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Special Issue:

The Evil Twins and Their Silent Otherness in Law and Legal Translation

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Preface

Our rationale skillfully critiques the interdisciplinary fields of culture, law and legal translation with the help of well-established researchers. This work brings together innovative research themes in order to unveil topics that are still under exploration internationally, but whose complementarities seem highly necessary to discuss the idea of *The Evil Twins and their Silent Otherness in Law and Legal Translation*. Our research fields cover the foundation of law meaning and law making in legal translation providing an even more solid bedrock when it comes to analyzing specific spaces and their translation issues, either in China or within the Court of Justice of the European Union.

The complexity of law and legal translation is semiotically articulated as an on-going process of meaning imbued with symbolism, memory, and cultural markers. Through a legal semiotics framework of articulation and analysis, the examination of law, which happens in conjunction with legal translation, expands understandings of how law is crafted and takes root. As law is a living reality (Gény 1922), "a culturally constituted sign-system" (Wagner & Matulewska. 2020), different potentialities in meaning may arise within space and time, leading to the "image of the witches' cauldron, where they stir up a slightly stewing broth". As such, Professor Jean-Claude Gémar in his paper *"The Abyss of Meaning or the Cauldron of Signs: Meaning and Tertium Quid. Shakespeare as a Translator?"* envisages this slow maturation not only as a prerogative of the law but also as its main weakness. Indeed, meaning is nested in a place of uncertainty – *the tertium quid*. So, the Evil Twins of Law and Legal Translation resemble a living, moving and evolving reality that integrates beliefs of different origins, fertilize them in a very specific legal soil (Deleuze and Guattari 1998), and so point out this Silent Otherness of these twins. For him, the legal translator's choice aims at three potential directions: "to keep law and form and due proportion" (*Richard II*).

Our Special Issue on the Evil Twins in Law focuses on how the construction of an identity, of a nation is staged through history. Hence, it is a place of multiple possibilities where Silent Otherness can act as a catalyst role through legal translation and creates a new legal language and legal system. Professor Deborah Cao in her paper "*Translation as a Catalyst in the Development of Modern Chinese Legal Language*' shows how it is possible to deploy legal translation as a catalyzer to highlight a staging of legal modernity in China. As such legal translation becomes a means of re-appropriating law, and so making this Silent Otherness visible under modern angles. However, as the Evil Twins imply "an overlapping of segments of disciplines, a recombination of knowledge" (Dogan 1997: 435), they also create a tension in meaning making and meaning understanding. Michele Mannoni in his paper "*On the Forms and Thorns of Linguistic Indeterminacy in Chinese Law*" tackles the issue of ambiguous meanings; i.e., the Silent Otherness. Indeed, linguistic vagueness can be promoted either voluntarily or involuntarily, be a source of progress or of obscurity, since legal constancy in law would require a strict legal frame. Besides as legal rules are never absolute, they have to adapt to societal development, resulting in linguistic indeterminacy to encapsulate sensible interpretation of a term by different authorities. Therefore, he analyses the potential linguistic variables in Chinese, which give its noble marks to the field of legal linguistics, also known as jurilinguistics. The Evil Twins are subject to fluctuation, and so their Silent Otherness helps recreate a Third Space, being "a product of cross-fertilisation of influences". In their paper "*Reconceptualising the Third Space of Legal Translation: A Study of the Court of Justice of the European Union*", Edward Clay & Professor Karen McAuliffe use empirical data from 2012 to 2016 to reveal the multilingual environment of ECJ and the challenges they face with legal translation, leading to a process of hybridity.

In our Special Issue on The Evil Twins in Law and Legal Translation and their Silent Otherness, influences are varied and diverse. Law is the result of creativity and has Legal translation developed in the course of time and space. Likewise, Law reflects, consolidates but also forms and transforms – directly and indirectly – value perceptions within society and are historically changing. But constructing the meaning of legal language is not only subject to societal mutations as law itself is slippery, fluid and highly

unpredictable and lead to the Silent Otherness, which will need to be deciphered, transplanted or even hybridized.

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L'ABÎME DU SENS OU LE CHAUDRON DES SIGNES. SENS ET *TERTIUM QUID* : SHAKESPEARE TRADUCTEUR ?

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Abstract: Somme des atomes ou molécules que sont les signes que l'auteur d'un texte organise en discours, le texte recèle le sens, en latence. Pour l'activer, le révéler, on doit l'interpréter, que le but soit ou non de le traduire. S'il s'agit de traduire, les difficultés que présente la traduction de textes normatifs tiennent en bonne part à la charge notionnelle, au degré de « juridicité » du message que porte le texte, et à la singularité culturelle que dévoile son mode d'écriture. Si la substance d'un texte occupe une place prépondérante dans son interprétation, la manière dont il est rédigé, présenté – sa forme – est loin d'être négligeable. Chaque manière de dire porte une signification propre et participe au sens. L'approche définie pour la traduction, sourcière (moins-disant culturel) ou cibliste (mieux-disant culturel), en oriente le sens. C'est alors que l'interprétation finale des deux versions du texte instrumentaire par les tribunaux accomplit la fonction canonique du droit et de son langage : dire le droit en arrêtant le sens de tout ou partie d'un texte. En suspens jusque-là, les signes générant le discours et son sens nichaient dans ce lieu d'incertitude qu'est le *tertium quid*, où reposent, tels les ingrédients que

touillent les Soeurs du Destin (Macbeth) dans leur chaudron, les signes d'où jaillira le sens, vérité incertaine et précaire déduite par l'interprète originel du texte instrumentaire, le traducteur, transcrite dans le texte cible. Shakespeare apporterait-il une réponse aux questions existentielles que se pose le traducteur, lorsque le spectre (Hamlet) et les sorcières (Macbeth), oracles énigmatiques, répondent aux questionnements ontologiques des protagonistes sur le sens et la direction de leur vie ? Le barde lance en effet cette injonction: *keep law and form and due proportion* dans *Richard II* (3.4.43)! Le traducteur le suivra-t-il dans chacune de ces trois directions ?

