



Legal Translation in the Perspective of Functionalism

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Abstract

This paper holds that legal translation studies should be conducted in a macro-to-micro way, that is, a top-down way which is consistent with Functionalist Translation Theory. Legal translational action and the agents within it are generally analyzed, and then translation Skopos and textual function in macro-level are combined with language disposal in micro-level. Given tremendous freedom and creativity of Functionalist Translation Theory, the translator is no longer the one who transmits between the source-text and the target text. In the process of the translational action, the translator has taken on a very active role of effective communicator whose main task is to make a successful interpersonal communication.

Key words: Legal translation; Functionalist translation theory; Macro-level; Micro-level

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INTRODUCTION

In our era of globalization, the demand for the free movement of people, goods, and capital is increasing; Consequently, legal translation affects people inevitably, for instance, international trade couldn't function if there

was no legal translation. From the above description, it can be seen obviously that legal translation is becoming more and more important. But neither in translation studies nor in legal studies, legal translation has been ignored for a long time in history. Little attention is paid to the theoretical studies on legal translation in China, though mountains of translation companies bring countless legal documents every day into being. After the analysis of a large body of the papers on legal translation in China, the author finds that most of the papers tend to focus on the micro-level, that is, they are mainly the personal empirical analysis of terminology and syntactic structures. Moreover, the long dominant debate whether the translation should be literal or free still goes on in the field of legal translation. This paper adopts the macro-micro research method insisted on by the Functionalist Translation Theory, by integrating the macro-level translation Skopos and textual function with the micro-level syntactic structures and lexical expressions. The author attempts to make an analysis of the rationality and applicability of the Functionalist Translation Theory as the guideline for legal translation.

1. APPROACHES ADOPTED IN THE PREVIOUS LEGAL TRANSLATION STUDIES

Although legal translation has a long history both in China and in the West, as is mentioned previously, it had not attracted much attention before China's entry into the WTO in both translation and legal studies. Legal translation, not regarded as an independent subject, is only seen as one of the special-purpose translations being recognized as less important.

Although large amounts of legal translations are produced on a daily basis, the documents on legal translation are in fact numbered.

However, more and more books and papers have been written on legal translation, especially after China's entry into the WTO, which is an obvious phenomenon we can find. But most of them deal with translation problems in the traditional linguistic "bottom-up" approach. These studies are supposed to do research from the aspects of words and sentences, with an intention of confining the translators to the micro-level study. In this sense, Chen Zhongcheng wrote two books about legal translation, focusing on the micro-level evaluation of legal translation from the perspective of terminology and syntax (Zhang, 2001, p.193). It cannot be denied that these books and papers contribute to legal translation studies in China. But after an analysis of these books and papers, it can be found that all of them have much in common—they tend to lay stress on the micro-level study dealing with terminology and syntax. That is to say, most scholars still have been focusing on the bottom-up translation approach which is traditionally linguistic-centered, and their method has not been changed from the micro-level to the macro-level.

Comfortingly however, among some studies on legal translation inspired by modern achievements in linguistics and translation studies, there are works in which genre-based approach is the most preferred, which is introduced by Alcaraz and Hughes in *Legal Translation Explained* (2002). Scholars of this group hold that "the concern to maintain the generic identity of the target-text" is one of the most crucial aspects of legal translation (Bhatia, 1995, p.206).

Besides, Functional approaches are also strongly suggested for their significance in dealing with practical problems. In this thesis, the author probes into how Functionalist Translation Theory can be used in legal translation practice.

2. LEGAL TRANSLATION IN THE PERSPECTIVE OF FUNCTIONALISM

2.1 Legal Translational Action

The present author adapts the Functionalist concept of a translational action which is regarded as the intercultural communication process. In this process, translators make communication happen between people from different cultures. Therefore, legal translational action can be named by the present author the cooperative process in cross-legal system communication which intends to produce an effective communication.

The concepts of translational action and translating are different in the Functionalist theory. A translational action not only involves translating but also involves intercultural activities, with cross-cultural consulting and cross-cultural technical writing even included. Since law is acknowledged as part of the culture in a broader sense,

cross-legal system consulting is the embodiment of cross-cultural consulting in the legal field, and likewise, cross-legal system technical writing is the embodiment of cross-cultural technical writing in the legal field. Therefore, in order to bring legal translation studies under the framework of Functionalism, it is a must for cross-legal system consulting and cross-legal system technical writing to be recognized as one part of legal translational actions and one part of legal translation studies as well.

As are displayed in Figure 1, there are four types of legal translational action: cross-legal system consulting, cross-legal system technical writing, interpreting and translating of written legal texts. This study focuses on the last one.

