

Comparative Analysis of Legal Terms: Equivalence Revisited

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Abstract

This paper focuses on the criteria for a comparison of legal concepts between different legal backgrounds. The traditional concept of equivalence must be revised, since absolute equivalence is, between national legal systems each with its own ethical principles and political priorities, no longer possible.

A comparison on the grounds of a definition by intension becomes difficult because of the indeterminacy of legal concepts which are bound to moral values of a given society in a certain period. The "tertium comparationis" for comparative terminology has to be found in the function of a concept within the framework of a specific legal solution, be it laws, court decisions, regulations or other legal provisions.

We must develop a new comparative approach which does not aim at complete conceptual correspondence but at complete documentation of the national concepts. The ultimate goal of terminology work in law is to inform the user of the concepts used by national legal systems to control specific social circumstances.

Equivalence in terminology.....	1
Legal concepts	3
a) Origin of legal concepts.....	3
b) Application of legal concepts.....	4
c) Indefiniteness of legal concepts	4
Basis for comparison.....	5
a) Functional analysis.....	5
b) Functional bridge.....	6
c) Methodology.....	7
Conclusion.....	9
Bibliography.....	9

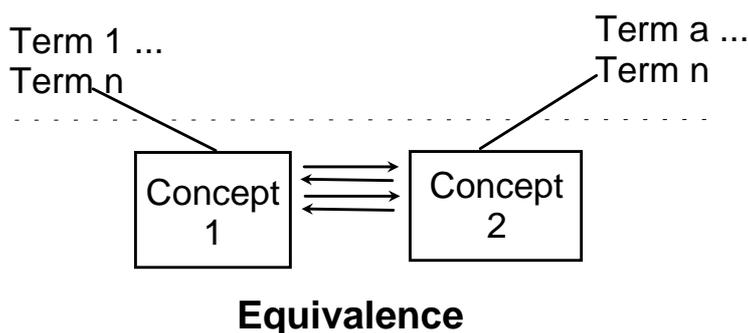
Equivalence in terminology

The preeminent goal of descriptive terminology is to describe relations between the concepts of a defined subject field and to identify the terms in two or more languages which designate one concept. [Cole 1993:400]

There are relations between concepts within one language, described in conceptual systems, and of course, between two or more languages, resulting from the comparison of the corresponding conceptual systems. We will focus on the second relationship.

In our first assumption we define equivalence, in line with Wüster, as a relation between concepts having the same characteristics (intensional identity). [Arntz/Picht 1989:159]

Relation of Equivalence



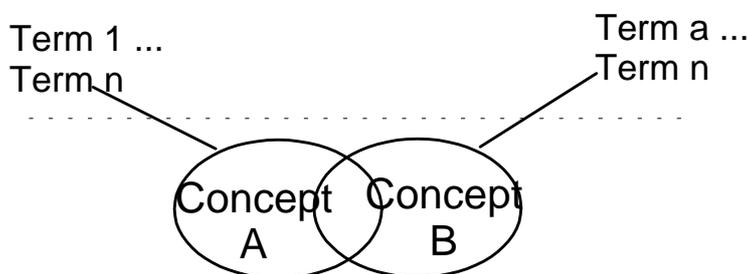
There is no equivalence on the level of terms. In systematic terminography, the characteristics, i.e. the intensions of concepts have to be analysed regardless of their linguistic representation. The linguistic form of the term is only of secondary importance. Geographical usage notes, level of language, prevalent term, etc., as additional information on terms, have no influence whatsoever on the relationship of equivalence. Obviously these are important in order to choose a term for use in a text, and there can be no doubt that these differences between linguistic forms should be recorded.

Equivalence is defined on the basis of corresponding conceptual features which depend on the intension of the concept and its position in the conceptual system of the chosen subject field.

The first and immediate case is so-called "absolute equivalence", i.e. when there is only one concept. In fact there is no relation at all: terms in two or more languages relate to the same concept. The opposite would be two completely different concepts: in this case too, there is no relation whatsoever between the two concepts. In both cases we do not need the concept of equivalence.