Keywords: Shakespeare, droit, langue, traduction, signes, sens.

THE ABYSS OF MEANING OR THE CAULDRON OF SIGNS: MEANING AND *TERTIUM QUID*. SHAKESPEARE AS A TRANSLATOR ?

Abstract: Sum of atoms or molecules that are the signs that the author of a text organizes in speech, the text contains meaning, in latency. To activate it, reveal it must be interpreted, whether or not the purpose is to translate it. When it comes to translating, the difficulties presented by the translation of normative texts are due in large part to the notional burden, the degree of "juridical status" of the message conveyed by the text and the cultural singularity revealed by its mode of writing. While the substance of a text is of paramount importance in its interpretation, the manner in which it is written and presented – its form – is far from negligible. Each way of saying carries its own, and participates in, the meaning. The approach defined for the translation, sourcing (least-cultural) or targeting (most-cultural), guides the meaning. That is when the final interpretation of the two versions of the instrumental text by the courts fulfils the canonical function of law and language: to say the law by determining the meaning of all or part of a text. Until then, the signs generating the speech and its meaning nested in this place of uncertainty that is the *tertium quid*, where rest, like the ingredients that the Sisters of Destiny (Macbeth) stir in their cauldron, the signs of where meaning will come out, an uncertain and precarious truth deduced by the original interpreter of the instrumental text, the translator, transcribed into the target text. Would Shakespeare provide an answer to the existential questions posed by the translator, when the spectre (Hamlet) and the witches (Macbeth), enigmatic oracles, answer the protagonists' ontological questions about the meaning and direction of their lives? The bard indeed launches this injunction: *keep law and form and due proportion* in *Richard II* (3.4.43)! Will the translator follow him in each of these three directions?

Keywords: Shakespeare; law; language; translation; signs; meaning

« *keep law and form and due proportion.* »
Richard II (3.4.43)

Introduction

Ces quelques mots de Shakespeare illustrent une doctrine que ne renieraient pas les traductologues férus de théories de la traduction et de leurs principes canoniques, soit : 1) être fidèle (au sens que porte le texte de départ, TD); 2) rendre – ou ne pas rendre – la forme du TD dans le texte d'arrivée (TA); 3) être ni prolixe ni trop laconique; autrement dit, produire un TA qui ne soit ni trop long, au risque de perdre le lecteur dans un texte labyrinthique, ni trop concis, risquant ainsi de laisser le lecteur perplexe devant une esquisse de sens et donnant du grain à moudre aux futurs interprètes appelés à établir la « vérité du texte ». Shakespeare, l'auteur absolu qui a touché à tous les sentiments, émotions et drames humains dans son œuvre, aurait-il voulu glisser en passant, dans son *Richard II*, un principe cardinal de traduction? Le barde comme précurseur de la traductologie, en somme... Si l'idée même peut paraître incongrue, il reste que le fait demeure, et que Shakespeare l'a instillé, ébauche d'un principe cardinal, dans le dialogue du jardinier et de l'apprenti, dans les jardins du *Duke of York*, lequel jardinier, personnage secondaire au demeurant, prédit le sort qui va être réservé à Richard II. Ce genre de prédiction se répète souvent dans les pièces de Shakespeare, sous une forme ou sous une autre, qu'elle vienne d'un spectre apparaissant à Hamlet ou des « Sœurs du Destin » dans Macbeth. Car les forces chtoniennes y sont à l'œuvre, spectres et sorcières battent la mesure du sens. Il semble bien que la vérité s'exprime à travers leur être, physique ou vision fantomatique, et qu'elle donne sens aux évènements tragiques qui se déroulent autour des protagonistes, quand ils n'en sont pas les acteurs mêmes.

Ce sens flotte dans l'incertitude, lieu improbable, les choses n'étant jamais dites directement, mais sous-entendues, et doivent être interprétées par 'qui de droit' : Hamlet, Macbeth, Ohello, Richard III... C'est ainsi que le sens est suspendu temporairement dans un espace-

temps,[1] permettant à ses éléments épars de se rassembler pour le concrétiser et l'exprimer, telle la pâte du boulanger qui, au sortir du four, deviendra croissant ou (baguette de) pain. Dans cet intervalle, l'esquisse de sens se trouve dans une zone d'incertitude et d'attente, que j'ai souvent qualifiée de *tertium quid* lorsque je traite de traduction, juridique notamment. Il gît là, forme incertaine, en attente d'être réalisé en signification dans l'esprit de son interprète – le traducteur en ce qui me concerne. L'image du chaudron des sorcières, où elles touillent un brouet peu ragoutant, donne une forme concrète à ce *tertium quid*. Ici, le temps est de l'essence du sens, qui ne jaillit qu'au terme d'une lente maturation, gestation aléatoire puisqu'il est toujours fugitif, incertain, jamais totalement réalisé, car à la merci de l'interprète final du texte et de ses composantes qu'est le juge. Tel est l'apanage du droit, ou sa faiblesse.

