



IRAQI
Academic Scientific Journals



العراقية
المجلات الأكاديمية العلمية

ISSN: 2663-9033 (Online) | ISSN: 2616-6224 (Print)

Journal of Language Studies

Contents available at: <http://www.iasj.net/iasj/journal/356/about>



Misusing the Translation of Arabic Legal Obligatory Terms into English

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Received: 28 /11 /2022, **Accepted:** 11 /12/2022 , **Online Published :** 20 /12/ 2022

Abstract

In some legal provisions, a great majority of obligation is used implicitly in Arabic particularly within legal texts. Most translators try to convey the explicit meaning neglecting the implicit one when translating. Moreover, for the urgent need to configure the legal text and grasp the surrounding meaning through employing the obligatory terms. We focus, in this research, on the possibility of using these phrases, which are implicitly existed in the Arabic language texts through avoiding the mistakes that give rise to mistranslation which may change the text status from mandatory to optional.

Keywords: deontic, obligation, legal text, misusing translation

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إساءة استخدام مصطلحات الالتزام القانونية عند الترجمة من العربية الى الانكليزية

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و

علاء حسن عبدالله

الملخص: يستخدم في بعض النصوص القانونية عدد كبير من مصطلحات الالتزام بشكل ضمني خصوصاً في النصوص العربية القانونية. حيث يحاول اغلب المترجمين ايصال المعنى الظاهري متجاهلين المعنى الضمني او المبطن عند الترجمة. وانصياً للحاجة الملحة في ايضاح النص القانوني وفهم المعنى المحيط به من خلال استخدام مصطلحات الالتزام. ركزنا في امكانية استخدام المصطلحات الالتزامية الموجودة بشكل ضمني في النص العربي الاصلي من خلال تلافي الاخطاء التي قد تؤدي لتغيير حالة النص من الزامي الى اختياري **الكلمات الدالة:** الزامي، الالتزام، نص قانوني ، اساءة ترجمة.

1.1 Research Problem:

In some legal provisions, a great majority of obligation is used implicitly in Arabic. Thus, most translators try to convey the explicit meaning neglecting the implicit one when translating due to the misunderstanding of the legal text or due to their cognitive understanding that the text should be translated linguistically. In the translations especially legal one, there is an urgent need to configure the legal text and grasp the surrounding meaning through employing the obligatory terms not only the literal meaning.

1.2 Research Objectives:

1. Illustrating the significance of stressing the implicit meaning by adopting obligatory terms when translating legal acts rather than explicit.
2. Recognizing the effect of these obligatory terms in shifting the text from non-obligatory to obligatory by employing these terms especially in Arabic.

1.3 Research Sample:

The research sample was represented by the M.A. students in the department of translation/ college of Arts / Tikrit University who are studying at the academic courses. Thus, the data analysis depends on the translation of those students and analyzing them.

1.4 Introduction

In the period between 1970s and 1980s, translation was a sub-discipline of applied linguistics. The dominance of translation by linguistic approaches, which mainly regarded translation as a code-switching process, led to focusing highly on the significance of the ST as well as keeping its features in the TT. Thus, the investigation of translation was directed by an equivalence-based approach to translation, e.g. the process of transferring the elements of the ST into the TT. Snell-Hornby (1988: 14). The following quotation is taken to illustrate the point:

“The central problem of translation practice is that of finding TL (target language) translation equivalents. A central task of translation theory is that of finding the nature and conditions of translation equivalence” (Catford, 1965: 21)

As far as translation is concerned, many definitions have been given at different times for translation. The first one is related to Catford (1965: 20) who defines it as the process of replacing textual material of a source language by an equivalent textual material in a target language. Another definition of translation can be taken from Toury (1982: 27), who defines it as the process of substitution of a message in one language into another without separating the language units, but to convey the whole message accurately as much as possible.

Translation is naturally related to other branches of linguistics such as pragmatics, semantics, discourse analysis, etc. as well as various disciplines such as sociology, anthropology, history, cultural studies and philosophy. Moreover, it maintains links with methods and theories from other disciplines which are adapted to be practiced to the translation analysis as a process. Ferreira et al. (2006: 2)

In relation to translation, Gotti and Candlin (2007: 198) state that legal translation is regarded as a very precise and complex sort of activity. Yet, it consists of both a comparative study of various legal systems and a consciousness of the problems caused by the absence of equivalents in legal terms.

