

# COMPARATIVE LAW AND LEGAL TRANSLATION IN THE SEARCH FOR FUNCTIONAL EQUIVALENTS – INTERTWINED OR SEPARATE DOMAINS?

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**Abstract:** There are no two identical languages, and there are no two identical legal systems; this is the challenge for both comparative lawyers and legal translators. Legal comparison is necessary to obtain the adequate legal translation, which in turn is applied to give comparative lawyers information about foreign legal systems. Although comparative lawyers and legal translators often face similar quandaries when engaged in the translation of legal terms, they operate within distinct theoretical frameworks and make use of different methodologies. In order to determine whether the functional method developed for comparative legal studies can be a useful tool for legal translators, this paper compares this method with the methodology applied by legal translators to find functional equivalents.

## PRAWO PORÓWNAWCZE I PRZEKŁAD PRAWNY W POSZUKIWANIU FUNKCJONALNYCH EKWIWALENTÓW – OBSZARY POWIĄZANE CZY ODDZIELNE?

**Abstrakt:** Przekład prawniczy oraz rezultaty badań komparatystyczno-prawnych są źródłem wiedzy o systemach prawa. Nieodłącznym elementem badań prawnoporównawczych jest przekład tekstów prawnych. Tłumaczenie prawne i prawnicze wymaga porównania pojęć i instytucji należących do źródłowego i docelowego systemu prawnego. Nie ma dwóch identycznych języków, jaki i nie ma dwóch identycznych systemów prawnych. Dlatego zarówno tłumacz tekstów prawnych, jak i komparatysta porównujący systemy prawne poszukują ekwiwalentów funkcjonalnych. Komparatysta odwołuje się do funkcjonalizmu, z którego wywodzi się jedna z najstarszych metod badań komparatystycznych, wciąż uznawana za metodę dominującą. W oparciu o założenie, że wszystkie społeczeństwa zmagają się z podobnymi lub nawet takimi samymi problemami, funkcjonalizm poszukuje w różnych systemach prawnych funkcjonalnych ekwiwalentów, czyli takich instytucji i uregulowań prawnych, których celem jest rozwiązanie podobnego problemu. Czy tłumacz uzna za przydatne ekwiwalenty wskazane przez komparatystę? Czy może posłużyć się tą komparatystyczną metodą? Aby odpowiedzieć na te pytania, w artykule porównuję metody ustalania ekwiwalentów funkcjonalnych stosowane przez komparatystów prawnych i tłumaczy tekstów prawnych.

## Introduction

Since the cultural turn in translation studies, it has been acknowledged that translation is made not only between languages but also between cultures (Pommer 2008, 17). This cultural transfer is observed especially when legal texts are translated, since legal translation is performed between legal languages, which are deeply rooted in the legal culture and the legal system of a particular country. Unlike other specialized fields (e.g., science, medicine), law has not developed an international and universal language and terminology (Brand 2009, 22; de Groot 2006, 423). Instead, each legal system has its own legal terms, known as system-bound terms, to denote concepts specific to that system. This is evident when legal systems use different languages; however, even in cases where legal systems apply the same ethnic language to create legal texts (for instance, English used by American and British law), the legal systems utilize different terminology, or the same terms are applied to denote concepts that are not exactly the same.

Therefore, in order to carry out a proper legal translation, language and translation skills alone are not sufficient; familiarity with *legal* languages is also necessary. The latter cannot be acquired without a deep understanding of legal systems and of the differences between them. Some authors argue that legal translation is better performed by a “law graduate who is acquainted with at least one or two foreign languages” than by a “translation graduate who has taken legal translation courses” (Manganaras 1996, 64ff). Law students, however, focus mainly on their domestic legal system and, to a lesser extent, on international and supranational law. Hence, most law graduates will not be extensively familiar with other legal systems or with the differences between them. Thus, both law and translation studies graduates might lack the knowledge necessary to perform a correct legal translation. However, there exists a discipline focused on recognizing and comprehending the differences and similarities between legal systems; that discipline is comparative law. With no claim to exhaustiveness, this paper aims to analyze whether comparative law can provide legal translators with the knowledge and tools needed to attain an accurate translation of legal system-bound terms. The main focus will be on the functional method, which is applied in comparative law to identify and compare functional equivalents. This method will be compared with the decision-making process performed by legal translators to identify functional equivalents in a target language. Before tackling the question of whether methods of comparative law (especially functionalism) meet the needs of legal translators, this paper explains why legal translators need comparative law.