Le génial barde résume ce processus des plus complexe en une formule brève de trois principes qui claque tel un fouet : *keep law and form and due proportion*. Prise au pied de la lettre, doit-on suivre l'injonction shakespearienne? Shakespeare a-t-il réellement voulu dire que la 'traduction juridique' doit être toujours fidèle, que la forme du TD doit suivre celle du texte original et que les proportions du texte, le TA, doivent être équilibrées? Le croire serait mal connaître le barde, qui a plus d'un tour dans son sac! Tout cela ne serait-il qu'illusion des apparences? Auteur génial autant que mystérieux, Shakespeare se retranche derrière les personnages qu'il met en scène et auxquels il fait émettre des apparences, des illusions de sens, ce "fantôme du sens" (Mathis 1996: 38). N'est-ce pas Shakespeare qui fait dire à Macbeth "*To doubt the equivocation of the fiend That lies like truth*" (5.5.48-49), le même qui déclare "*it is a tale Told by an idiot, full of sound and fury, Signifying nothing*" (5.5.17-28) [Je souligne]. Mensonges, manigances, absence de sens, l'illusion est complète. Mais la vérité n'en ressort pas moins à la toute fin de ces pièces et d'autres. Le brouet que concoctaient les sorcières dans leur chaudron fait sens et vérité; les spectres, dans leur silence, révèlent une vérité qui éclatera au grand jour.

Prenons Shakespeare au pied de la lettre sur ses trois prises de position, s'agissant de la traduction juridique, afin de tenter d'en démontrer la vérité ou l'erreur, ou encore la relativité d'une affirmation qui, en traduction comme dans le langage et son discours, peut s'avérer bonne conseillère.

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[1] Entre autres qualifications possibles, tel le concept de "tiers-espace" (*Third-space*), cher à Homi K. Bhabba.

Dans les deux parties de ce bref essai où sont traités chacun des termes de l'injonction shakespearienne, je compare en particulier les positions extrêmes que sont la doctrine de la traduction dite littérale, qui n'est pas tout à fait le mot à mot, donc "sourcière", et celle de la thèse inverse qui favorise la fonction "cibliste" de la traduction, que l'on qualifie parfois de libre, quoique cet adjectif équivoque puisse déboucher sur une certaine facilité, voire une adaptation plus ou moins poussée du TD par le traducteur. La première partie expose les raisons et arguments pour et contre une traduction littérale suivant de près le TD, longtemps règle implicite en traduction juridique, afin de vérifier le bien-fondé de l'argument sous quelques-uns de ses aspects. Dans la seconde partie, la question de la 'forme', objet de vifs débats en traductologie, retient particulièrement l'attention d'un traductologue nourri à la stylistique comparée, appliquée notamment aux textes juridiques. Dans cette partie, j'ai réuni les deux termes finals, *form* et *due proportion*, estimant qu'ils relèvent, justement, de ce que l'on qualifie, en français, de 'forme' par opposition au 'fond', et les traite néanmoins séparément en allant du générique *form* au spécifique [*due*] *proportion*. Cela demande, en effet, que l'on se penche sur la question de la comparaison des proportions jugées 'raisonnables' pour un texte législatif anglais ayant été traduit en français, entre deux systèmes aussi dissemblables que le sont la common law et le foisonnement de ses textes, chargés de détails à profusion, et les textes resserrés et concis issus de la tradition civiliste.

Parmi les nombreuses questions que l'on peut se poser, en conclusion, la moindre n'est pas de se demander quels effets la phrase à saveur juridique prononcée par l'apprenti jardinier peut-elle exercer, selon la juridicité qu'elle porte, sur le sens que véhiculera une formule porteuse ou non d'une obligation. Il n'est pas exclu que le spectre du sens, tel celui du père de Hamlet, hante éternellement le traducteur.

1. Keep law... » : S'en tenir au droit ?

Shakespeare était-il *aussi* juriste ? On ne prête qu'aux riches... Le mystère de sa vie nous cache tant de choses que l'on peut penser, sinon qu'il savait le droit, du moins qu'il connaissait *the Laws of England*. De savants juristes le pensent qui ont trouvé dans ses pièces nombre de situations et de questions juridiques. François Ost est l'un d'eux (2012).

Dans un de ses articles (Ost 2014 : par. 5), il cite plusieurs auteurs, éminents juristes de toutes origines, qui se sont intéressés à la question, et même jusqu'au vocabulaire juridique, de plusieurs centaines de termes, relevé dans les pièces du barde pour en faire un dictionnaire (Sokol 2004). Leurs travaux et réflexions amènent Ost, poussant le bouchon plus loin, à penser que l'on pourrait soutenir, vu que "l'anglais est la langue de Shakespeare", que "le système juridique anglo-américain est 'le droit de Shakespeare'" (Ost 2014 : par. 5). Quand on sait que "sur les 36 pièces qu'on lui attribue, une trentaine d'entre elles contiennent des scènes de procès."[2] (Ost 2014, par. 1). Pas de quoi mettre en doute la compétence du barde en matière juridique et judiciaire. Et celle de traducteur?