The author of the present study thinks that it is necessary to clarify cross-legal system consulting and cross-legal system technical writing, though they two are not the emphasis of this study, and doing this, it can bring about a more systematic and clearer study. Generally speaking, legal translation always tends to aim at producing a target-text (either oral or written), but the final result may not necessarily be a target-text in the perspective of Functionalism. For example, a Chinese lawyer is entrusted to send a lawyer's letter to a Singaporean company. He asks the translator to translate the letter from Chinese into English. But the translator, based on his knowledge that many small Singaporean companies use Chinese and this target company is one of them, suggests that no translation be done for better communication. If his suggestion taken, even though there is no translating of any texts, it is actually consulting and is still regarded as a legal translational action.

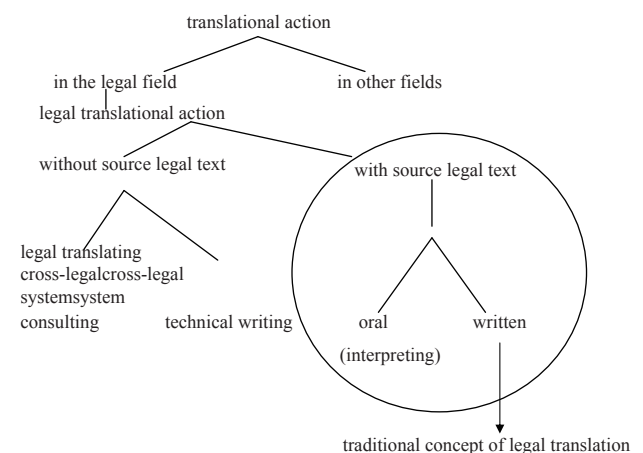


Figure 1
Legal Translational Action

In the Functionalist view, it is crucial for a translator to identify a translational action, for functionalism understands translation as a social action of communication, and in this communication, the translator is a very important mediator. Studies of the translating are important, and the ones of other translational actions are important as well. It should be decided

firstly whether there is a real necessity to translate, and next, the translation strategy should be chosen to be used in the practice. This accounts for the reason why studies on cross-legal system consulting and cross-legal system technical writing should be included in the legal translation studies.

2.2 Agents of Legal Translational Action

The people or agents engaged in the translation process play different roles, which are related to each other to complete a translational action. The action theory, the theoretical foundation of Skopostheorie, divides the different roles into initiator, commissioner, translator, source-text producer, target-text receiver and target-text user. This division can also be applied to the legal translation. Obviously, without initiator or commissioner, there would be no translational action. The initiator plays a more essential role than that the commissioner does for it is the initiator that gives the translation brief to the translator. When dealing with the translation of laws and statutes, the initiator or commissioner are often the government bodies. Clearly, the source-text producers are the drafters of a law. After the translator has received the source-text and the translation brief from the initiator, he will begin to translate. The skopostheorie raises the translator's position and the translator has become an expert in translational action (Nord, 2001, p.21). The above is very true in the translation of laws. Most law translators are not only experts in language but also experts in some particular fields. When they translate, they are not the passive transmitter but the active mediator, and they can also make some suggestions while some unexpected problems take place. The communication between translators and initiators is likely to bear more importance and necessity in legal translation than in other translations. After the translation of a law has been completed, the target-text receiver and user will come on stage in the process of translation.

Let's take the translation of Contract Law of the PRC for instance. The Legislative Affairs Commission of the NPC is the source-text producer, for it is the drafter of the law. It happened that the Bureau of the Legislative Affairs under the State Council thought it necessary to translate the law into English, and made some arrangements about the translation, and therefore, the Bureau of the Legislative Affairs is the initiator. When the translation Skopos was decided, the bureau began to find translators, which were the principal roles in the translation process. Guided by the translation brief, the translators started their mission of translation. After the translation was completed, the companies both in China and in the foreign countries do business or communicate using the English version of the law. Therefore, the translation process started from the initiation, and ended with application, which can be seen very clearly in this example.

2.3 Source-Text Sender and Source-Text Producer in Legal Translation

Legal translation is different from literary translation, on which the traditional translation studies mostly focus. In literary translation, the source-text sender and the source-text producer are always the same, which means the author himself is the producer of the idea and the producer of the language as well. However, in legal translation, it often happens that different people are in charge of the idea and the language respectively. When the legislative texts are written, the legislators are thinking about the idea and the drafters are writing the language. In judicial texts, it is even more common to witness the separation between the idea and the language.