## Divergence and incongruence of legal systems: The challenge for legal translators

If the discipline of law shared a common system of reference like the discipline of science, medicine, and technology, legal translation would be much easier. When translating a manual for a mobile phone user, for example, all the translator needs to know is how the device works. The mobile model will operate in the same way, regardless of where or by whom it is used. In order to call someone, the user, will dial a number and then press the same icon or button, to the same effect, regardless of whether it is labeled as: ‘anruf’, ‘appel’, ‘call’, ‘chamar’, ‘opkald’ or ‘połącz’. However,

when a legal term is translated, the translator must consider carefully what meaning it denotes and what legal effect it causes in the source legal system in order to transfer the same meaning and legal effects into the target legal system. For example, let us consider the word ‘marriage’, which is used not only by lawyers but also by laypersons in ordinary, everyday language. In Poland, only two persons of the opposite sex can legally get married, whereas in Portugal two people of the same sex can also enter into a legal marriage. Marriage to a 13-year old girl is considered void in all European countries, while it is valid in South Sudan<sup>25</sup>. In Israel, a follower of Judaism cannot marry a person not recognized as a Jew by the Orthodox Chief Rabbinate (U.S. Department of State 2011, 3-4), yet such a marriage can take place just a short flight away in Cyprus, and it will then be recognized in Israel (*ibid.*). Marrying a woman while already validly married to another is recognized as an offence (bigamy) in many countries, whereas, in others, especially those governed by Sharia (Muslim) law (e.g., Saudi Arabia) polygamist marriages are considered valid.

These examples illustrate how differently the concept of marriage can be understood in various legal systems. What one legal system recognizes as a valid marriage can, in another, be considered a criminal offence. Can we denote these various concepts with the same term ‘marriage’? The above comparison, which is based merely on juxtaposition, not on comparative analysis, relies only on one criterion; that is, who can legally enter into marriage. Other criteria, like rights and obligations of spouses, matrimonial property regime, or divorce, should also be taken into consideration to determine the full meaning of the concept under a given legal system. The first chapter of the Polish Family and Guardianship Code of February 25, 1964, titled “Marriage”, includes 61 articles, and these are not the only Polish legal provisions that directly refer to the institution of marriage<sup>26</sup>. In order to grasp the meaning of the concept of marriage in Polish law, a lawyer must analyze not only legal acts, but also case law and doctrinal works, which provide the interpretation of legal provisions on marriage. A legal translator does not need to know all details and nuances associated with a legal concept to such an extent, but mere awareness of the complexity of legal concepts and differences between them in various legal systems might not be sufficient to make appropriate translation decisions in order to produce a good legal translation.

If we regard translation as a cultural transfer, and legal translation as the translation from one legal system into another (de Groot 1987, 807; Doczekalska 2009b, 120; Šarčević 2000, 13), then we must admit that legal translators should know how legal concepts and institutions operate in both the source and target legal systems, or they should at least have a method to acquire this information. A legal translator should be able to recognize the differences between concepts in source and target cultures and to evaluate significance of the divergence or, in the words of Šarčević (2000, 236), the degree of equivalence, if any. A translator should identify whether the concepts form functional equivalents for each other or, conversely, whether they do not have

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<sup>25</sup> In South Sudan, marriage is governed by customary or religious law (including Sharia), according to which “girls are considered ready for marriage as soon as they reach puberty - at around 12” (Human Rights Watch 2013, 77).

<sup>26</sup> For instance, one can find the provisions that refer to the concept of marriage in the Criminal Code of June 6, 1997 (art. 206 on bigamy), the Personal Income Tax Act of July 26, 1991 (provisions on joint taxation of spouses), or the Civil Code of April 23, 1964 (e.g., provisions on succession).