Most authors (Arntz/Picht, Felber/Budin, Felber) cite at least two intermediate cases of partial equivalence. Two concepts could be overlapping with some corresponding and some differing features.

Relative Equivalence Case 1



Arntz/Picht (Arntz/Picht: 162) make a distinction between cases where the overlapping section is large enough to establish equivalence and cases where it is too small.

The problem is that there is no criterion for the terminologist to decide whether there are enough overlapping characteristics to justify a common concept. In some cases just one

differing feature could lead to two distinct concepts; in other cases quite a few differing features will not suffice to abandon equivalence. It is up to the terminologist to decide. In this conflict the concept of equivalence does not help very much.

A second case of relative equivalence is assumed where one concept comprises another concept. This is a relation between subordinate concept and its superordinate concept.

In an intralingual context, Wüster called this relationship "Leitersynonyme", where the superordinate concept is synonym to a subordinate concept. An interlingual relationship between a subordinate concept in L1 and a superordinate concept in L2 is obviously not a relation of equivalence even though the term in L2 could be used in some contexts as a translation.

Another distinction of possible occurrences of equivalence is needed in translation studies. A translator must have all the conceptual information on the subject field involved in order to know which terms exist in the target language. But he also has to take into account textual, pragmatic parameters which can influence his choice of words and terms.

Conceptual equivalence is the basis on which a translator proceeds to reach his ultimate goal of textual equivalence [Neubert 1987:78]; information on the first is a *sine qua non* for a coherent decision on the second. We will not go further into the concept of translation-oriented textual equivalence, which has been the object of controversial discussion (see Draskau 1991).

The objective of terminology is not equivalence in the sense of complete interchangeability in text - a target which could only be reached in a few cases - it is rather conceptual correspondence. This will be the topic of the following exposition related to legal terms.

Legal concepts

As shown above, the basis on which two terms are compared in terminology is the concept, i.e. the intension of the concept or the sum of its characteristics. Concentrating on legal concepts, we will try to describe their peculiarities and focus on the discussion of definiteness or indefiniteness of legal concepts as they are created and used in law.

a) Origin of legal concepts

Legal concepts are formed by abstraction of the general features from a large number of instances. Thus "contract" is the legal concept abstracted from various instances of legal relationships which are called contracts. Usually after a long discussion by the general public, politicians, law consultants, legislative bodies, etc., a group of actual or possible situations in real life which shall be the object of legislation is described with the aim of regulating the interaction of humans (civil law) or of controlling people's behaviour (penal law). Most legal concepts originate from such a process, e.g. abortion, dismissal, leasing, factoring, murder, theft, etc.

Rooted in a national legal system, concepts are subject to the moral values predominant in this particular society at a particular period in time. Furthermore, every rule, every law is the result of a political discussion and decision process: a society deliberately chooses the basis on which its members will live together. It is in the interest of lawmakers to make provisions so that rules will be obeyed, thereby serving their purpose. This would make lawmakers aim at most accurate definitions to guarantee that this particular situation will

always be managed the way they have decided. Nevertheless, they cannot foresee how society with its moral values will evolve or whether the "real life situation" at the basis of the rule will change completely in time.

To sum up, we can say that legal concepts:

- 1) originate from a system of moral values
- 2) refer to specific "real life situations" within a particular society
- 3) contain provisions on how to handle these situations

Culture-specific criteria play a significant role both in the process of coining legal concepts and in the process of applying them.

b) Application of legal concepts

In the course of the administration of justice, concepts have to be applied to single concrete cases. There is not necessarily a strict separation between the origin of legal concepts and their application by judges or lawyers. In Common Law countries, judges have much more influence, and once a new decision has been taken, they are subject to the binding force of judicial precedent (*stare decisis*); in this respect, judges create and define legal concepts. In Civil Law there is also a tendency to abide by judicial precedents, but judges have more freedom in this respect although they are much more bound by written law.