The legal translator should have a unique knowledge of the legal system in the SL and TL as well. The legal translator, therefore, should have familiarity with the relevant terminology, and must be well qualified in the TL-specific style of legal writing. In addition, the legal translator should comprehend all the shades of SL meaning so that he/she can reproduce it as naturally and faithfully as possible in the TL. Cao (2007:37)

The translation of a legal text should depend upon the comparative law analysis. In the first place, a legal translator should take into account the terminologies of the legal terms and the concepts that cover the source terms and target system, and possibly to the corresponding penalty. Secondly, a legal translator should pay more attention to the domain of phraseology, the structure of text type according to syntax and style. Depraetere (2011:242)

The relationship between legal system and legal language is a very complicated issue. Independently, legal systems derive from the legal language that they are used and created through political and social circumstances. One legal system can use various legal languages, whereas one legal language can be subcategorized into various legal systems. When doing translation between various legal systems, the translator has to estimate the relatedness of legal systems and take into consideration the appropriateness of the languages engaged in translation. Temmorman and Campenhoudt (2014: 122)

From the 19th century until the advent of the 20th century, the consciousness of legal translation had increased. Legal translation has played a crucial role in communication whether nationally or internationally. This role has become more influential, because of both globalization and the instituting of international bodies such as United Nations.

El-Farahaty adds that legal translation is culturally bounded since it is not only the transcoding between the SL and the TL, but rather a process of translating one legal system into another. El-Farahaty (2015: 6-9)

Legal translation is unique on account of the absence of equivalence in the languages that have different systems and on account of the legal language utilizes words from ordinary languages with a specialized sense. Moreover, most languages for different and special aims use terms from ordinary languages as terms with particular meaning. Sarcevic (2015: 153)

1.5 Deontic Modality

Loos et al (2009: 33) state that Deontic moods are a category of grammatical moods that are used to express deontic modality. An example for a deontic mood is the imperative ("Come!"). However, many languages (like English) have additional ways to express deontic modality, like modal verbs ("I shall help you.") and other verbs ("I hope to come soon."), as well as adverbials (hopefully) and other constructions. A linguistic modality known as deontic modality, sometimes known by the abbreviation DEO, describes how the world should be in accordance with specific standards, expectations, speaker preferences, etc. In other words, a deontic phrase means that some norm or ideal, whether societal (such as laws) or personal (such as wishes), is not being met by the condition of the world (where "world" is loosely defined here in terms of the surrounding circumstances). The deontic modal usually denotes an activity that would alter the world in order to bring it closer to the norm or the ideal.

Suikkanen (2018: 354- 363) claims that there are several idioms in the English language known as "deontic modals" that frequently refer to certain ideas. These words include must, should, ought to, may, shall and similar ones. These terms frequently convey deontic modal notions, which are fascinating in many ways. First of all, there are logical relationships between them; for instance, they can be arranged according to strength. I should go home right away, which implies that I must go home right away, and that statement also implies that I can go home right now. However, the inferences from "may" to "ought" and from "ought" to "must" in the other manner are invalid. Deontic modals are available in several flavors as well. The intuitive notion is that if I say, "I must go home now," I am using the word "must" in a different sense depending on whether I am expressing the idea that, overall, I have the most reason to go or the idea that, according to morality, prudence, law, or another normative standard, I must go home. Various non-deontic modalities can be expressed using the same words. When I say, "The train should be at the station" for instance, I'm using the word "ought to" in an epistemic meaning that refers to how things would typically be given the knowledge I currently possess.

Salkie (2009: 177) comments that in legal/diplomatic language (should and must) share with shall some pragmatic roots of demanding action and expressing obligation. In particular, "should" can be vested with a performative or a prescriptive communicative function. "shall" is used to impose obligation upon the sentence meaning, whereas other modalities could refer to ability, permission, etc. Some deontic modalities like should and ought to seem to have been specifically chosen to convey ideals and concepts and indicate weaker obligations than those containing shall or must. In actuality, all instances of should appear in phrases that relate to the provision of law.

