective

Martin Heidegger's idea of calculative and meditative thinking, such as two methods of thinking a human being is characterized by expressed in his *Discourse on Thinking*, seems well applied to the theory of translation, as these two ways of thinking are the features of any research process, moreover, they are invisible. Speaking about calculative thinking Heidegger suggests the following, "… whenever we plan, research, and organize, we

always reckon with conditions that are given. We take them into account with the calculated intention of their serving specific purposes. Thus we can count on definite results." (Heidegger, Discourse on Thinking, 1966). In translation studies, we cannot do without precise calculations, such as translation and contrastive analysis, qualitative data, and corpus studies. However, while studying details and calculating, there is a risk to lose the general concept of the text, fail to perceive the general picture, and forget about the function of the original text, which should be performed by the translated one in a new environment. In this connection, meditative thinking may always help us not to be blinded by data; it implies generalized assumptions, keeping in mind abstract notions and overall idea. Heidegger called to refer to the meditative thinking again, as otherwise; we experience certain challenges, which he names a "flight-from-thinking", and inability to get distracted from everyday matters and practical results. "Yet anyone can follow the path of meditative thinking in his/her manner and within his/her limits. Why? Because human being thoughts coincide with the meditating thinking." The meditative way of thinking used to study the translatability of legal terms gives a new perspective and, in further studies, factual material needs its analytical approach to reveal the evidence. It means that calculative thinking requires the assumptions of the proven fact. In this regards a translator is considered as a thinker, researcher, participant of a cognitive process, and a producer of a new knowledge.

Philosophers (Heidegger, Gadamer, Derrida, Russell, and others) have focused on the problems of translation since the middle of the twentieth century, applying "meditative thinking" to speak about the understanding, interpretation, correlation between cultures, and of course about the untranslatability as the core problem of transforming a text of one language into a text in another language. Taking as a starting point the absolute translatability and concentrating mostly on philosophical text, they claimed it impossible to find proper equivalents to render the notions formulated in one language through another. The degree of translatability is considered on the text level, as the scholars discuss different

types of texts in terms of the possibility to produce their equivalent translation. W. Benjamin in his *The Task of the Translator* also speaks about the translatability of texts (Benjamin, 1996). J. C. Catford later differentiated between linguistic and cultural untranslatability of texts (Benjamin, 1996). Neuberd classified texts into relatively untranslatable, partially translatable, and optimum translatable (Neubert, 1973). In Ukrainian philosophy, the problems of translatability were analyzed in a special issue of the *Filosofska Dumka Journal* (Philosophical Thought) devoted to the philosophy of translation (Bohachov, Kebuladze, Panich). Bohachov speaking about translatability argues with H. Gadamer (who differentiated between the texts) about translation process – which parts of the text are subject to translation and which are not, claiming that poetry is almost impossible to be translate, while texts, which represent reality, can be translated without any edition procedures. Bohachov (Bohachov, 2010, p. 6) discusses the degree of translatability that Gadamer developed following C. Ogden and I. Richards anticipated it in the 1920s (Ogden, 1923). Here we can claim that J. Derrida, E. Nida, and other scholars developed the issue of translatability, which is still relevant.

This paper studies the translatability of legal discourse, considering both texts and linguistic means, formulating an idea of the translatability potential of both lexical units and texts as a whole. The term potential has been chosen as any text (document) or term within the legal discourse requires translators' effort in understanding and interpreting (following Gadamer's theory) (Gadamer, 1960, p. 22) to produce a new text (document) functionally appropriately for a new legal environment. It largely depends on the level of the translator's expertise whether this potential is being realized to the maximum or not.