“comparable counterparts in other legal systems” (Šarčević 2000, 233)<sup>27</sup>. In order for translator to make a correct decision when choosing term in a target language to denote a concept of a source legal system, some comparison of source and target concepts, institutions and terms is required. Therefore, according to Bocquet (Bocquet 1994, 7; as cited by Šarčević 2000, 237), the comparison of concepts and institutions is an obligatory step in the legal translation process.

There is an understanding among translators that translation is not about replacing one word with another, but rather that it is the meaning that is translated<sup>28</sup>, thus the translator must go beyond the language in order to provide adequate translation (Poon Wai-Yee 2005, 323). Nevertheless, the primary source from which we derive the meaning of the text is the (source) language. Moreover, a (target) language is used to render this meaning in a translated text. Therefore, it is important to use a method and strategy that makes it possible to find the adequate term in a target language denoting a legal concept of the source legal system. This legal concept, as a rule, is autonomous (in legal language)<sup>29</sup> and system-bound (in the language of translation studies). The choice of what strategy or method is used depends on the type of legal translation. Two criteria apply when making this decision: (i) the purpose of the legal translation, and (ii) whether the translation occurs within one legal system or between two legal systems. The purpose of the legal translation is defined by the intended communicative function of the translated text in the target legal system. Functions of source and target texts are not always the same (Cao 2007, 10). Hence, the translation process sometimes provides a shift of function (i.e., source and target texts have different functions), and sometimes does not (i.e., source and target texts have the same function). Based on the criterion of the purpose of translation, at least two types of legal translation can be identified<sup>30</sup>.

- (i) Translation for informative purposes (Cao 2007, 11), performed when the translated text will merely provide its readers with information about foreign law. If the source text has force of law in the source legal system, then translation for informative purpose can be referred to as non-authentic translation (Šarčević 2000, 277). However, legal information can be rendered not only in legal acts but also in contracts, writings of doctrine or even in fiction novels<sup>31</sup>.
- (ii) Translation for normative purposes, made when translation of a legal text (usually a legal act) that has binding force will also have a legal effect and will bind its addressees. Although in translation studies the terms ‘authentic

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<sup>27</sup> Terms denoting concepts that do not have “comparable counterparts in other legal systems or legal families” are defined by Susan Šarčević (2000, 233) as “system-bound terms”, which “designate concepts and institutions peculiar to the legal reality of a specific system or related systems”.

<sup>28</sup> The ‘word-to-word’ versus ‘sense-for-sense’ debate is described and analyzed, e.g., in Baker (1997, 320ff).

<sup>29</sup> For instance, the European Court of Justice refers to the concepts that are of the law of the European Union (i.e., that are specific to the EU legal system) as ‘autonomous concepts’; see *int. al.* paragraph 45 of the judgment in Case C-373/00 *Adolf Trully GmbH v Bestattung Wien GmbH* [2003] ECR I-1931, or paragraph 27 of the judgment in Case C-498/03 *Kingscrest Associates Ltd and Montecello Ltd v Commissioners of Customs & Excise* [2005] ECR I-4427; see also Doczekalska 2009a, 131, 242ff.

<sup>30</sup> Deborah Cao (2007, 10-12) distinguishes three types of legal translation: translation for informative purposes, translation for normative purposes and translation for legal or judicial purposes in order to provide certain information needed in court proceedings.

<sup>31</sup> See, e.g., Pontrandolfo (2012), comparing translation procedures applied when translating (into English and Spanish) the legal terms used in the Italian legal thriller *Testimone Inconsapevole* by Gianrico Carofiglio.

translation', 'authoritative translation' (Šarčević 2000, 19-21) or 'normative translation' (Cao 2007, 11) are used, in legal language a text that has the force of law will not be referred to as a translation, even if the text is prepared by means of translation (Correia 2003, 41, Doczekalska 2009a, 316).

When a text is translated for informative purposes, the translator can choose the equivalents that convey some elements of foreignness while at the same time providing the reader with the adequate associations about the meaning of the text. When a translated text will bind its addressees, the translator will focus mainly on finding wording for the target text such that it will have the same effect as the source text<sup>32</sup>.