Furthermore, it is a problem existing for a long time that there is always a distance between the intended meaning and the expressed texts. Even some studies focus on the errors of the source-text (Li, 2004, pp.26-27). Even if the very same person is responsible for both the idea and the language, there still can be a gap between them, i.e. sometimes people can not express what they actually want to express in their own languages. If the above is often true, it can be imagined that the gap between the idea and the language is much greater in legal texts, for communication with other people is always more difficult than communication with oneself.

The special production of the source-text in legal language lead to a particular characteristic of legal translation, i.e. the source-text may not be consistent with the real intention of the legislators or other legal text-senders (Wagner, 2002, pp.70-75). Due to the inconsistency between the idea of the legal text-sender and the language of the legal text-producer, translators are always put into trouble to think about the question of who they should be faithful to. Functionalism can help legal translation get out of the trouble by making the translators able to apply function-emphasized strategies to achieve the Skopos of the translational action.

2.4 The Changed Role of Legal Translators

The issue of defining the translator's role is one of the fundamental questions in translation studies. The legal translator traditionally played a role of mediator between text producers and receivers in a triune relationship. Worrying that any departure from the original could put the identical interpretation and application in danger, lawyers have always required the translators to stay completely faithful to the source-text by transmitting the wording and syntax of the source-text as much as they can. This view has been gradually challenged since the early twentieth century when Virgile Rossel, a professor of law, who was bold enough to translate the German text of the Swiss Civil Code into natural French and referred to the principle of language equality to support his translation (Sarcevic, 1997, pp.36-40). The legal translator didn't manage to change his negative role in the

translation process into a positive one until the twentieth century (Sarcevic, 1997, p.87).

It is very true that new developments in legal translation can be seen in the areas like Canada, Switzerland and Hong Kong, because these places are the ones where bilingualism is used. In those places, there are two kinds of language users who require the parallel legal texts which should be equally authentic. And this results in the practice of drafting the law in two languages, which involve the legal translators in the legislating process and thus have essentially changed the traditional role of the legal translator.

3. APPLICATION OF FUNCTIONALISM IN LEGAL TRANSLATION PRACTICE

The following three examples are taken from the author's own translating experience. Last summer vacation, a teacher who works with the Law School of Shandong University asked the author to translate some law materials from English to Chinese, and the author accepted the task. Getting the material, the author just felt it necessary to ask him much more information about this task. Finally, the author understood that the material, including only three articles, is from an American law textbook. He wanted it to be translated in order to let his students understand these three articles, and then compare them with the related Chinese law. Therefore, the Skopos of this translational action is to produce a target-text the Chinese students can understand easily. To achieve this goal, the author understood that the target-texts must conform to the norms of the Chinese legal language so that the Chinese students could comprehend them easily. Besides, the authoritativeness and solemnity of the original legal texts should be preserved as much as possible. Therefore, the intratextual and intertextual coherence is necessary to be achieved.

Example 1

The English Version

81. (1) If it is made to appear by information on oath before a magistrate that

there is reasonable cause to believe that any person has in his custody or possession without lawful authority or excuse—

- (a) Any bank note; or
- (b) Any implement for making paper or imitation of the paper used for bank notes; or
- (c) Any material having thereon any words, forms, devices or characters capable of producing or intended to produce the impression of a bank note, or
- (d) Any forged document, seal or die; or
- (e) Any machinery, implement, utensil or material used or intended to be used for the forgery of any document.

The magistrate may grant a warrant to search for the same, and if the same is found on search, it shall be lawful to seize it and carry it before a magistrate to be by him disposed of according to law.

(2) Every document, seal or die lawfully seized under such warrant shall be defaced and destroyed or otherwise disposed of—

- (a) By order of the court or magistrate before which or whom the offender is tried; or
- (b) If there be no trial, by order of a magistrate.

(3) Where any forged bank note, or any machinery, implement, utensil or material used or intended to be used for the forgery of a bank note, is lawfully seized under a warrant granted in pursuance of subsection (1) or otherwise, the bank note, machinery, implement, utensil or material, as the case may be, shall, notwithstanding anything in subsection (2), be delivered up to the Financial Secretary or to any person authorized by him for the purpose, by order of the court or magistrate before which or whom the offender is tried or, if there be no trial, by order of a magistrate.

The Chinese Version:

81. (1) 如果有人起誓告发到地方法官, 有正当理由相信某人无合法权利或缘由而存有或占有:

- (a) 纸币; 或者
- (b) 任何一种用于制造印制纸币的纸张或相似纸张的工具; 或者
- (c) 其文字、表格、图案或字样, 能够使人认为或意欲使人认为是纸币的任何材料; 或者
- (d) 任何伪造的文件、印章; 或者
- (e) 用于或意欲用于伪造任何文件的机械、器具、用具或材料,

地方法官可以签发搜查证. 如上述任何一种被查获, 必须依法查缴、移送地方法官, 依法处置.