Precise intensional definitions in written law would hinder the adaptation of the abstract rule to the single case in question. The more characteristics for the legal validity of a concept there are in a law, the fewer possibilities judges have for an extensional application. For a fair and just application of laws and equal treatment of citizens, judges must have a certain range of freedom in applying abstract rules to concrete cases which can differ considerably. On the other hand, if this freedom becomes too far-flung there will be insecurity about the application of laws and citizens will not know what to expect from the administration of justice.

Furthermore the extensional definition of a legal concept can change considerably by application of the analogy principle, i.e. extending the applicability of a rule to other cases not provided for in the law. Legal concepts can therefore not be described adequately by intensional or extensional definitions.

The administration of law cannot be a simple syllogistic reasoning process which attributes to each case in question the applicable abstract rule, as was claimed by conceptualism. Conceptualism treated legal concepts and terms as having fixed and invariable meanings in all contexts, like concepts from natural sciences. This assumption may lead to wrong and unjust decisions and inhibits the development of legal rules in different contexts.

c) Indefiniteness of legal concepts

The interpretation and application rules of each national legal system lead to a certain degree of vagueness of legal concepts. Legal concepts tend to be in a state of constant flux, being redefined by lawmakers, judges or scholars. Definitions of legal concepts should leave room for interpretation of laws and the adaptation of rules to new or changed social and moral environments. Definitions of legal terms are, therefore, always open definitions.

In addition to the factors listed above under a), indefiniteness of legal concepts comes from:

- 1) the need to adapt laws to different situations and/or changing times
- 2) interpretation rules
- 3) the analogy principle

It must be stated clearly at this point that the so-called indefiniteness of legal concepts does not derive from language as such; it is intrinsic to the functioning of law as a system. So we must acknowledge this fact and speak of the flexibility or adaptability of legal concepts to different contexts.

Basis for comparison

The distinctive nature of legal concepts works as a decisive factor against equivalence. We stated above that legal concepts are embedded in a specific working environment and in national legal systems, and that each national legal setting has its own principles for the application of concepts.

There cannot be absolute equivalence, unless it is a consequence of complete identity of moral values, legal provisions, interpretation rules and forms of application of laws - but this again would mean the same legal framework.

On the basis of what has been said, we must assume that terminography in law cannot be merely the search for identical concepts in two or more legal systems because this would only cover a minority of cases - and even these could be questioned - and leave out the majority of cases with greater or lesser differences between the concepts. A methodology should be developed to deal with the cases of partial equivalence or overlapping characteristics. To achieve this we have to abandon the concept of equivalence in favour of a more flexible comparative approach. The difference lies in the presupposition that legal concepts as part of a national system of laws are fundamentally different across legal systems and that only a comparative approach is possible; the establishing of equivalence relations is not.

a) Functional analysis

The aim of a comparative terminography in this respect is the functional analysis of concepts within their legal environment; it should provide an insight into the purpose of single concepts (and their terms) within the framework of a rule and a system of laws.

To describe the function of a legal concept, we have to consider each concept as a structural part of a legal setting which originates from the need to control a certain aspect of social life. Legal concepts are components of a whole legal solution (laws, statutes, provisions, regulations, summons, writs, sentences or even established custom and non-written law) for a certain problem in society. To obtain the best results, we have to take such a legal setting as the subject of the terminological research and analyse all the concepts needed to regulate this aspect of life.

The function of a concept within a legal setting comprises the reason for the existence of this particular concept in the legal setting as well as its position and relation to the other concepts constituting the legal setting. Concept definitions need to refer to this particular legal setting and describe the function of the concept with respect to the purpose for which they have been created or for which they are used in this context.

b) Functional bridge

Only after having described the purpose of the single concepts as components of a national legal solution can we move on to see if there are possible connections to concepts of the other national legal system.

Similar function or comparable purpose of the concept within a particular segment of the whole system of laws are the criteria for establishing links between concepts. The segment of the national legal system is determined sociologically by the real-life problem it is intended to control.