Translation for informative purposes usually transfers a legal text from a source legal system into a target legal system and, as mentioned earlier, involves comparison of legal concepts and institutions. Translation for normative purposes usually occurs when one legal system produces its laws in two or more languages. Thus, all authentic language versions of a legal act are applied within the same legal system, and consequently the legal terms in various language versions of the legal act refer to the same legal concepts and institutions. It would seem that translation performed to draft multilingual laws does not require any comparison; however, in practice, the comparison of legal concepts is often necessary when multilingual law is produced. For instance, the European Union has developed supranational and autonomous law drafted in its 24 official languages. These languages are also the official languages of EU Member States and are used to draft their national laws. In order to avoid confusion between national legal concepts and EU legal concepts, terms denoting EU concepts should be chosen carefully. The *Joint Practical Guide*<sup>33</sup> particularly requires that "terminology specific to any one national legal system [be] used with care" (guideline 5). Therefore, when legislative drafters choose terms from 24 languages that denote an autonomous EU legal concept, this EU concept is compared with the equivalent national legal concepts, and national legal terms denoting national concepts that could be regarded as functional equivalents are replaced with neutral terms (i.e., terms that are not specific to any national legal system) or neologisms. Therefore, if EU legal acts seem to be awkward or difficult to understand, this is the result of the conscious decisions of legislative drafters and translators, not their mistakes.

Hence, notwithstanding the purpose of translation and the number of legal systems involved in the translation process, translation requires comparison of both legal concepts and legal terminology. According to some authors, "[t]ranslation of legal documents is actually comparative law" (de Groot 1987, 809), and others assert that "[t]he ideal legal translator is a comparative lawyer" (Goddard 2009, 169). While this would in fact be the ideal situation, Obenaus (1995, 253) notes that it is unrealistic to expect a translator to be an expert in the field of law; however, a translator may be

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<sup>32</sup> Word-by-word or literary translation is not necessary to produce the same legal effect in two language versions. The example of co-drafting (which in fact does not even include any translation elements) of English and French versions of Canadian federal legal acts illustrates that both language versions can have the same legal effect even when the wording or even the structures of a legal provision differ widely; see examples at McLaren 2010-2011, 299-300.

<sup>33</sup> *Joint Practical Guide of the European Parliament, the Council and the Commission for persons involved in the drafting of legislation within the Community institutions*, available at <http://eurlex.europa.eu/en/techleg/index.htm>, last accessed August 30, 2013; see Doczekalska 2009a, 124ff.

expected to be able to find the right information quickly. Can comparative law provide a translator with such information or with the method to acquire it?

### **Do methods of comparative law meet the needs of legal translators?**

The use of the word 'law' in the term 'comparative law' is misleading. It can suggest that the term refers to positive law that has the force of law, or to a branch of law, like civil or criminal law, that encompasses a set of legal norms<sup>34</sup>. Despite its name, however, comparative law is an academic discipline or a branch of legal science, not a body of legal rules. The German term *Rechtsvergleichung* (Michaels, forthcoming, 3) or the Polish term *komparatystyka prawnicza* (preferred to *prawo porównawcze*, comparative law), which mean 'comparison of laws' better describe this concept<sup>35</sup>. The German and Polish terms bring the act of comparing into focus. Comparison of laws is the subject matter of this discipline. Comparative legal scholars compare different legal systems (macro-comparison) or legal institutions, concepts, rules, legislations and solutions to social problems (micro-comparison)<sup>36</sup>. Such legal comparison or its results can be interesting to legal translators. However, has comparative law developed any methods that can be applied efficiently and successfully for the purpose of legal translation?

For some authors, comparative law is nothing more than a method (Gutteridge 1971, as cited by Palmer 2005, 281), yet as Palmer (2005, 262) observes, the seminal books on comparative law do not even mention methodology. According to Brand (2007, 408) "the methodological malaise of comparative law" results not from the lack of methodology but from pluralism of the different schools of methodological thought that "do not engage in constructive discourse". Brand (2007) analyzes four methodological approaches to comparative law - functionalism, comparative law and economics, comparative law as a hermeneutic exercise and critical comparative law - which are deeply rooted in philosophy of law. Both Brand and Palmer note that methods applied in comparative legal research are limited in their application<sup>37</sup>.