S. Borutti claims that the translation can be considered as a cognitive experience from a larger philosophical perspective. "Translation is an activity of gaining new knowledge and dealing with it, and in this process, several theoretical problems and crucial cognitive situations are revealed. First of all, it is *a learning experience* and *a research dimension*, as

it touches the problem of approaches (cognitive, communicative and affective) to the difference." (Borutti, 2019, p. 12)

The translation of legal texts requires not only the above-mentioned processes and knowledge but also the awareness of specific features of the legal systems. The legal discourse of different language groups determines the choice of linguistic means of legal texts. Therefore, it is of great importance to which legal system the text belongs to, as the notions and terms denoting them may differ from one legal system to another. The situation where a legal translator finds him/herself is complicated if the legal systems of the original text and the target texts are different. This is what we can observe in English-Ukrainian translation. Two different legal systems formed in a specific way produce different concepts expressed by the terms, clichés, and set phrases. They reflect the processes within the legal systems, their participants, actions within them, and the results of these actions, all denoted by lexemes having complicated semantics. The semantic structure of each lexeme found in a legal text includes all lexical meanings actualized in different contexts, not only within the legal discourse but also beyond it. On the other hand, such lexemes are used in the exact context of a legal document, where they have strictly defined meaning (one meaning within their lexico-semantic structure) that contains the concept of the legal system the document belongs to.

In case if the legal systems for English speaking countries and Ukraine are different, the concepts found in the documents will not coincide. Even those of them which are close in meaning, differ considerably, and Ukrainian lawyers reading the translated document may be confused applying their knowledge of the concept to the Anglo-Saxon document which is erroneous. So translating a legal text from English into Ukrainian we face a dilemma of untranslatability, incompatible with the practical task of legal translation.

Another reason contributing to the idea of untranslatability is the fact that English and Ukrainian are languages with different structures, their lexical definition have many

isomorphic features, official style has considerable differences too. So, all these isomorphisms at all language levels result more challenges for a translator, and the possibility to provide an equivalent translation of a legal document seems that it is equivalent to zero. On the other hand, we find documents translated every day, and translations of international agreements ratified by parliaments and no longer considered to be translated. It is another dilemma, which requires further explanations and determination. Speaking about translatability, we can use the postulate that there is no absolute equivalence but only a relative one. From the point of view of absolute equivalence, we can speak about the untranslatability of legal notions from one language into another, as there is no full direct correspondence between two language systems and two legal systems. Therefore, there is no chance to find in a target language a lexical unit with the same semantic structure expressing the same concept as the lexical unit of the source language.

Philosophers speaking about translation and the problem of untranslatability analyze mostly philosophical terms, as they are the main reason for them to get concerned with the problems of translation. A regular decision that scholars offer is to create a new word in the target language and explain its meaning, which seems reasonable for a precise understanding of the concept without adapting an existing word with its semantic structure, connotations, and contexts to express some genuine term created by the author in the language of origin. Thus, translators of Heidegger's *Being and Time* translate two key terms of his work 'Sein' and 'Dasein' in two different ways as 'being' and 'Dasein', as the former has an English equivalent, while the latter does not (Heidegger, Being and Time, 2001). Hypothetically, this approach could be applied in law too, and it could make theoretical sense. However, a practical implementation of such method would prove to be unreasonable, as the number of documents translated every day is hard to be estimated, and nearly all the terms require a new equivalent of other language, as they have different referents in two languages in question.

As a result, we can observe a “conventional” use of terms in translation, since; there is a silent agreement between lawyers of the origin language discourse, translators and lawyers of the target language environment. They concluded that terms are translated "traditionally" in a certain way, and the lawyers of both sides should be aware of the difference of legal systems.