1.6 Aspects of Legal Text

Legal language is a rich language since it has different systems and complex vocabularies, then it should be studied precisely in order to cover its importance up as

much as possible. However, the classifications of its aspects are given on the basis of different scholars viewpoints.

1.6.1 Lexical Aspects

Goodrich (1987: 177) states that legal English has its particular features, its own legalese. Legal vocabulary can be defined as “a vocabulary of possibilities purportedly comprising a comprehensive system of meanings that are internal or latent within the lexicon itself”.

Concerning the parts of speech in legal English, Hiltunen (1990: 84) comments that adjectives are clearly scarce and they are often vague and imprecise, nouns are abstract because they often do not relate to physical objects and verbs are chosen from a small number of lexical sets.

Beveridge (2002: 59) claims that many legal English terms were borrowed from French and they are used at present like (purchase, evidence, court, verdict and judge). Matulewska (2007: 130) elucidates that English legal text has to have religious words or expressions as in acts of God, in the name of our Lord or in the year of our Lord one thousand nine hundred and eighty-four. Relatedly, English legal language naturally has many words that are relying on the culture and legal system and they may be used to express a single legal system and it is not conditioned that the target language has equivalents to express their meanings e.g. the word (Backbenchers).

(El-Farahaty, 2015: 22)

The example above shows that the word (Backbenchers) is used to express one single legal system since in the English language it can be compensated by using the modern term (Parliament) which whereby in the Arabic language for example, the word used is (نائب) or (عضو).

Finally, El-Farahaty (2015: 20) states that legal vocabulary can be classified into three subtypes *pure technical* which are system specific terms as court, barrister and case, etc. *semi-technical* which can be called mixed terms or legal homonyms like assessment, enclose, clarification, advise, settlement and *everyday vocabulary* which is used widely in legal texts e.g. record, injury, access, examine, appointment, and party.

1.6.2 Syntactic Aspects

Tiersma (1999: 75-76) shows that a nominalization is a noun phrase that undoubtedly has a systematic correspondence with a clausal prediction which related morphologically to a corresponding verb such as assessment to assess, movement to move and inspection to inspect. Thus, the function of nominalization is to obscure the subject and the object within a text. Tiersma (ibid) adds that one of the most common techniques used by lawyers in their writing is the use of passivization which would help them to foreground the offence rather than the offender. In a sentence using active voice, the subject of the sentence performs the action expressed in the verb. In a sentence using passive voice, the subject is acted upon. Examples from legal discourses include:

Active voice (The police officer arrested the man)

(The police officer is the subject of the sentence and is performing the action of arresting.)

Passive voice (The man was arrested by the police officer)

(The man is the subject of the sentence but he is not performing the action of arresting.)

(Quirk & Green Baum, 1993: 359)

As concerned with syntactic features, Danet (1985: 280) clarifies that English legal discourse is characterized by the use of wh-deletion, in spite of its rare use. Wh-deletion is used in English legal discourse as a means of stylistic variation. These grammatical expressions are highly used in contracts where the words initiated by (wh) are dropped and the past participle of the verb is given, e.g. (notice given, obligation assumed, the times required and assistance required).

Connectedly, Mellinkoff (1963: 321) clarifies that English legal texts commonly use hypothetical formulation and complex conditionals which are displayed as parenthetical clauses such as (if, whenever, where, assuming that, provided that, should, as long as and whereas). Meredith (1979: 64) comments that the prepositional phrases are widely used in the legal English language. Consider the following phrases: “without prejudice”, (which is used as a report to the court) “pursuant to”, (in Marriage Certificate) “subsequent to”, (Partnership Contract) and “in accordance with” and “prior to”. Legal English widely uses restrictive connectors as under, notwithstanding, whereas, and unique determiners like said as in (aforesaid).

Gustafsson (1975: 9) shows that binomial expressions refer to the notion of doublets and triplets and it can be defined as sequences of two words that belong to the same class, which are syntactically coordinated and semantically related.

