

# Comparative Law for Legal Translation: Examining Nepali-English Translation

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## Abstract

*This article examines the comparative law for legal translation to analyze the Nepali-English legal translation. It studies comparative law to find the nearest equivalence between the source and the target legal systems. The comparative laws are applied in Nepali legal translation to explore the semantic and procedural similarities and differences between two systems even if the effect is symmetrical. The equivalence between Nepali and English legal terminologies is analyzed at linguistic and extra linguistic levels using Eugene Nida's equivalence theory and Mary Snell-Hornby's cultural theory. The comparative study of law is used in legal translation to explore the sociocultural aspect of law which differs from system to system or nation to nation. In translating legal text some source law concepts do not correspond to the target legal system, which challenges legal translation to convey the source message to the target readers in their language and culture. The knowledge of comparative law works to overcome the challenges by analyzing the SL legal systems to find the nearest equivalence in the TL system. This research analyzes conceptual legal terms between Nepali and English to find similarities and differences in meaning and effect in translation. The significance of this study is to increase awareness of the comparative law for legal translation and increase translation competence. It concludes that the legal translator needs to know comparative law to comprehend source law properly and translate it into the target legal system. It helps to match the right equivalence and minimizes the risk of under-translation or over-translation.*

**Keywords:** explore, comparative law, system, translation, equivalence

## Introduction

Legal translation is a technical translation that deals with the subject concerning legal matters of everyday life and legal traditions. Transcoding the SL content into TL is not always enough to convey the intended message to the TL readers, and they are compelled to be satisfied with the information received from reading translation as they have no access to the original due to linguistic and cultural barriers. The legal language of a nation depends on the history, culture, economics, and other extralinguistic elements that may not be found equivalently in the TL. A legal translator requires the knowledge of comparative law to find the nearest equivalence of the source law (institutional, cultural,

and religious terminology) in the target language and legal system. According to Cao (2007), one feature of legal language and legal translation is the use of legal terms unique to law, the so-called system-bound words. Many such words associated with legal personnel, court structures, and particular areas of law and institutions (p. 60). She means that many legal words of SL do not correspond to the TL system which creates a challenge in translation to deliver the SL meaning equivalently in TL. Like other language translation pairs, the legal translation of Nepali-English has been suffering from the same problem of not finding the complete equivalent between the English and Nepali languages and legal systems. For instance, the Nepali legal term used for the legal professional “*adhivakta*” is translated into

“advocate” in English but this corresponds to the “solicitor” or “barrister” in the English legal system. The term *barista adhivakta* (senior advocate) of Nepal is partially equivalent to the “barrister” of the English court but functionally they are similar to the advocate in representing the client. In England and Wales, a solicitor directly deals with the clients. In English legal practice, barristers generally do not deal with clients directly (Soriano-Barabino, 1973, p. 111-12). The barristers represent the case in court while the solicitors counsel the parties for legal issues. The Nepali advocate directly deals with the clients, counsels, and represents the client in court. The *Abhivakta* (pleader) is hierarchically lower than the *adhivakata* (advocate). The *abhivakta* functionally corresponds to the solicitor of English law and Nepali *abhivaktare* presents his/her clients in the court except the Supreme Court of Nepal (Nepal Bar Council Act, 1993). *Adhivakta* (advocate) can present an argument in any Nepalese court of law on behalf of his client. The legal professional terms used in the Nepali legal profession are more equivalent to those of the Continental (French) legal professionals. Nepali legal professionals are labeled with different legal words. They are *lekhapadhi Byabasaya* (certificate for preparation of documents in offices and court) hold legal drafting licenses and simply counsel clients for simple legal matters necessary for the works of judicial and quasi-judicial bodies. Now, their qualification is an SLC/SEE pass and they have to sit in the exam conducted by the District Court (§ 28) and short-term training. The *Abhhivakta* of Nepal represents the parties in the District and the High Courts, and their qualification is a degree of Intermediate in Law (IL) (§ 17) or 12 class pass in law and a license for advocacy. The *Adhiwakta* represents the parties in any court of law in Nepal. Their qualification is a Bachelor of Laws (LLB) or BL (§ 17). Other legal professionals are the Notary Public (attestation/certification/translation) need to be as qualified as the advocate. They are

known as public officers and are responsible for the public work of translating public legal documents, attestation, and certification of legal documents. The translator has to pass the exam conducted by the Notary Public Council to get the translation license (*An Act Relating to Notary Public*, 2007). The term “notary public” is borrowed from the Western legal tradition and used in Nepali law but Nepali notary public professionals are facilitated by limited work of notarization. The legal professions of Nepal and France are terminologically near. As Cone (1975) mentioned the French legal profession:

First, there is the *avocat*, who has a monopoly of practice before the most important courts, is authorized to give legal advice, and is governed by an independent bar. Second, there is the *notaire*, who has a monopoly of conveyancing, estate work, and the execution of certain formal instruments, and who is governed in part by an independent professional association and in part by the Ministry of Justice. Third, there is the *conseiljuridique* (legal counselor), who is authorized to give legal advice and to prepare legal instruments, and who is governed by the Ministry of Justice; he is not accorded a monopoly of any aspect of the practice of law. Outside these three categories, there are advisors who do not qualify as *avocats*, *notaires* or *conseilsjuridiques* but who are nevertheless permitted to give legal advice and to prepare legal instruments; they may neither call themselves by, nor use a title susceptible of confusion with, any of the foregoing titles. These advisors include house counsel, labor union or trade association lawyers, real estate agents, accountants, and other unregistered practitioners (pp. 465-66).

Under different professional titles gives legal services to customers as regulated by the French national legal system. The lawyers who represent in the court. They have a monopoly to represent the clients as defense lawyers and leads in the cases for public interest litigations (PIL). Despite the

adoption of the Common Law System in Nepal, the structure of the Nepali legal profession is nearly equivalent to the French legal system. The term “advocate” as practiced in Nepal is not in use in England and Wales but English law uses the “solicitor” and “barrister” as correspondent words.

In the US, the lawyers are entitled as attorneys, attorneys-at-law, counselors, or counselors-at-law. They are academically, professionally, and legally qualified to prosecute and defend in court. The US legal system does not differentiate between lawyers who plead in court and those who do not as in the case in England. (Sariano-Barabino, 1973, p. 124). The State provides them licenses after they pass the exam held by the Bar. The academic qualification to be a lawyer the applicant has to hold a law degree (Juris Doctor) from an accredited law school (p. 125). A law degree in the US is a post-graduate degree after completing a three or four-year bachelor’s degree. The qualification for a lawyer or an advocate in Nepal needs to complete the academic qualification of a bachelor’s degree in any discipline and an additional three-year bachelor’s degree in law (LLB) or a five-year degree after completion of class twelve (BA, LLB). The academic structure of being a lawyer in Nepal and the US is comparatively near. However, the inconsistencies in the substantial and procedural law between the source and target legal system, the legal concepts are not conceptualized identically. So, this research poses the following research questions for this research article:

- (1) How does the competence of comparative law help in legal translation?
- (2) How does comparative law increase the selection of equivalent legal correspondents in legal translation?

The primary objective of this research is to analyze the use of comparative law for legal translation between Nepali and English legalese and find the

nearest counterparts in the TL. Besides, this study sheds light on the knowledge of Nepali-English translation pairs to understand legal concepts that possess the same legal effect in different linguistic structures and legal terminologies. This qualitative research uses primary and secondary data to analyze and interpret legal translation using comparative law between Nepali and English legalese to find the nearest correspondence.

## Review of Literature

Legal translation and comparative law are interrelated disciplines because innovative legal knowledge and methods have been spread to law by legal translation, and legal translation translates legal texts that bring legal consequences or legal information to the target readers. Comparative law is the study of different legal systems which consists of different legal cultures with unique histories, social backgrounds, and evolution of law. When a legal translator translates source law from one legal system into another, the knowledge of the source and the target legal systems is mandatory. It requires more to translate the cultural-bounded or institutional-bounded legal terms equivalently. Although legal translation is technical, it is not like the translation of medical science or math, which are not culturally bound. Law is culture-bounded and is affected by national legal culture. Pommer (2008) argued, “Law is a cultural domain, occupying an important place among the cultural practices. The roles of legal institutions cannot be fully comprehended if not seen as part of their culture and at the same time a culture cannot be fully understood without attending to its form of law” (17). This view suggests how law and legal translation are interconnected and justifies that comparative law helps to understand SL legal concepts critically and allows legal translators to translate creatively selecting the best correspondence. As Ramos (2014) mentioned:

Legal translation study (LTS) will be understood here as an (inter)discipline concerned with all aspects of the translation of legal texts, including processes, products, and agents. Linguistic mediation between legal systems or within multilingual legal contexts (such as international or multilingual national systems) and the academic study of such mediation requires the coherent integration of concepts from TS, Linguistics (as drawn upon through TS), and Law. Without these elements, it can be argued that legal translation as a problem-solving activity would be an unreliable exercise, and LTS would not stand where it stands today. (p. 261)

Legal translation is interdisciplinary and connects not only with language and law but also with the other disciplines that play a role in the evolution of law and the legal system. The mere linguistic transcoding from SL to TL is insufficient for legal translation as law strongly connects with the history, culture, and economics. Law is a cultural product and legal translation is a means to spread legal knowledge on legal principles and practice from the SL legal system to the TL legal system. Translating source law means communicating and transferring the SL legal traditions into the TL legal system. Due to the incongruence in the legal system, comparative law plays an important role in the translation of legal texts because it allows for identifying similarities and dissimilarities between different legal systems (Soriano-Barbino, 1973, p. 19). Legal translators use comparative law to avoid conceptual misunderstanding and transcribe source legal culture in TL legal tradition. Comparative law can be used as a tool for the assessment of equivalence and equivalence effects in translation. Using comparative law translator tries to inform the TL readers as the SL readers are believed to be communicated by reading the source text. Based on Lawrence Friedmanite Ginsburg (2009) argued that comparative law is preoccupied with the problems of translation across cultures and the corresponding

search for functional equivalents (p. 6). Comparative law helps to maintain function equivalence in translation if the absolute equivalence is absent between the two languages and legal systems. It is said that no two languages and legal systems are completely identical in meaning and effects. Legal translators can use comparative law in translation to analyze foreign legal concepts and apply them to bring equal meaning to TL readers similar to SL readers.

## Materials and Methods

This study is qualitative. The primary data are taken from the Nepali to English translation of legal texts focusing on the conceptual differences in comparative law. The English translation of Nepali legal terms used in Nepali laws was comparatively analyzed with the terms that represent similar ideas in English and other foreign legal traditions. The conceptual meaning of the legal terms in the comparative legal systems (English and French) is analyzed to find absolute equivalence, partial equivalence, and no equivalence in Nepali-English legal traditions. Both primary and secondary data are collected and used based on the library research method.

## Results and Discussion

### Asymmetries in S Land TL Legal Traditions

Almost all countries promulgate family laws to manage and regulate family affairs and continue the traditional practices people pursue as their customs and culture. Normally, family law governs legal behaviors of marriage, divorce, adoption, guardianship, partition share, the child-parent relationship, and other family affairs based on a country's needs. It systematizes and harmonizes the domestic relations of people in their families. The family structure of source law, the variation in the relationships, rights, and obligations given to the family members, the customary practice, and the influence of religion in family affairs make the laws

considerably different from one to another. It can bring conceptual gap when translating from the SL to the TL legal system. For instance, the practice of cohabitation, same-sex marriage, and single-parent families as legalized in Western societies is not recognized in the Nepali Civil Code, 2017, which brings a conceptual gap in the TL readers. Translation of these foreign legal concepts into Nepali law does not directly correspond but is equivalent functionally. For example, the process of determining the father of a child in question after the marriage or after the death of the husband is different in Nepal and the Western legal system. The Nepali Civil Code declares and legalizes the parent (father) of the baby to take birth within 180 days after the marriage or 272 days after the death of a husband or the dissolution of the marriage (National Civil Code, 2017) unless proved otherwise. This system of “determining the parents” of the baby’s birth in question is not identical to foreign legal traditions. In English legal traditions, the parent-child relationship is justified by the DNA test not written in the Nepali statutes. In Western countries, the “Proof of parentage will usually involve DNA tests, which are currently the most accurate technology for determining parentage” (Proof of Parentage 2019, p.7). Despite this fact, some American States make the legal provision for declaring the birth of a baby within 300 days after the separation/divorce/death of the husband is the child of the former husband if the woman does the next marriage (Roberts, n. d., p. 1). The legalization of the parentage of a baby in question after divorce or separation from the husband is different in different nations according to their domestic laws. The translation of the source Nepali concept of “parentage” in question is not completely equivalent to the legal provision to the foreign legal traditions. In such a state, the knowledge of comparative law contributes to the translator providing ideas to translate this conceptual equivalence functionally to give the SL concept in TL by explaining in short

as a footnote or in the definition section. How much knowledge of comparative law is necessary for the legal translator? is the burning question that arises for the legal translator. Regarding this, Prieto Ramos (2011) argued, “Even if legal translators do not need to be equipped with a jurist’s level of legal expertise, it is essential that they acquire sufficient legal knowledge in order to situate the documents in their legal and procedural context, as well as to grasp the legal effects of original and target texts” (13). The legal institution or designation in which the source legal system exists may not exist in the target legal system so the legal translator needs to apply different translation techniques to bring the SL legal cultural concept equally to the TL legal system for the readers either explaining unfamiliar concepts to the TL readers or borrowing the SL ideas in the TL legal system. The historical background, the main characteristics of source law, the inclusion of unique institutions and designations, and the knowledge of the main legal trends of SL and the TL are necessary for the legal translator to be competent in legal translation.