Que Shakespeare ait traduit ou non des œuvres étrangères en anglais importe peu finalement, mais le triptyque "***keep*** *law and form and due proportion*" semble tout droit sorti de la bouche d'un traducteur d'expérience recommandant à un traducteur néophyte devant traduire un texte de droit de s'en tenir à ces trois principes cardinaux. Ils ne seraient pas déplacés dans la pensée d'un traductologue actuel. Si l'actualité des thèmes juridiques que traite le dramaturge dans ses pièces ne semble soulever aucun doute chez les juristes : "[C]e qui frappe surtout l'observateur, outre la centralité du droit dans l'oeuvre du poète, c'est l'extraordinaire actualité du propos." (Ost 2014 : par. 1), on peut s'interroger sur le sens réel qu'a voulu imprimer le poète à ces mots. Adepte du double langage, de l'ambiguïté des mots et de l'équivoque des situations, Shakespeare est un maître dans l'art de duper son monde par les propos des personnages qu'il met en scène, dont l'archétype est Iago, suivi de près par Lady Macbeth. Les paroles des spectres et sorcières doivent être interprétées à leur juste valeur, qui n'est qu'apparence, comme le constate amèrement Macbeth, qui en fait les frais. Car

> [L]e mot s'enrichit mainte fois d'un sens second, qui en multiplie la portée. Le signifiant, comme diraient nos linguistes, porte plusieurs signifiés. C'est du jeu de mots qu'il s'agit, du calembour, du « double-entendre », implicite ou ironique. (*Universalis*)

[2] Le nombre de pièces de théâtre attribuées à Shakespeare varie selon les sources. De son vivant, on en compte 21. Le compte total, dont les pièces publiées à titre posthume, s'élève à 37 au moins selon la *British Library*. En ligne : https://www.bl.uk/people/william-shakespeare (consulté le 23 juillet 2020).

Aussi peut-on, en forme de conclusion sur le sujet, poser la question qu'avance Hélène Garello : "Est-ce parce que le langage est fondamentalement insuffisant et menteur que l'on ne peut être sincère [...]?" (2018 : 145). Et j'ajouterai : que l'on ne peut être cru. L'apparence de vérité du langage que tient Cordelia induit Lear en erreur sur ses véritables sentiments envers son père, lequel trouve son propos trop tiède, et révèle "son incapacité à soulever [son] cœur jusqu'à [ses] lèvres"[3] (Garello 2018 : 146). Écoutons plutôt Cicéron (*Jules César*, I, 3), personnage plus lucide que bien d'autres : "Les hommes interprètent les choses selon leur sens, très différent peut-être de celui dans lequel se dirigent les choses elles-mêmes." Insuffisance des mots, impuissance du discours.

Il s'ensuit que l'on doit prendre au sérieux, c'est-à-dire au pied de la lettre (1.1), l'injonction *keep law*, ou bien, compte tenu des faits mis en action par Shakespeare, suivre la réflexion de Prospero "*We are such stuff / As dreams are made on*" (*The Tempest,* IV.1) et envisager la possibilité que le poète, dans son for intérieur, ait pu penser le contraire, soit viser l'esprit plus que la lettre (1.2). L'art théâtral repose sur les faux-semblants, l'ambiguïté et le degré de vérité que l'auteur instille dans son oeuvre. Shakespeare a porté cet art à son comble. Envisageons un scénario dans lequel le barde aurait aussi été un traducteur, ajoutant une strate au terreau fertile sur lequel il a bâti son œuvre.

1.1 Traduire le droit au pied de la lettre

Traduire le droit, comme les autres matières, place le traducteur devant son éternel dilemme : opter pour l'une des deux démarches traditionnelles dégagées par de grands prédécesseurs et penseurs, dont W. Humboldt :

> Chaque traducteur doit immanquablement rencontrer l'un des deux écueils suivants : il s'en tiendra avec trop d'exactitude ou bien à l'original, aux dépens du goût et de la langue de son peuple, ou bien à l'originalité de son peuple, aux dépens de l'oeuvre à traduire. (Humboldt 1984, 9)

[3] "*I cannot heave / My heart into my mouth.* " (*King Lear*, I,1, 85-86).

Même si Humboldt visait la traduction littéraire et son esthétique, le principe reste le même : il y a deux façons de traduire, soit de façon 'sourcière', soit de manière 'cibliste', pour reprendre les termes ayant cours en traductologie[4] (Ladmiral 2014). Ce faisant, Humboldt suivait la voie que Cicéron avait tracée : "*nec converti ut interpres, sed ut orator"*[5] (Horguelin 1981, 19) et présentée dans deux mots chargés de sens et de symboles: traduire comme *interpres* (traducteur) ou comme *orator* (auteur). Selon les tenants de la première option, la traduction doit être réalisée en suivant la lettre du texte de départ, de façon littérale, voire mot à mot, par respect sacré du mot; les partisans de la seconde sont convaincus, au contraire, qu'une traduction doit être faite dans l'esprit de la langue et de la culture cible, de façon plus ouverte, voire libre, en prenant de la hauteur, une certaine distance par rapport au texte de départ. Telle est l'alternative qui s'offre au traducteur et que Cicéron, qui était aussi traducteur (on peut voir en lui un des précurseurs de la jurilinguistique), a exercée tantôt au premier sens, tantôt au second selon le poids qu'il accordait aux mots, croyant "que ce qui importait au lecteur, c'était de lui offrir non pas le même nombre, mais, pour ainsi dire, le même poids" (Horguelin 1981: 19). Depuis, on ne compte plus les définitions de la traduction, aussi nombreuses que les traductologues, les institutions, organismes et autres entités qui en produisent de façon quasi industrielle. L'alternative (traduction) sourcière / cibliste a fini par donner naissance à une kyrielle de méthodes et de stratégies aussi nombreuses qu'improbables.