(2) 以上依法查缴的文件, 印章, 应销毁或者

(a) 依据审判违法行为者的法院或地方法官的决定处置; 或者

(b) 未经审判的, 依据地方法官的决定处置.

(3) 按(1)中规定或依其他方式被查缴的伪造的纸币, 或者用于制造或意欲用于制造伪币的机械、器具、用具或材料, 视情况可无需(2)中规定的程序, 依据审判违法行为者的法院或地方法官的决定, 未经审判的, 依据地方法官的决定, 送交财政大臣或者财政大臣授权的任何人.

English legal syntax is typically characterized by long and complicated sentences, partly because of multiple qualifications, cases and conditions, and partly because of the way the legal sentences are written.

To produce the Chinese text of Article 81, it becomes necessary to adjust sentence structures, shuffling the components of sentences, making necessary additions and deletions.

In the English Version, "If it is made to ... or excuse—" is a very long sentence, and there is not even one punctuation. This is a typical "if" clause in English legal text. If the clause is translated word for word into Chinese,

the Chinese version will go against the Chinese grammar and the typical Chinese sentence structures. Taking this into consideration, the author cut the long English clause into two parts in Chinese, and what's more, by the addition of “有人” and deletion of “it is made to appear”, the Chinese Version is made much more fluent and thus easier to understand by the students.

In 81.(1) (c), “capable of producing or intended to produce the impression of a bank note” is the attribute to modify “words, forms, devices or characters.” But in the Chinese translation, “words, forms, devices or characters” becomes the subject, and “capable of... a bank note” is the predicate, thus forming a subject-predicate structure. And this structure is used as an attribute to modify “any material.” And also in translating “producing or intended to producing the impression of”, with the addition of “使人” and conversion of noun “impression” into the verb “认为”, the Chinese Version is made much more fluent and clearer by the author. The Chinese has its own grammatical structures. An effective way to deal with long and complicated English legal sentences, clauses and phrases is to rearrange the components and to relocate the qualifiers. When translating “it shall be lawful to seize it and carry it before a magistrate to be by him disposed of according to law”, the author translated this long English legal sentence into “必须依法查缴, 移送地方法官, 依法处置.” It can be seen from here, that in most cases, when long English legal sentences are translated into Chinese, syntactic restructuring is often necessary. In 81.(3), the ways of using “deletion” and restructuring the syntactic structure are similarly adopted like the above. In Chinese Version of Article 81, not only the meaning of the Article is rendered clearly, but the authoritativeness and solemnity of the Article 81 are transplanted in Chinese Version. Therefore, both intratextual and intertextual coherence are achieved, thus so is the translation Skopos.

Example 2

The English Version:

82. (1) In an indictment or information for an offence against this Part with

reference to any document, seal or die, it is sufficient to refer to the document, seal or die by any name or designation by which it is usually known or by its purport, without setting out any copy or facsimile of the whole or any part of the document, seal or die.

(2) Where an intent to defraud or an intent to deceive is one of the constituent

elements of an offence punishable under this Part, or under any other enactment relating to forgery or any kindred offence for the time being in force, it shall not be necessary to prove an intent to defraud or deceive any particular person; and it shall be sufficient to prove that the defendant did the act charged with intent to defraud or to deceive, as the case may require.

(3) If any person who is a member of any co-partnership, or is one of 2 or more beneficial owners of any property, forges any document, matter or thing with intent to defraud the co-partnership or the other beneficial owners, he is liable to be dealt with, indicted, tried and punished as if he had not been or was not a member of the co-partnership, nor one of such beneficial owners.

The Chinese Version:

82. (1) 被告发违反本部分规定所涉及到的文件、印章, 只需指称该文件或印章常用的名称或大概名称, 无需提供其全部或任何部分的副本、摹本。

(2) 诈骗或欺骗意图使构成本部分规定应受惩罚的或者其他现行生效的法规规定的有关伪造或类似的违法行为的要件, 而不必证明被诈骗或欺骗的对象; 视情况需要, 只需证实被告作出了被指控的有诈骗或欺骗意图的行为。

(3) 合伙人, 两个或两个以上的任何财产共有人中的任何个人, 伪造文件、印刷书写之物或其他, 意欲诈骗其他合伙人或财产共有人, 视其不为合伙人或财产共有人之一, 依法被牵连、告发、审判或惩罚。

At the dawn of the twentieth century, the legal texts are still considered to be sacred and inviolable. It is very common for people to believe the source-text of the legal language shall be rendered word for word loyally into another language. Nowadays, the direction is completely changed into the opposite, that it is believed that it is the sense that should be rendered, not the word. Different jurisdictions have different drafting practices. In common law system, the drafters try to restrict judicial discretion by producing more detailed and complicated written law, compared with civil law legislation. American law belongs to the common law system, which has the features mentioned above; however, it is not the case in Chinese law, which belongs to the civil law system. Therefore, in this author's translating task, the deletion of words is done in order to convey the sense concisely and precisely.