### **Procedural Asymmetries in Legal Conceptions**

The terminological differences in representing legal concepts between the SL and TL legal systems create translation challenges. Conceptually, the legal terms are alike, but the procedural part for implementing the law in practice varies between the SL and TL concepts. For instance, the appointment of the “guardianship” of an incompetent or quasi-incompetent person mentioned in the National Civil (Code) Act, 2017, is not identical to the foreign legal tradition. The priority of “guardianship” to the incompetent adult as coded in the Nepali Civil Code is “(a) husband or wife living in a joint family, (b) father or mother, (c) son, daughter or widow daughter-in-law living in a joint family, (d) separated husband or wife, (e) separated son, daughter or widow daughter-in-law, (f) grandfather or grand-mother, (g) grand-son or grand-

daughter, (h) elder or younger brother or elder or younger sister, (i) grand-father, grand-mother on the mother's parent side, maternal uncle, maternal aunt" (§ 136.1). This order of "guardianship" to the incapacitated person may not identical to foreign laws where no joint family structure avails. The priority of "guardianship" maintained in Nepali law does not correlate with other foreign legal traditions where such order is not maintained. The provision for giving guardianship in Nepali law is unlimited or limited is not clear. The responsibility of unlimited guardianship is high, from limited guardianship in a state of emergency for the welfare of the dependent. Unlimited guardianship is not given to the guardian of the incapacitated persons as Glatstein (2017) mentioned that the underlying philosophy of guardianship is that the guardian's powers should be no greater than necessary to see to the needs of that particular ward (protected person). If an unlimited guardianship is believed necessary, the petitioner (guardian) will have to explain to the court's satisfaction why an unlimited guardianship is necessary. Otherwise, a limited guardianship will be ordered (p.339). The meaning of the term "guardianship" as translated interplay law "*samrakshakatwa*" does not correspond to the English concept of guardianship. In Colorado "guardian" or "conservator" is appointed to disabled persons after assessing the mental and physical condition of the incompetent adult. A person for whom a "conservator" is appointed is known as a "protected person" who cannot manage his or her finances. In such a case a court can appoint a guardian, a conservator, or both (p. 337). So the term "guardianship" used for the incompetent or quasi-competent person is partially or functionally equivalent in the TL legal system if analyzed in the comparative legal system. The order of priority for the appointment of guardianship to a person who completed 21 years without a criminal history is eligible as per the law of Colorado where the order of guardianship is as given:

(1) a currently acting guardian; (2) a person nominated as guardian by the respondent; (3) an agent under a medical durable power of attorney; (4) an agent under a general durable power of attorney; (5) the spouse of the respondent or a person nominated by a will or other signed writing of a deceased spouse; (6) an adult child of the respondent; (7) a parent of the respondent or an individual nominated by a will or other signed writing of a deceased parent; and (8) an adult with whom the respondent has resided for more than six months immediately before the filing of the petition. If good cause is shown, the court can appoint someone with lower priority or no priority as a guardian (Glatstein, 2017, pp. 338-39).

This provision for appointing guardianship to the incompetent person in Colorado and the legal provision of Nepali law as mentioned in section 136.2 are functionally near equivalence by these provisions that (a) Where there is more than one person in one priority order eligible to be a guardian, the person mutually agreed upon by them, and in the absence of such agreement, the person as designated by the court, (b) In the case of a person of sound mind and having attained ten years of age, a person chosen by him or her, provided that in so choosing the guardian, a deed shall be executed to that effect and certified by the court. (c) In the case of a minor of a couple whose matrimonial relationship has been extinguished by law, the father or mother who maintains him or her, (d) If any person who is in the priority order declines to be a guardian, becomes of unsound mind or does not act in the capacity of a guardian, the person who is in the next priority order. If a person in the next order is to become a guardian, the person shall get it certified by the court that he or she is the guardian. Functional asymmetry is another challenge in legal translation that can be solved by intense analysis of the given law and finding their equivalent in TL as far as possible.