De tout temps, plus que d'autres domaines, le droit a été traduit de façon littérale. La raison en serait simple et évidente, selon un éminent juriste québécois, parce qu'un "traducteur en droit par nature est un homme prudent car il craint dans la traduction de s'éloigner du texte primitif [...]" (Bonenfant 1979 : 390). Cette crainte, justifiée ou non, hante les traducteurs. L'histoire de la traduction juridique, en particulier entre l'anglais et le français mais pas seulement, est constellée de textes traduits littéralement. Sur ce plan, le Canada est aussi coupable que bien des pays. Un exemple caractéristique de ce type de traduction nous est donné par la traduction française - d'origine, mais non officielle - de l'article 3 du *British North America Act* (*Loi*

[4] Voir le compte rendu de l'ouvrage par Christine Pagnoulle dans la revue *Meta*, 62-3, 2017, p. 647-648.

[5] Dans ce texte (*De Optimo genere oratorum*, V, 14), Cicéron commente les traductions qu'il a faites de deux discours de Démosthène et d'Eschine.

constitutionnelle de 1867, Constitution du Canada) qui donne une bonne idée de la fidélité à la lettre que représente une traduction littérale, et même mot à mot:

Tableau 1.

It shall be lawful for the Queen, by and with the Advice of Her Majesty's Most Honourable Privy Council, to declare by Proclamation that, on and after a Day therein appointed, not being more than Six Months after the passing of this Act, the Provinces of Canada, Nova Scotia, and New Brunswick shall form and be One Dominion under the Name of Canada; and on and after that Day those Three Provinces shall form and be One Dominion under that Name accordingly. **82 mots**	Il sera loisible à la Reine, de l'avis du Très-Honorable Conseil Privé de Sa Majesté, de déclarer par proclamation qu'à compter du jour y désigné, mais pas plus tard que six mois après la passation de la présente loi, les provinces du Canada, de la Nouvelle-Écosse et du Nouveau-Brunswick ne formeront qu'une seule et même Puissance sous le nom de Canada; et dès ce jour, ces trois provinces ne formeront, en conséquence, qu'une seule et même Puissance sous ce nom. **80 mots**

Le nombre de mots, la disposition, la structure, la ponctuation, le style, etc. du texte, tout dans la version française est calqué sur le texte source. On fera valoir qu'il s'agit d'un texte ancien (1867) et qu'à cette époque tous les textes, entre autres juridiques, étaient traduits de façon littérale, ce qui n'est pas faux. Si, depuis, on est passé à une manière de traduire mettant davantage l'accent sur le sens du message plutôt que sur ses mots, le littéralisme n'a pas été effacé pour autant et subsiste dans certaines traductions, au Canada comme au Québec. L'article 426 (1) du *Code criminel du Canada* en est une bonne illustration :

Tableau 2.

426 (1) *Everyone commits an offence who*	**426** (1) Commet une infraction quiconque, selon le cas :
(a) directly or indirectly, corruptly gives, offers or agrees to give or offer to an agent or to anyone for the benefit of the agent — or, being an agent, directly or indirectly,	a) par corruption, directement ou indirectement, soit donne ou offre, ou convient de donner ou d'offrir, à un agent ou à toute personne au profit de cet agent, soit, pendant qu'il est un agent, exige ou

corruptly demands, accepts or offers or agrees to accept from any person, for themselves or another person — any reward, advantage or benefit of any kind as consideration for doing or not doing, or for having done or not done, any act relating to the affairs or business of the agent's principal, or for showing or not showing favour or disfavour to any person with relation to the affairs or business of the agent's principal;	accepte, ou offre ou convient d'accepter de qui que ce soit, pour lui-même ou pour une autre personne, une récompense, un avantage ou un bénéfice de quelque sorte à titre de contrepartie pour faire ou s'abstenir de faire, ou pour avoir fait ou s'être abstenu de faire un acte relatif aux affaires ou à l'entreprise de son commettant, ou pour témoigner ou s'abstenir de témoigner de la faveur ou de la défaveur à une personne quant aux affaires ou à l'entreprise de son commettant;

Le texte français de cet article extrait du *Code criminel* en vigueur aujourd'hui reproduit fidèlement l'original anglais en une longue phrase de 128 mots sans point ni point-virgule, ce qui est loin de correspondre à une énonciation française.

L'inclination sourcière caractérise également la version française du *Civil Code of Louisiana*, récemment traduit (2017), bien que la version française du par. B de l'article 2315 soit plus longue que l'original anglais – question qui sera abordée plus loin.

Tableau 3.

Art. 2315	*Art. 2315*
[...] *B. Damages may include loss of consortium, service, and society, and shall be recoverable by the same respective categories of persons who would have had a cause of action for wrongful death of an injured person. Damages do not include costs for future medical treatment, services, surveillance, or procedures of any kind unless such treatment, services, surveillance, or procedures are directly related to a manifest physical or mental injury or disease. Damages shall include any sales taxes paid by the owner on the repair or replacement of the property damaged.*	[...] B. Les dommages et intérêts peuvent inclure la perte de la compagnie, de l'affection et des services conjugaux ou familiaux et peuvent être recouvrés par les mêmes catégories de personnes qui auraient le droit d'agir du fait d'un acte délictuel ayant entraîné la mort de la victime d'un dommage. Les dommages et intérêts n'incluent pas le coût des traitements, des services, du suivi, ou des actes médicaux à venir, quelle que soit leur nature, sauf lorsqu'ils sont directement et manifestement liés à une atteinte à l'intégrité physique ou mentale, ou à une maladie physique ou mentale.

	Les dommages et intérêts doivent inclure toutes les taxes payées par le propriétaire pour la réparation ou le remplacement du bien endommagé.

On trouve aussi des traductions du français à l'anglais. Le *Code civil du Québec*, qui est rédigé en français, doit être traduit en anglais. La version anglaise, rendue de manière littérale et peu idiomatique, affirme la préséance du droit civil du Québec exprimé en français : les notions et institutions civilistes sont traduites littéralement, sans aucune adaptation (McClintock 2013).