Setting aside the evaluation of comparative law methods and discussions of whether comparative law has developed or should develop its own methodology and whether plurality of methods will enrich or jeopardize the results of comparative legal research, I will focus on the very first method that has been consciously developed for the purposes of the comparison of legal concepts and institutions. Different names have been applied to this method, including functionalism (Brand 2007, 408), equivalence functionalism (Michael 2012, 20), functional method<sup>38</sup>, or problem-solution approach (Brand 2009, 31).

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<sup>34</sup> Interestingly, the noun 'law' is used in the term denoting comparative law in this misleading way not only in English but also in Romance languages; for example, in French, *droit compare*; in Italian, *diritto comparato*; in Portuguese, *direito comparado*; and in Spanish, *derecho comparado*.

<sup>35</sup> Some scholars use the term 'legal comparativism', which is closer to the aforementioned German and Polish term; see the recently published book on methods of comparative law (Monateri 2012, 7ff) or Monateri 2009, 9ff.

<sup>36</sup> According to de Cruz, the terms 'macro-comparison' and 'micro-comparison' are attributed to Rheinstein (de Cruz, 1993, 37); see also Örticü 2004, 40ff.

<sup>37</sup> Brand proposes a new conceptual approach to comparative law methodology, while Palmer suggests a more pragmatic and inclusive view of this methodology.

<sup>38</sup> According to Michael (2012, 3) the term 'functional method' is a misnomer.

The reasons to take this method into consideration are twofold:

- (i) Although criticized, it is still the dominant and the most often used method in comparative legal research (Brand 2007, 405);
- (ii) It aims at identifying functional equivalents. Thus, this method or at least its findings can interest legal translators.

In order to evaluate to what extent the functional method can be useful for legal translation, I will compare:

- (i) how the concept of functional equivalent is understood in translation theory and comparative law, and
- (ii) how functional equivalents are identified for purposes of legal translation and comparative legal research.

Throughout the 19<sup>th</sup> century, when comparative law was still developing (it was recognized as a new branch of legal science in the second half of the century), comparative legal studies focused on the investigation of legislation (Stramignoni 2002, 747) and were based mainly on textual analysis (Michaels, forthcoming, 3). At the beginning of the 20<sup>th</sup> century, the approach towards comparative legal research changed and scholars noted that positive research based on legal texts and legal language does not actually provide the full picture of the law. The analysis of legal provisions does not explain how a judge will interpret them and what legal effects they will actually provide. Therefore, the focus of the research moved from the ‘law in books’ (i.e., what legal texts, especially legislation, say) to the ‘law in action’ (i.e., how the law is applied)<sup>39</sup>. Moreover, because scholars distrusted language, they decided that legal research should be conducted beyond language. This approach is reflected in the method developed for the comparative study of law in the first half of the 20<sup>th</sup> century by Ernst Rabel who expressed a desire to “get behind the façade of language” and focus on the ‘living law’ (Gerber 2001, 199, 201). Instead of analyzing domestic and foreign legal texts, he compared the solutions to a particular social problem in different legal systems (Gerber 2001, 199). This method is based on the assumptions that (i) all societies face similar or even the same social problems or human needs and, (ii) the role of law is to provide solutions to these problems (Michaels, forthcoming, 2; Örüci 2006, 443-444)<sup>40</sup>. If two institutions deal with the same or similar problems, they are regarded as functional equivalents and are seen as comparable, even if “they display different doctrinal structures” (Michaels, forthcoming, 2). The focus of the comparative legal research is not on language or terminology but rather on the set of legal norms that create a legal concept or institution. Language is considered to be a barrier to comparative law (Brand 2009, 18ff) or at least of no assistance for a comparative legal study (Örüci 2006, 448). The functional method thus facilitates the research conducted beyond language and helps to omit pitfalls of terminological false friends.