The questions which need to be answered in order to find a comparable concept are:

- a) How does the legal system B regulate this matter? (legal setting in B)
- b) How is the legal setting structured? (concept system)
- c) Is there a concept within this legal setting with the same function or purpose in relation to the overall juridical goal?
- d) What is the position of this concept in relation to the other components of the legal setting?

If these steps are sufficiently documented, a functional bridge can be established between single concepts. These functional bridges should not provide interchangeable equivalents but rather should give the user knowledge about the concepts used in both national legal systems.

comparison of independent concepts
aim: establishing links between
concept groups

Legal concepts	compared on the basis of
within a system of laws	function position legal setting

Susan [\[1991:618\]](#) discusses the problem of acceptability of functional equivalents: "For the sake of accuracy, it is generally agreed that there is a certain point beyond which a functional equivalent can no longer be considered acceptable". This brings us back to the distinction of conceptual and textual equivalence. Acceptability can only be measured by textual criteria, including pragmatic parameters. And it is **not** the aim of terminography to find equivalents which can be substituted automatically. A descriptive approach in terminography should inform the user about the use of the concepts and their designations in the respective languages or legal systems, which is what [\[1991:619\]](#) says in the same article [\[1991:619\]](#) "Generally speaking, partial equivalence is sufficient in dictionaries written exclusively for information purposes and intended for readers of diverse legal realities." Every translator needs information about the legal systems of the source and the target text, and terminographical works (termbases, LSP dictionaries) should provide this information. It is on the basis of this (conceptual) information that a

translator can make his decision on which (textual) strategies he should use for the target text; `ar<evi< mentions some of them: literal equivalents, borrowings, descriptive equivalents, neologisms.

In cases where the two legal solutions for the same basic social problem are completely different, a set of different concepts is also used in the two legal systems, and the first thing a translator should be aware of is this difference. Such information about the concepts used in both legal systems (SL and TL) should also be the basis for the creation of new terminology in bilingual legislation or the use of terminology in international bodies.

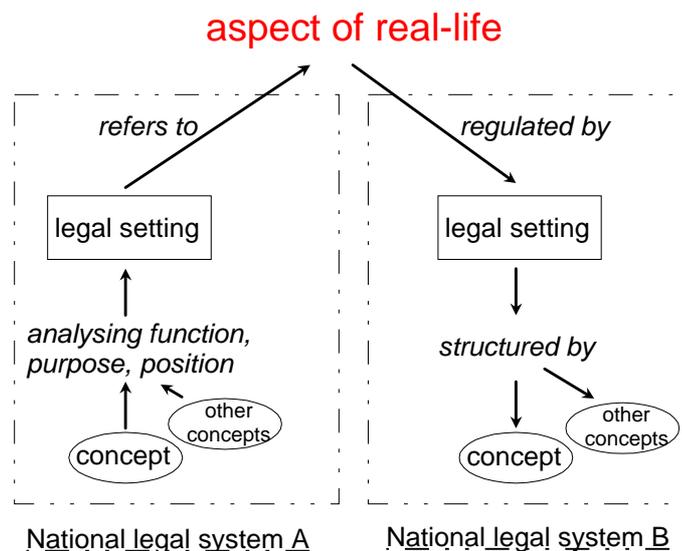
It is highly dangerous in legal terminology to apply methods such as the creation of new terms, borrowings, or literal translations without first describing the differences between the two legal systems and the concepts involved. Without this vital information, the user could take the neologism or literal translation for an authentic term of the target language.

For Mary Snell-Hornby [Snell-Hornby 1990:224] it is the lexicographical tradition to hunt for an "immediately insertable equivalent". She states that "it is the task of the translator not to hunt for the insertable item, but to use the given information as an aid in his all-important decision-process in recreating the text." A term bank or a good specialised dictionary should give this kind of information, especially when there are two or more legal systems involved.

c) Methodology

The methodology to be applied for a comparative approach is a systematic one. Systematic in this respect means the analysis of a concept as part of a structure of concepts which has been created for a particular legal purpose. Each concept has to be seen as a component of a legal solution for a particular aspect of real-life. This sociological reference to facts outside the law is the only direct connection between different legal systems and should be used as a thematic outline for single terminography projects.