Tableau 4.

1. Tout être humain possède la personnalité juridique; il a la pleine jouissance des droits civils.	1. *Every human being possesses juridical personality and has the full enjoyment of civil rights.*
2**.** Toute personne est titulaire d'un patrimoine. Celui-ci peut faire l'objet d'une division ou d'une affectation, mais dans la seule mesure prévue par la loi.	*2. Every person is the holder of a patrimony.* *It may be the subject of a division or of an appropriation to a purpose, but only to the extent provided by law.*

La traduction anglaise de ces articles en révèle le caractère littéral. Les critiques ont fusé de tous côtés sur la qualité de la traduction comme sur celle de la langue. On dénonce en bloc les "*un-English sounding phrases*" (Meredith 1979 : 67) de la version anglaise et les nombreuses erreurs de concordance entre les deux versions (Meredith 1979 : 55).

Le Canada n'est pas le seul coupable, nombre de pays le sont également, dont l'Allemagne, l'Italie, l'Espagne, le Portugal, etc., si l'on se penche un instant sur leurs traductions du Code Napoléon dans leur langue.

Est-ce ce que Shakespeare entrevoyait lorsqu'il mit les mots *keep law* dans la bouche de l'aide du jardinier, alors que ce dernier, s'adressant à son aide, lui dit "*All must be even in our government"* (l. 38)? Les sous-entendus percent sous les allusions. Alors, le barde, s'agissant de traduction, ne pensait-il pas plutôt à une forme de traduction correspondant davantage à sa manière de voir les choses? Ne sous-estimons pas, chez Shakespeare, l'art de l'"équivocité de la réalité" (Garello 2018 : 123)

> Le théâtre de Shakespeare met en scène la possibilité que la forme sous laquelle le réel se présente ne soit jamais qu'une apparence susceptible d'être vue d'une manière différente à chaque observation et pour chaque sujet. (Garello 2018 : 123)

Rappelons-nous le cri de Macbeth, pathétique constat : "*Fair is foul, and foul is fair*: De l'inversion des valeurs à la perte du sens" (Garello 2018 : 123). Il ne faut pas oublier non plus que, dans ses pièces, Shakespeare "réfléchit beaucoup au langage, au fait qu'on puisse le tordre dans tous les sens jusqu'à lui faire dire le contraire de la vérité" (Edwards 2014). Dans un autre entretien, Edwards souligne le fait que "la pensée de Shakespeare est parfaitement lucide dans sa très grande complexité et dans sa décision de ne pas tout expliciter" (2012).

Aussi faut-il se méfier des premières impressions quand on lit ou voit une pièce de Shakespeare, comédie ou drame. Les mots prononcés ne le sont que pour induire le ou les protagonistes (Macbeth, Lear) en erreur, instiller doute et équivoque. Il est donc permis de penser que l'injonction *keep law*, conçue dans l'esprit fertile du barde-traducteur, puisse signifier le contraire. En d'autres termes, au lieu de croire qu'il était favorable à la traduction (juridique) littérale, comme l'usage de son époque l'y incitait, imaginons qu'il la rejetait pour mieux embrasser son contraire, la traduction du sens, faite dans l'esprit du droit et de son langage, ainsi que Voltaire, lui-même traducteur de Shakespeare, le voyait : "[M]alheur aux faiseurs de traductions littérales qui, en traduisant chaque parole énervent le sens. C'est bien là qu'on peut dire que la lettre tue et que l'esprit vivifie." (196 : 82-83).

1.2 Traduire le droit dans l'esprit

Quand on connaît la verve, le foisonnement lexical et la charge sémantique des mots chez un auteur qui "échappe par l'idée, il échappe par l'expression [...] Shakespeare résiste par le style; Shakespeare résiste par la langue" (Hugo 1865 : 18-19). Lorsque :

- on parle d'un poète dont la richesse et l'originalité de la langue exigerait du traducteur qu'il crée "la langue nouvelle, la langue révolutionnaire, la langue du mot propre et de l'image [...]" (Hugo 1865: 33-39);

- on évoque un dramaturge qui fait dire à l'un de ses *personnages "There's a double tongue ; there's two tongues"[6];*

- cette langue "est d'autant plus fertile qu'elle résiste à la compréhension, à la prononciation, à la traduction, empêchant toute fixation de son et de sens" (*Fabula* 2013);

- cette langue est "d'une richesse inouïe", parce que "le mot s'enrichit mainte fois d'un sens second, qui en multiplie la portée. Le signifiant, comme diraient nos linguistes, porte plusieurs signifiés" (*Universalis*);

- un de ses plus récents traducteurs soutient que "c'est aussi une langue plus polysémique, plus ambivalente, plus riche et plus complexe que la langue de ses contemporains [...]" (Desprats 2016);

- enfin, il est du nombre "des êtres impérieux, tumultueux, violents, emportés, extrêmes, chevaucheurs des galops ailés, franchisseurs de limites, « passant les bornes », ayant un but à eux, lequel « dépasse le but », volant brusquement d'une idée à l'autre [...]" (Hugo 1864 : 347).

Donc, comme le voyait Michel Leiris,

> **Shakespeare** – qu'il parle, crie, rie ou soupire,
> son chant permet à chacun de faire,
> en esprit, échec au pire. (Leiris 1985: 56)

comment croire que Shakespeare pût pencher vers la littéralité, c'est-à-dire, pour une traduction française de la phrase anglaise suivante, des plus banales au demeurant, que je prends comme exemple:

> Adjudication implies the application of law to individual cases brought, through one means or another, before the bar of justice.