Section 137 of the Code permits the extra family

member to be the guardian of the incompetent persons. According to this, notwithstanding anything contained in section 136, if guardianship to an incompetent or quasi-competent person is provided by a person other than the one referred to in that section, the person so providing guardianship shall be considered to be a guardian of such a person but to be certified by the court. Even the organization shall be the guardian for the cases. If a child who is living in an organization, such as a child welfare house, orphanage, child home, or children's organization, registered under the law with the object to have the welfare of and protect rights and interests of children, has no other guardian, such an organization shall be considered to be his or her guardian. Hence, the conceptual or procedural differences between the SL and the TL legal systems invite inconsistency in meaning to the TL readers. The knowledge of comparative law well functions there to choose one of the nearest equivalents out of many false friends.

### **Asymmetry in the Sources of Law**

The differences in the source of the SL and TL law can be unfamiliar to the target readers when a translation is read. The source is guided by the Hindu *Dhramashastra* (holy books) which is unfamiliar to the target readers. Concepts of marriage, adoption, inheritance, trust, partition share, and succession are influenced by the Hindu religion in Nepali law. As Thapa (2010) mentioned, "Nepalese social structure is still based on and guided by the old values, norms, customs, and rituals of the Hindu religion" (p. 929). The concept of divorce and termination of marriage is absent in the Hindu religion so this is borrowed from Western family legal tradition. After marriage, a Hindu woman adopts her husband's home as her own home, which is accepted and legalized in Nepali family law. Section 87 of the Civil Code of Nepal has the legal provision that the husband's home is the dwelling place of the wife if they agree to live separately. This concept

is influenced by the Hindu marriage concept in which after marriage, Sita went to her husband Rama's home in Ayodhya (India) from her father's home in Janakpur (Nepal) as per the great Hindu epic the *Ramayana*. Unlike Christian marriage as a covenant or contract, the concept of marriage in Nepali law is permanent and stable though there is a provision for divorce in Nepali law. The UK legal provision to perform a marriage in the registered building is unfamiliar in Nepali law. The system of English marriage performed in the presence of the "Society of Friends" is unknown in Nepali marriage law. In the UK marriage, the couples performed their marriage according to the rules of society observed by the "Society of Friends" (Marriage Act 1949). According to the law of Nepal, marriage can be performed by organizing a ceremony, gathering, and any other work in which the couple accepts one another as husband and wife (National Civil Code, 2017). No legal provision for the "Society of Friends" exists in Nepali law. So, UK "marriage" and Nepali "*bibaha*" are not completely equivalent to each other because these are culture-bound legal terms and mean differently to the SL and the TL readers. The functional equivalence can be maintained explaining the procedural differences between the SL and TL marriage law. The legal effect of marriage is equal though the procedural legal provision of the marriage varies. These procedural differences in the conceptualization of law for marriage, divorce, adoption, and inheritance between the SL and the TL confuse the TL readers and loss in translation. To compensate for the loss, the knowledge of comparative law can be applied by analyzing the source legal text from linguistic and extralinguistic perspectives and match with the legal terms that give the source legal spirit to the target readers in their language and culture. Sariano-Barabino (1973) asserted, "Due to the different cultural and historical evolution of legal systems, it is reasonably common to find the

same term with a different meaning in another legal culture, even if the language is the same” (p. 176). In the Nepali-English legal translation pair, the language, culture, and source of the law of Nepal and English are different so the meaning of the legal concepts between Nepali and English differs comparatively high and the legal translator handles the translation carefully evaluating various linguistic and paralinguistic aspects of the law.

## Conclusion

Legal translation as a technical translation is designed for the language of special purposes. The legal subjects are culturally bound and reflect the evolution of the national legal traditions. Translation from one legal tradition into another is challenging and demands a careful selection of equivalent correspondents in the target language. The history, culture, legal families, and branches of law affect legal meaning which are not alike in SL to TL. Comparative law contributes to the translator’s understanding of the legal realities of the source and target legal systems that help the translator evaluate equivalent and equivalent legal effects in legal translation between the SL and the TL. A basic knowledge of comparative law is needed for legal translators who know the similarities and differences of the legal terminologies used in the legalese. The competence in comparative law in the Nepali-English language pair helps the legal translator to understand Nepali and English legal traditions that ultimately bring quality to translation.

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