Within the legal settings of both countries, the concepts should be described functionally with regard to their purpose as a component of the whole regulation. Once all the concepts and their relation to each other have been described and documented, the structure of the legal settings emerges clearly. On the basis of this data, the role of the single concepts can be compared: It will be possible to single out pairs of concepts having the same position and a comparable function.



The result of this process, i.e. a set of concepts and terms from two legal systems and the relations or functional bridges between them, must be stored and managed with the help of suitable terminology management software.

It must be stressed that in such a term bank we store the result of a comparison, but not occurrences of equivalence. The relations between concepts of different legal systems do not imply immediate interchangeability or intensional identity, but rather represent a sort of window onto another legal reality. Such an approach should enable the user to see what concepts and terms are employed by another legal system to control the same matter.

This connection to the other legal system can be described and classified on the basis of the result of the comparison of concepts. In my doctoral thesis I proposed the following types of relations:

Direct relation

This relates two concepts directly to each other. Both concepts have the same function and the same position within the concept structure, and both are part of a legal setting that refers to the same basic social problem.

Functional relation

The functional link describes a relation between concepts which have the same function within their legal setting, but perhaps another place in the concept structure. It can also be used to describe relations of one concept in the first, versus two concepts in the second legal system (1:2).

Indirect relation

This type of relation can be established when two concepts refer to the same aspect of life as a part of the overall thematic enclosure. In principle this connection resembles the link based on the overall legal setting, in both cases there is a *tertium comparationis* outside the national legal systems. On the microlevel, however, the aspect of life controlled by this particular concept is a small part of the whole and is used exclusively for the comparison of the concepts. As with the functional relation, it also encompasses cases where two or three concepts are used in the first legal system and only one in the second (1:2 or 1:3).

These three types describe relations between single concepts, between one and two concepts or at most between one and three concepts. In cases where there are great discrepancies between the legal systems involved or where the legal structure is very

different, it will be necessary to introduce further possibilities of linking concepts to another legal system. In contrast to the first three relations, these would be relations between groups of concepts. This could be a relation established on the basis of the concept structure or crossing the bridge to the other legal system by looking up its first or second superordinate concept to see if there is a relation to the other legal system.

If all else fails, the ultimate point of convergence is the thematic delimitation of the terminography work; it refers to the particular aspect of life which is the object of different legal solutions. A terminology management tool should be able to provide the user with all the concepts constituting the whole legal solution. Thus the user can see which concepts and which terms are used in the other legal system and make use of this information for his purposes.

Conclusion

Descriptive terminology work 'describes' the terms and concepts used in two or more legal systems. It is not intended to offer equivalents or translations, or to create new terms. Descriptive terminology is a precondition to normative terminology work and to translation, both of which have to make decisions on terms, whereas descriptive terminology depicts the usage of concepts and terms in a particular subject field.

This also holds true for comparative legal terminology: it should be 'user-driven' [Cole 1991:17] meaning that it is carried out in order to provide information about the concepts and terms used in two legal systems. The above-mentioned different types of possible links between system-bound concepts should enable the user of terminographical products to 'have a look' into the other legal system, to find comparable concepts and their terms, and eventually decide which term he/she should use on the basis of this information.

The concept of equivalence is abandoned in favour of a more flexible comparative approach. The results of the comparison are presented not in terms of equivalents or non-equivalents but in terms of different stages of comparability. The ultimate goal of this approach is to give the most detailed information on concepts and terms of the legal systems involved.

We should develop new specialised term banks which can manage the results of such a comparative approach along the line of the model described in my doctoral thesis [Sandrini 1996].

A further line of research should go into the nature of comparison and how the results of a comparative approach could be managed for information purposes. This can be applied to culture-bound terminology but also to culture-bound texts and comparative text analysis.

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