Traduite selon une vision littérale (aussi dénommée "transcodage"), donnant ainsi plus ou moins une version comme celle-ci:

> Jugement implique l'application de la loi aux cas individuels portés, à travers un moyen ou un autre, devant la barre de justice.

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6 *Much Ado About Nothing* (5.1.165-66)). Trad. française de F-V. Hugo: « il a la langue double, il a deux langues…».

Aussi, réflexion faite, c'est donc vers une traduction davantage dégagée de la lettre qu'un esprit libre tel que le sien devait se tourner. Ce qui pourrait donner une version plus ou moins 'cibliste' de la phrase anglaise prise en exemple :

Tableau 5.

Adjudication implies the application of law to individual cases brought, through one means or another, before the bar of justice.	Juger consiste à dire le droit dans une cause soumise, d'une façon quelconque, à la justice.

Mais que Shakespeare, à l'égal de Racine, aurait peut-être rédigée ainsi : ”L'un veut plaider toujours, l'autre toujours juger.” (*Les plaideurs*, I, 4).

Aujourd'hui, au Canada mais en d'autres lieux aussi, la traduction (législative) de type 'sourcier' compte peu d'adeptes. Il convient de dire qu'il est aujourd'hui admis que ”la traduction juridique doit être idiomatique, et non pas strictement littérale” (Flückiger 2005 : 356); la forme et la fonction du texte importent autant que le fond. On le constate dans les lois contemporaines d'États tels que le Canada, la Suisse ou la Belgique, entre autres, comme dans cet exemple extrait d'un article de la *Loi* (fédérale) *d'interprétation* [LRC (1985), ch. 1-21] qui permettra d'en juger :

Tableau 6.

20 *Where an Act requires a report or other document to be laid before Parliament and, in compliance with the Act, a particular report or document has been laid before Parliament at a session thereof, nothing in the Act shall be construed as requiring the same report or document to be laid before Parliament at any subsequent session*	**20** Une loi imposant le dépôt d'un rapport ou autre document au Parlement n'a pas pour effet d'obliger à ce dépôt au cours de plus d'une session.

Même si l'exemple d'un seul article ne peut préjuger la question cibliste, l'on y voit que la version française, plus courte que le texte anglais, est (co)rédigée selon d'autres principes que ceux que Coode recommandait pour les lois anglaises et que le barde, eût-il connu ce dernier, eut rejetés. Il aurait certainement fait sienne la pensée d'un Ricoeur (1986), qui avance cette thèse :

> Une parole n'a qu'une permanence réduite et reste captive des circonstances où elle a été prononcée. L'écrit, lui, se libère de ces deux contraintes. Dès lors, il devient disponible pour une lecture nécessairement ouverte et plurielle. Ce que l'auteur a voulu dire n'est pas plus figé que ce que le lecteur voudra lire. Il n'y a donc pas de sens unique… (Je souligne)

J'en conclurai, toujours avec Ricoeur et en tant que traductologue, que "interpréter, c'est prendre le chemin de pensée ouvert par le texte". C'est bien le chemin que Shakespeare nous invite à emprunter et, en adepte du "double-entendre", offre à notre libre interprétation.

Le barde ne s'en tient pas là (*keep law…*) pour autant, il poursuit sa réflexion de traducteur énigmatique par ces mots "*and form and due proportion"*, qui nous interpellent de la même façon que le premier terme: doit-on traduire les mots ou le sens? Ici, se pose la question de la forme du texte traduit : faut-il respecter la 'forme' du texte de départ, autrement dit, d'une part, sa disposition, celle de ses phrases, paragraphes et énoncé, et, d'autre part, les 'proportions', soit sa longueur, aspect que vient compliquer l'adjectif *due,* dont l'interprétation, dans cette expression, pose quelques difficultés quant à sa signification?

2. [Keep law] and form and due proportion

Que voulait dire Shakespeare lorsqu'il fait dire à l'aide jardinier *keep* [*law and*] ***form*** *and* ***due proportion***? Il évoquait, semble-t-il, la vaste question de la 'forme', entendue comme antonyme ou complément de 'fond'; et ce d'autant plus qu'il vient de parler du 'fond' : (*keep*) ***law***. En ajoutant ces mots "*and due proportion"*, il se situe clairement dans le registre de la forme, dont *Larousse* propose cette définition : "Manière de formuler, d'exprimer une pensée, une idée : Un exposé brillant par la forme, mais pauvre par le fond.*"*

De plus, ces deux termes, *form* et *proportio*n, appartiennent à la même catégorie conceptuelle, celle sous laquelle on regroupe tout ce qui a trait à la "Façon, manière de faire les choses", comme le disait déjà Furetière, dans son *Dictionnaire universel* (1690), sous l'entrée FORME. Ce faisant, par ces mots, le subtil barde cherchait sans doute à

'noyer le poisson' en les utilisant pour exprimer des notions aussi vagues qu'imprécises, tributaires du terme générique *law*.

Il me paraît donc nécessaire de les analyser séparément dans cette seconde partie pour tenter d'en extraire sens et signification.

2.1 [Keep…] form. Respecter la forme ?