What happens to the semantics at all language levels during this process of recoding by a translator requires special study, and here it would only be possible to set many presumptions that are to be controlled by empirical methods that should prove or discard them in the future. On the lexical level, the semantics of each term depends on a number of factors, including the fact if the term originates from a common word stock and acquires new meaning in the legal context, or it is a specific legal term with a limited number of lexico-semantic components. The former type has a complex semantic structure that includes all meanings of the word, formed under the influence of various contexts, additional meanings, emotional coloring, and other elements. In this case, the untranslatability degree rises and it is impossible to find an equivalent term with the same semantic structure. In this case, the best solution is that, a translator can find an equivalent which has a common component of meaning, so all the connotations and other definitions and components of meaning found in the term of the origin language will be lost. For example, 'law' is one of the key terms of both English and Ukrainian legal systems, and still, its translatability potential is low, since English ‘*law*’ means ‘*pravo*’ in (law system including all elements), ‘*zakon*’ (legal act), ‘*zakonodavstvo*’ (all legal acts of the state, when used in plural) in Ukrainian language. Taking account of the fact mentioned above, that terms of two different systems have different referents even if they are close in meaning, we can say that this adds to the untranslatability degree of the term. If a term is specifically legal and is not used in the target language in other contexts, like Latin terms found in the legal documents, we can say that the degree of untranslatability is very low. In this case it is obvious that these terms have direct full equivalents in the target language

(Latin terms are usually translated by Latin terms into Ukrainian, either translated by calque translation or not translated at all).

So legal terms used in the English discourse vary according to the translatability potential, depending on their origin and use in everyday speech. As for the polysemantic words used as legal terms, they have low translatability potential, while terms of Latin origin are of high translatability potential.

Thus, the legal documents, they can be classified in the following ways: if a document is found in both legal systems, and its name and contents are potentially translatable with minimum losses in meaning, while other documents may be found only in the source language, in this case their translatability potential is very low. Such document is the Quote widely used by commercial companies of English speaking countries. This document has elements of the Invoice and the Commercial Offer, frequent for Ukrainian companies; it can also contain the terms and conditions of cooperation between two parties, found only in the Contracts in Ukraine. The difficulty here is that English speakers use all four types of documents, and translators face the challenge of translating both the name of the document and its content into Ukrainian, as it is initially of low translatability potential.

Translators within the Legal Discourse

Speaking about the attitude towards translation, Bohachov suggests, “The relation between the recipient of the translation and the translator is based on the *trust.* It consists not only in an occasional trust to the translator's qualification, status, and integrity, but also in the belief in the possibility to translate from one language into another, and the possibility to set a correlation between diverse discourses, that is in the possibility to approximate the distant” (Bohachov, 2010, p. 6). Here comes a question, if a translator can be trusted considering the fact that any translation is interpretation. Gadamer saw a translator’s task in both understanding and interpreting the meaning of the text of origin, trying to set the boundaries for interpretation and stressing the restricted powers of a translator in this

respect. “Here the translator must translate the meaning to be understood into the context in which the other speaker lives. Of course, this does not mean that he/she is at liberty to falsify the meaning of what the other person says. Rather, the meaning must be preserved, but since it must be understood within a new language world, it must establish its validity within in a new way. Thus, every translation is at the same time an interpretation. We can even say that the translation is the culmination of the interpretation that the translator has made of the words given to him.” (Gadamer, 1960, p. 386).

R. Jakobson generalized, saying that all linguists act as interpreters, meaning translators as well. "No linguistic specimen may be interpreted by the science of language without a translation of its signs into other signs of the same system or signs of another system. Any comparison of two languages implies an examination of their mutual translatability; the widespread practice of interlingual communication, particularly translating activities, must be kept under the constant scrutiny of linguistic science." (Jakobson, 1959, p. 234).

While studying the legal language in general and semantic shifts found in the translations of legal texts, it is highly important not to take for granted conventional translation of certain terms and specific lexis and look at them critically, as tradition sometimes plays tricks on human's choices. Here comes a necessity to apply another approach, i. e. the critical discourse analysis which "is based on two fundamental assumptions: first, it indicates a particular positioning of the researcher, who leaves the distancing of conventional approaches and has a set of ideological assumptions in the way he/she studies a reality. Second, it identifies a close relationship between social structure and language, tending to analyze political systems and ideologies as texts aimed at creating a collective political will.” (Godino, 2016, p. 5). Following L. Godino who studied political translations, we can say that the same is true for legal texts, as for those translating them and correspondingly, studying their translation, the critical discourse analysis may be of help in identifying social, political, and legal aspects influencing the choice of lexemes. (Godino, 2016, p. 5).