Danet (1985: 281) comments that an English legal sentence is twice as long as the scientific sentence. Moreover, the longer the sentences, the more complex they are, and the higher the number of subordinating clauses and phrases. In this respect, Triebel (2009: 160) shows that the word „doubling’ is pointed to as the use of several terms describing one single concept, where a single term would be adequate for that purpose. In addition, doublets and triplets are caused by a juxtaposition of two or more words. For example, “I make, publish and declare” and “Will and testament”

1.6.3 Textual Aspects

Halliday and Hasan (1976: 278-281) elucidate that textual features are involved in the text as a very large unit. The major textual area is cohesion. In legal English, the devices of cohesion are highly used in legal texts like lexical cohesion and conjunctions; whereas others are utilized with caution (for instance reference) and some devices are rarely used (such as ellipsis). Cohesion is used in such variation to achieve accuracy and avoid ambiguity. They illustrate that lexical repetition is presented by various means whether by words, phrases or clauses. It is called (Reiteration) which means the process of inserting a lexical item that is identical to another lexical item mentioned earlier in the same text or context. Additionally, lexical repetition in legal English is utilized instead of pronouns because pronouns may have ambiguous reference. More exactly, avoiding the use of pronouns makes sense in legal documents like contracts where it is very essential to carefully distinguish the rights and obligations of two or more parties. In talking about textual features, Mellinkoff (1963: 305) admits that reference is efficient in legal speech and when reference and former speeches are specified in a text, it does not have any vagueness. Lexical repetition is employed if vagueness emerges, although the repetition happens as an outcome of increasing. Archaic terms are considered common ways of reference in legal documents, e.g. hereafter, aforesaid, herein and so on.

El-Farahaty (2015: 30) states that conjunctions determine the way that the writer wants the reader to link what is going to be said to what has been said before. As for conjunctions, they can be classified into additive, causal, adversative, continuatives and temporal. In legal English, the most recurrent usage of conjunctions is “and ”and or”.

1.7 Discussion & Data Analysis

It is to be noted that when translating acts and provisions in legal texts, one should pay attention to the obligatory terms, especially to the deontic modality regarding obligation within translating acts and rules, rather than focusing on the equivalence and general meaning. Below is the example of mistranslation of obligatory terms.

يوضع الموظف غير المثبت تحت التجربة من جديد اذا اعيد توظيفه

The non-verified employee is placed under probation again if he is re-employed. (The M.A. research sample translations)

The temporary employee shall be placed under probation again if he is re-employed. (Alan & Hoffman, 2018)

The research sample attempted to convey the equivalence rather than stressing on the legal meaning if the act within the text. Therefore, translating legal terms of different connotations require a high degree of experience in the translation craft, due to its significance when conveying the TL equivalence. The text involved includes many implied obligation terms which are explicitly undetermined, because as it is known that legal texts should be rendered according to the comprehension of the law not according to the text alone. In the text above, the word "يوضع placed" is literally translated into "is placed", which is a mistaken translation as this is a legitimation not only a text. However, the suitable translation would be "should be placed", or "shall be placed". Arabic differs from English in that some Arabic legal texts might not include explicit obligation terms, but when translating them they shall be translated with obligation such as the Arabic text

المحافظة على اموال الدولة التي في حوزته او تحت تصرفه واستخدامها بصورة رشيدة.

"The state assets shall be preserved".

In this text there is no obligation term in Arabic like "يجب، ينبغي، يلزم". Therefore, most translators especially nonprofessional ones tend to adopt semantic and grammatical approaches rather than focusing on the pragmatic one which in turn would lead to literal translation as in the word "محافظة" which is translated into "preserving". However, the appropriate translation should be translated with obligation such as "be preserved". Furthermore, Arabic obligation terms "يجب، ينبغي، يلزم" could be implicitly stated within the text. Some translations require changing the grammatical category of the TL provided that the meaning is unaffected. Legal translation not only requires a kind of appropriateness or equivalency, but also need to pay attention to some critical syntactic orders of both codes in order to identify the exact meaning not assuming it.