In 82. (1), the words “indictment” and “information” has the same meaning, therefore, in the Chinese Version, they are not translated one by one, but only translated into “告发.” Similarly, the words “name” and “designation” are only translated into “名称.” In this way, the meaning of the original is transmitted concisely and clearly.

The most important point here the author would like to note is the translation of the word “matter” in 82. (3). It is difficult to make it clear what the word “matter” refers to, if it being dealt with as an isolated word. To understand it, the word “matter” is put in the whole textual context by the author. After referring back to Article 81, the word “matter” actually refers to the above mentioned “any machinery, implement, utensil or material used or intended to be used for the forgery of any document”, therefore, the word “matter” is translated into “印刷书写之物” by the author. This case shows that the textual context plays a very important role in order to achieve the intratextual and intertextual coherence.

Example 3

The English Version:

83. (1) Where an offence against this Part also by virtue of some other enactment subjects the offender to any forfeiture or disqualification, or any penalty other than imprisonment or fine, the liability of the offender to punishment under this Part shall be in addition to and not in substitution for his liability under such other enactment.

(2) Where an offence against this Part is also an offence under the terms of any other Ordinance, proceedings may be taken either under such other Ordinance or under this Part.

The Chinese Version:

83. (1) 违反本部分规定, 同时也违反了其他法规规定的, 违法行为者依法受到除拘禁罚金之外的没收、

取消资格或其他的惩罚时, 实行数罪并罚, 而不能取代别的法规规定的惩罚。

(2) 违反了本部分规定, 同时也违反了其他法令的, 可适用本部分规定的程序, 也可适用其他法令规定的程序。

It is obvious to find that the similar way of restructuring the syntactic structure is also used in translating Article 83 to make the Chinese Version readable for the Chinese students.

After the law teacher and his students read the author's translation, they all felt satisfied with the Chinese Version of these three Articles, thus proving the author's translation is a qualified and successful one.

Here, the author's decision-making process can be summarized in the following simple Figure 2.

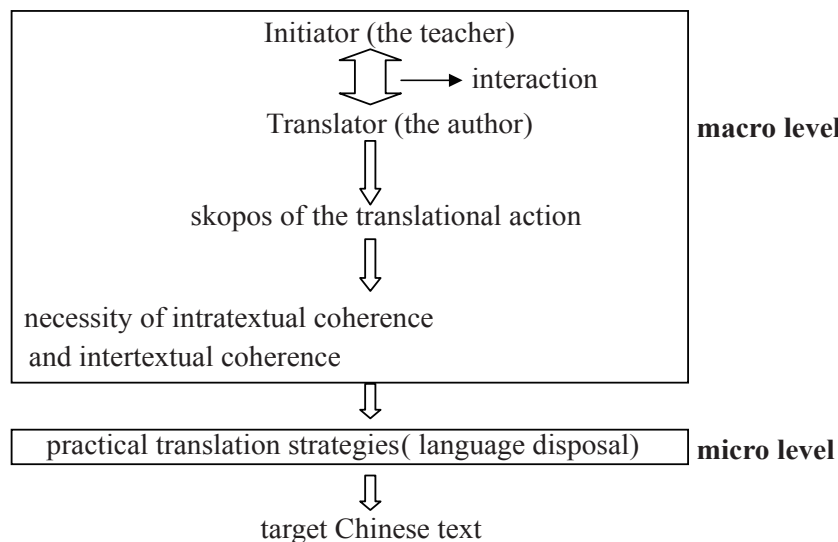


Figure 2
The Author's Decision-Making Process

CONCLUSION

This paper is conducted with a macro-micro, i.e. top-down way researching method, which is proposed by Functionalists in Germany, represented by Katharina Reiss, Hans J. Vermeer, Justa Holz-Manttari and Christiane Nord, entirely different from the traditional bottom-up linguistically-oriented approach and in consistency with Mary Snell-Hornby's research method. This research is only a general one carried out within the Functionalist framework and defines a general guideline for legal translation on the basis of Functionalism, and it is by no means near perfect and needs further argumentation from various researchers. The research on legal translation needs to be perfected theoretically and systematically, and much more effort must be made to continue studies in this orientation.

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