The Lifetime of an International Document and its Translatability Potential at each Stage

The translatability potential of legal documents and their fulfillment is determined by the translator's decision on each stage of the document's lifetime. The discourse of legal documents is affected by all the sides involved in the process of their creation.

Upon certain circumstances, states decide to sign a bi- or multilateral document to reach their purpose. Then the process of drafting the document starts, and it is only necessary to look more attentively at it: even if representatives of different countries speak English or French while discussing the contents, they have different backgrounds, cultural environments, and ideas about the same notions, which means that the text of the document is somewhat different for speaker of different languages.

If translators are involved, each stage of translation expropriates some shades of meaning, alternates modality, etc., we assume that no translation errors are possible at this level, which is not always true (human error is possible anyway). Though the translatability potential of such documents is high in general, the final result is largely determined by the translatability potential of the key terms used in the agreements. If the initial document is drafted by one side, for example, English, then the sides make changes and negotiate terms and conditions. In this case, we have to bear in minds that translators are involved in each step of negotiating and making amendments results and in semantics issues. One more participant of the process plays a key role in this; it is a revisor whose task is to make sure that the terminology is translated in the best possible way consistently used throughout the document. In the Ukrainian text of the EU-Ukraine Association Agreement the key term 'approximation' is translated in five different ways, so the translatability potential of the document in general, and the term itself in particular, was not realized by the team of translators and the revisor.

Drafted multilateral document is to be translated into the languages of the signatory states, and we should not forget that each translation adds some national specifics and excludes or replaces some notions, not found in their culture, law system, etc. Each document contains key notions expressed by terms in the text of origin, and the translator faces the challenge of choosing an equivalent for it in the target language. This task seems clear and obvious, looking deeper at his problem we can see that any lexical unit of one language and its 'equivalent' in another language usually differ considerably, as the semantics the notion bears in one language would never be the same as the semantics of its substitute in another language. Therefore, the first and foremost step in translating a key term of any document is analyzing the notion itself, the semantics of the word used as a legal term. In this case, the correlation with the object of the actual reality where it is denoted by the term, functions and finds (for him/herself) the most detailed and profound explanation of the notion. It enables to choose an equivalent, which is the closest in semantics, including all components of meaning that constitutes the semantics of the source term. Therefore, according to M. Heidegger, intralingua translation is the most important, as he was talking about the translation of philosophical texts, which applies to legal texts as well.

“Originating from within the own most of language, and free from the supremacy of the mother tongue and the authority of a dictionary, Heidegger's hermeneutic method governing the task of translation assigns a derivative status to the interlingual translation, while giving a more original and prominent status to intralingual translation. It is this original and prominent status of the intralingual translation that in my view defines what is singular, unique, and decisive about Heidegger's hermeneutic method governing the task of translation and sets this method apart from other approaches to a translation like that of Paul Ricoeur.” (Schalow, 2011, p. 177).

The interpretation of the text by a translator is the core factor that ensures the realization of the translatability potential. "Although the translator does not interpret the text as the judge does, he/she is expected to preserve the unity of the single instrument by producing a text

that expresses the uniform intent, i.e., the original intent of the lawmakers (legislation), States parties (treaties), or contracting parties (contracts)… it is presumed that all parallel texts of a plurilingual instrument express the same intent and that this is the original or true intent." (Šarčević, 1997, p. 88).