تتحقق الاهلية في عقد الزواج بتوافر الشروط القانونية والشرعية في العاقدين او من يقوم بمقامهما.
القانون العراقي / اركان العقد وشروطه / الفصل الثاني / المادة ٥

Competence in a marriage contract shall be achieved by the legal conditions of the two contracting persons or whoever on behalf. (Alan & Hoffman, 2018)

Legitimacy in a marriage contract is obtained by providing legal and legitimate conditions between the contractors or the ones who take their place. (The M.A. research sample translations)

In this text, there is an implied obligation embedded in the word (تتحقق) as if it is (يجب ان تتحقق) or (يجب تحقيق). This indicates that it is possible to translate the verbal construction of يتحقق into participle as تحقيق rather than (is obtained) as most of the sample attempted. The translator adopts the semantic approach of translation which is approximately expresses the literal translation as is the case with the word (legitimacy) as a translation for the Arabic word (الاهلية) which is unaccepted replacement for the

word (competence) since the latter is considered more acceptable within the legal texts, due to the fact that the word “legitimacy” means conformity to the law or rules, whereas the word “competence” means to be able and legally abided. If “اهلية” is translated as “legitimacy” rather than “competence”, it might indicate that the person is abided by laws but is unable to get married. Therefore, translating “اهلية” into competence is better than legitimacy. The adjectives (القانونية والشرعية) are ought to be expressed as one word in English as (legal) rather than following word-to-word translation. Such a mistake indicates the inexperience of the translator to deal with the legal texts. Another mistake made by the sample translation in the word “بتوافر”. It is parsed as a prepositional phrase in Arabic, where the sample tended to follow the literal translation by translating the same construction in Arabic as a prepositional phrase as “by providing”. However, in English, it should be pragmatically parsed as phrase embedded in the next construction “legal and legitimate conditions” without the need to mention it. Thus, translators have to be aware using the appropriate words especially when processing the legal translation. Undoubtedly, such Arabic text must be translated according to the pragmatic approach since the meaning will not be affected. In addition, legal texts especially the laws are obliged even if they do not have explicit words referring to obligation. For example, in the Arabic text there is no explicit obligation term, where the reader may be confused to determine the obligatory of the text. Thus, translators usually tend to count on the pragmatic approach in order to preserve the real meaning of the SL text as is the case with professional translation (shall be).

يسري على الجرائم القانون النافذ وقت ارتكابها ويرجع في تحديد وقت ارتكاب الجريمة الى الوقت الذي تمت فيه افعال تنفيذها دون النظر الى وقت تحقق نتائجها
قانون العقوبات العراقي رقم ١١١ لسنة ١٩٦٩ / المادة ٢- الفقرة ١

At the time of committing the crimes, the law in force shall be applied for determining the time of committing the crime. (Alan & Hoffman, 2018)

Crimes are subject to the law in force at the time of their commission. Determining the time of committing the crime refers to the time when the acts of execution were completed, without regard to the time when their results were achieved. (The M.A. research sample translations)

In this text, it is noted that the translator adopts the literal approach of translation where he neglects conveying the essential idea beyond the meaning which whereby leads to a weak translation. Despite the fact that the phrase (Subject to) indicates obligating and the translator attempts to achieve the implied meaning for the word (يسري), which in legal Arabic text refers to an implied obligation "يجب ان يسر". The sample translation neglected translating deontic modality by depending on the semantic meaning since crimes are not subject to law but rather the sanctions imposed on them. As seen in Hoffman's translation (shall be applied) is considered a more effective rendering which conveys the significance of meaning and expresses the force of the law. Furthermore, the literal translation was explicitly followed by the Arabic phrase (الوقت الذي تمت فيه افعال تنفيذها) which is translated to (the time when the acts of execution were completed), not to mention that the synonyms (execution and completed) were arbitrarily used without focusing on the real meaning of the SL text.

Alan and Hoffman stressed on using the passivation of the deontic modality in the phrase “shall be applied” which in turn embeds the subject of the action, whereas the research sample attempted to render the text of obligation without deontic modality be referring to adjectival structure as in “crimes are subject to laws”. In fact, the use of

deontic modality makes the translation more constructed legally and gives an indication that the doer of the action is the authority.

Conclusion

The current research has come up with a conclusion that when translating legal texts, the translator should pay attention to the degree of obligation force within the text as the degree would determine the type of legal text either an act or provision, resolution and etc. it's also concluded that grasping the syntactic structures would lead to decode the process of understanding the textual meaning.

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