The legal translator is aware that the use of the same or similar names to denote legal institutions in two different legal systems does not mean that the institutions are

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<sup>39</sup> This approach to the concept of law and legal studies developed within legal realism derived especially from O. W. Holmes’s theory of law (Holmes 1897, 461ff) and sociological jurisprudence; see Pound 1910, 12ff.

<sup>40</sup> See also Brand (2007, 410) who indicates the third presumption of the functional method (i.e. “that legal systems tend to resolve practical questions in the same way”).

identical. Terminology can be of as little assistance to a translator as it is to a comparative lawyer. Translators look for adequate terms in the target language to denote the concepts and institutions of the source legal system. In the event that they cannot find the exact equivalent, one of the methods that can be used is the search for a functional equivalent. In translation theory, however, functional equivalent is not a concept or institution but rather, as Šarčević (2000, 236) defines it for the purpose of legal translation, “a term designating a concept or institution of the target legal system having the same function as a particular concept of the source legal system”.

Šarčević (2000, 237ff) explains how a functional equivalent should be determined and identifies the criteria of acceptability for the found term. The process that leads to the choice of an adequate functional equivalent has at least three stages:

- (i) conceptual analysis that aims at identifying essential and accidental features first of the source concept and then of the target concept;
- (ii) comparison of the conceptual features in order to classify the equivalence as: near equivalence, partial equivalence or non-equivalence;
- (iii) determination of the acceptability of functional equivalents (*ibid.*).

According to Šarčević (2000, 241), near equivalence is always acceptable, whereas non-equivalence is never acceptable. When partial equivalence is determined, the functional equivalent can be considered acceptable only if it corresponds with the source term in terms of structure/classification, scope of application, and legal effects (Šarčević 2000, 241-242).

Thus, a comparative lawyer and a legal translator search for functional equivalents, but do they look for the same equivalent? Do comparative lawyers and legal translators apply the same method? The answer to these questions is important in order to determine whether they can learn anything from each other and whether they can apply the results of their findings in legal research and legal translation. In order to answer the questions, I will compare the methods applied in comparative law and legal translation and consider the following criteria: (i) the purpose of the methods; (ii) the starting point for each method; (iii) what a comparative lawyer and a legal translator actually compare; (iv) how the term ‘functional equivalent’ is understood; and (v) how the concept of function is understood.

Legal translators search for functional equivalents in order to find adequate terms to denote source legal concepts that do not have exact counterparts in the target legal system. The investigation undertaken by comparative lawyers does not have a terminological character. Comparative legal scholars apply the functional method in order to find the solutions to social problems. The results of such legal comparison can, for instance, help to reform, unify or harmonize law. Therefore, they do not look for the terminology but rather for legal regulations that resolve certain problems. Consequently, the identification of the social problem or need is the starting point of their research, whereas in legal translation the term that does not have the exact equivalent is the starting point for the translator to look for the functional equivalent.

A given social problem may be addressed by a whole branch of law or by a single legal norm that does not create any legal concept or institution. Hence, a comparative legal researcher will compare legal regulations and legal norms. The considered norms may or may not form legal concepts or institutions. Moreover, even if

applied to study legal concepts and institutions, a comparative functional method focuses on functional relation of legal concepts and institutions to social problems rather than on their essence (Michael 2012, 14). Conversely, a legal translator concentrates on identifying essential features of the compared concepts or institutions in order to find terminological equivalence. The functional relation of the legal concept or institution to a social problem can be one of the essential features, but it probably will not be the only one taken into consideration by a legal translator. Consequently, the subject matter of the comparison performed by a comparative legal scholar and by a legal translator may not be the same.

What a translator and a comparative lawyer regard as functional equivalents can differ as well. Although functional equivalents must share the same function for the purposes of legal translation and comparative legal studies, the term 'function' does not necessarily have the same meaning in the two domains. A comparative lawyer will regard two institutions as functionally equivalent when those institutions aim at dealing with the same social need. Michael describes functions as "relations between institutions and problems" (2012, 22). A social need can be satisfied in diverse ways, and legal norms shaping the institutions in various legal systems can have different legal effects (Michael 2012, 16). On the other hand, according to the aforementioned equivalence acceptability criteria, two terms are recognized as functional equivalents in legal translation when they denote concepts or institutions that have corresponding legal effects. Thus, the term 'function' refers mainly to the legal regulation's aim in comparative law but to its results in translation studies.