Jurisprudence belonging to humanities cannot be a precise science, though by its function and purpose it is restricted to a set of laws, statutes, precedents (depending on the law system) and needs to be as precise as possible, the paradox to be coped by all the participants of the legal discourse. We could leave it to law specialists and say that linguists deal with lexical matters and grammar rules and should not get concerned with law issues and ambiguity caused by the unprecise character of human language. Still, it is hardly possible to separate ourselves from these issues as each time we get puzzled by the content of a term and face a necessity to make a translator's choice; we find it necessary to learn as much as possible about the notion underlying the term used in the text of origin. Studying the notion, we get to know more of how the legal system works in the country of the document's origin and have to find a correlation with the target legal system, which is not always possible. Another restriction a translator has is that he/she is not allowed to interpret the document, and it is worth mentioning here that legal translation is one of few translation fields where the literal translation is widely applied. It means that the target text needs to be as close to the text of origin in form as possible, while the meaning should be rendered adequately. The literal translation means that all repetitions are preserved, all sets of synonyms used in one sentence should be as detailed as in the source document, and even the word order should preferably be the same. When we speak about English and Ukrainian, two languages of different structures, the former being more analytical, and the latter being more synthetic, the point about the word order seems hard to be followed as it requires considerable effort with such different function of it in both languages. So being deprived of the right to interpret, translators are limited in means of producing an equivalent text in the target language.

"Legal translators are now permitted to make linguistic decisions; however, they should always be aware that even minor linguistic changes can sometimes unintentionally alter the substance, thereby changing the meaning and/or effect… Most translators are barred from making legal decisions; although there is a very limited number of translators specialized in legal terminology. As a rule, lawyers agree that legal translators must understand the source text to produce an adequate translation; however, they are not permitted to interpret the source text(s) as judges do." (Šarčević, 1997, p. 91).

Within the described international legal discourse some complicated instances require special attention. Thus, judgments and decisions of the European Court of Human Rights on the cases involving citizens of Ukraine stay within an extremely complicated international discourse. The events that make Ukrainian nationals appeal to the European Court of Human Rights occurred in Ukraine, so they are based on Ukrainian reality, notions of its legal system, specific features of Ukrainian enforcement authorities, etc. Still, the court documents drafted upon the court frame are in English only, then unofficially translated into Ukrainian. Considering that fact that, the interpreter is directly involved in the procedures, still some information might be missing, some shades of meaning and connotations of emotionally colored words can be transformed. Here we have to say that it is a natural interpretation process (a good interpreter speaks 2/3 of the time of a speaker, the decisions about the choice of words are made immediately, there is no chance to correct yourself if it is not a vital error about important information, so some losses are inevitable).

Therefore, each word has its value in particular documents, and nothing is insignificant, the same is in the process of translations. Once a document is adopted or ratified, its life only begins, as in many actions states and individuals are guided by it; they refer to it in case of disputes, it may influence court decisions, and the most important point is that the sides refer to it in the decision-making process. Every time the document is referred to, it is quoted, exact linguistic means are actualized, explained, and interpreted by law professionals.

It should be admitted that a document signed by international parties, translated and ratified, later on, cannot be 100 percent identical in all the languages. It is worth mentioning that any document of state importance is ratified by parliaments of the states and considered to be of the same legal force, for instance, all UN international agreements, conventions, declarations, EU Regulations and Directives, bilateral agreements between states. So it would be incorrect to think that we all live according to the same laws, signing international agreements and conventions, as actually, each nation perceives what is written in the text of these documents in its way, not to say that each person understands words they hear and read in a different way, which causes misunderstanding between people every day.

CONCLUSIONS

The translatability potential is a notion that requires evaluating the possibility of producing a quality translation of a text, a document, a lexical or grammatical unit. The idea of the translatability potential originates in the philosophical approach to translation studies and contemplation on the question of what can and cannot be translated. Taking into account practical tasks of translation, all linguistic units and texts are to be translated, even if the translatability potential is very low. Therefore, a translator often uses conventional equivalents; it means that, both origin text users and target text users agree to consider equivalents. Speaking about the international legal discourse it is of utmost importance to understand the translation process, its level of involvement, applied methodology, the influence of cultural, mental, emotional, and other factors that are very vital for the process. Further study of the problem will require setting the criteria to identify the translatability potential of linguistic units and texts, studying its effects on the semantic shifts found in the translation, identifying the correlation between the object and the subject within the translation process.

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