As a consequence of the aforementioned differences in the approaches towards functional equivalence in legal translation and functional comparative law, two institutions recognized by a comparative lawyer as functional equivalents are not always identified as such by a legal translator. However, this does not mean that the comparative functional method can be regarded as incompatible with terminological search in legal translation.

Response to the same social problem is the criterion of both functional equivalence and comparability. That is, if two legal institutions respond to the same social problem, they are considered to be functionally equivalent and comparable. The recognition of functional equivalence and hence comparability of two institutions by a comparative legal scholar can be a first step for terminological search performed by a legal translator. For a translator the statement that two institutions are comparable because they carry out the same function is not sufficient to make a terminological decision. The institutions can be recognized as sufficiently equivalent to provide the terminological solution only after fulfilling the equivalence acceptability criteria described by Šarčević.

The aim of a legal researcher who applies the functional comparative method is not to find similar institutions but rather to discover how law in two or more legal systems approaches the same social problem. Therefore, a legal translator who wants to apply the research results of legal functional comparison as a first step in searching for terminological functional equivalents should take into consideration that:

- (i) the functional comparative method recognizes functional equivalence of legal institutions or concepts despite the similarity or divergence of their structural and systematic embedding (Michaels, forthcoming, 2).
- (ii) different institutions or concepts can tackle the same problem in various ways;

- (iii) a single institution or concept usually faces more than one problem and thus might have more than one function, and different institutions or concepts do not always share all functions that they perform.

The following question may be faced by a legal translator who applies the results of the functional comparative method: if two institutions responding to the same social problems (i.e., functional equivalents in comparative law) propose different solutions, may they be regarded as terminological functional equivalents in translation studies? To make a terminological decision in this situation, a legal translator should ascertain whether the function of the institutions that makes them functional equivalents for a comparative legal scholar is the *main* function and what the other functions of the institutions are, and especially whether the functions of the institutions and differences in their solutions are essential features of these institutions. If the only similarity between institutions or concepts is the function they share, the terms denoting them are not terminological equivalents.

Moreover, when legal translators determine a functional equivalent, they are required not only to confirm that legal effects and functions of legal concepts correspond but also to evaluate whether the structural and systematic embedding of the concepts are similar (e.g., whether both concepts belong to the same branch of law; de Groot 2006, 425; Šarčević 2000, 242).

### Concluding remarks

This comparison of the methods applied by legal translators and comparative lawyers who look for functional equivalents revealed more differences than similarities. It has been shown that comparative law and legal translation – although intertwined and interdependent – are actually separate domains. They are interdependent in the sense that they serve as tools for each other. Legal comparison is necessary to obtain the adequate legal translation, and in turn a comparative lawyer applies legal translation to gain information about foreign legal systems. There are no two identical languages, and there are no two identical legal systems; this common challenge intertwines comparative law and legal translation. They aim, however, at different purposes and this separates these domains and causes them to use different methods. A legal translator uses the knowledge obtained by the comparison of legal systems, concepts and institutions to render the source text in a target language, while comparative lawyers apply this information to better understand, reform, harmonize or unify law.

The differences between these methodological approaches do not necessarily indicate that the functional method, or the results of comparative legal research based on this method, cannot be used for the purposes of legal translation. It is, however, important to be aware of the differences between these approaches in order to determine when the functional method of comparative law facilitates or hinders the search for the adequate terminological equivalent.

The crucial difference between the two approaches that cannot be ignored by a legal translator is the fact that the functional method is oblivious to the correspondence of legal effects and to the similarity of structural and systematic embedding of the compared concepts. Hence, if legal translators decide to use the

results of comparative research obtained through the functional method, they must confirm that the equivalents identified are actually structural equivalents that provide corresponding legal effects.

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