Le sujet de la forme d'un texte, soit notamment son expression[7] et son style[8], est la source de débats incessants, quels que soient le domaine en cause, le temps et le lieu. La forme des *Essais* de Montaigne en est l'illustration parfaite, critiquée par les uns (Pascal: "Le sot projet que Montaigne a eu de se peindre"), louée par les autres, innombrables. L'oeuvre de Shakespeare, quand ce n'est pas son auteur lui-même, connaît un sort semblable. Car, chez lui, souvent forme varie…

En effet, au contraire d'un Racine ou d'un Corneille, dans la même piece le comique peut cotoyer le drame, la farce s'insère dans les interstices de la justice, de l'histoire, de la tragédie, et vice versa. Cette confusion des genres et des règles jugées "classiques" ne facilite pas le travail d'interprétation des dialogues ou monologues, des propos que tiennent les personnages, alors que l'interprétation même est sujette à caution: " Any interpretation still hangs in the air along with what it interprets, and cannot give it any support. Interpretations by themselves do not determine meaning." (Wittgenstein 1958: No198) [Je souligne].

Mais la forme que prend le mot 'sens' est-elle la même, est-elle traitée de la même façon lorsqu'il est question de *Law* — que l'on peut rendre, en français selon le contexte, par Droit, Loi, ou encore par Règle (de droit)? C'est un peu comme si

> *l'esprit* du droit, *ressource* profonde de sens, n'était jamais séparé de la *lettre* du droit, sa *source* de surface. Comme si les *formes* juridiques étaient resssourcées en permanence aux *forces* culturelles (narratives-normatives) dont elles procèdent (Ost 2014 : 4).

[7] Que le *Robert* définit ainsi: fait d'exprimer par le langage.

[8] Ainsi défini par le *Robert* : Part de l'expression (notamment écrite) qui est laissée à la liberté de chacun, n'est pas directement imposée par les normes, les règles de l'usage, de la langue.

On sait que la lettre du droit ne se laisse pas saisir facilement, alors son esprit... Boucher d'Argis, le remarquable et prolifique rédacteur des entrées dédiées au droit dans l'*Encyclopédie* (1751-1765), offre cette définition du droit : ”Droit, (*jurisp.*) *jus,* s'entend de tout ce qui est conforme à la raison; à la justice & à l'équité, *ars oequi & boni*.” Ou comment éclairer l'esprit de qui cherche à comprendre ce qu'est le droit! Le ”Droit Anglois”, du temps de Guillaume le Conquérant, n'est pas mieux loti, que Boucher d'Argis décrit en ces termes :

> Polydore Virgile dit, en parlant des nouvelles lois données à l'Angleterre par Guillaume le Conquérant, & qui étoient rédigées en langage normand, que c'étoit une chose étrange, vû que ces lois qui devoient être connues de tout le monde, n'étoient cependant entendues ni des Français ni des Anglois.

Nul n'est pourtant censé ignorer la loi! On comprend mieux, ainsi, le mystère du sens que peut porter le terme *law* chez Shakespeare. Quant à la forme que revêt le texte juridique, elle requiert attention et éclaircissements. Celle des lois du temps de Shakespeare s'est perpétuée jusque fort avant dans le 19e siècle. George Coode l'a plus ou moins codifiée dans son ouvrage majeur *Legislative Expression or, the Language of the Written Law* (1845) :

> None but natural rules, that is to say, such rules as are strictly derived from the nature of the subject-matter, and therefore of universal application to it, can ever be maintained. Such natural rules, from their admitting no exceptions, and from their being extremely simple, intelligible and efficacious, can be easily applied by the draftsman and any infraction of them readily detected and displayed. (1848: 6)

Si l'on se réfère à la rédaction des lois britanniques et des Dominions dont j'ai donné un aperçu plus haut [cf. Tableaux 1. et 2.], il semble que Coode n'ait réussi à convaincre ni ses pairs ni le Législateur. Alors que le *Code civil* (1804) des Français, bien antérieur aux préceptes énoncés par Coode, suit une tout autre voie comme le montrent ces exemples tirés de l'original de 1804 :

> Art. 2. La loi ne dispose que pour l'avenir; elle n'a point d'effet rétroactif.
> Art. 5. Il est défendu aux juges de prononcer par voie de disposition générale et réglementaire sur les causes qui leur sont soumises.

Quant à la Constitution, il en va de même, la différence entre la manière anglaise et la manière française est flagrante :

Tableau 7.

The British North America Act, 1867	*Constitution de 1875, IIIe République*
3. It shall be lawful for the Queen, by and with the Advice of Her Majesty's Most Honourable Privy Council, to declare by Proclamation that, on and after a Day therein appointed, not being more than Six Months after the passing of this Act, the Provinces of Canada, Nova Scotia, and New Brunswick shall form and be One Dominion under the Name of Canada; and on and after that Day those Three Provinces shall form and be One Dominion under that Name accordingly. **82 mots**	Article 1. - Le pouvoir législatif s'exerce par deux assemblées : la Chambre des députés et le Sénat. - La Chambre des Députés est nommée par le suffrage universel, dans les conditions déterminées par la loi électorale. - La composition, le mode de nomination et les attributions du Sénat seront réglés par une loi spéciale. **52 mots** Article 2. - Le Président de la République est élu à la majorité absolue des suffrages par le Sénat et par la Chambre des députés réunis en Assemblée nationale. Il est nommé pour sept ans. Il est rééligible. **35 mots**

La différence principale entre les deux articles apparaît dans la longueur des dispositions : il faut deux articles de la Constitution française pour égaler la longueur d'un seul article du BNAA; ensuite, l'article 3 est une longue disposition dont la ponctuation (points et point-virgules) est absente [Essayez de la lire d'un seul souffle!]. Il pourrait s'agir du monologue d'un des acteurs du théâtre shakespearien...

On voit bien par ces exemples ce qu'il faut entendre par 'forme'(du texte), laquelle ne se résume d'ailleurs pas uniquement à ces aspects. Le barde-traducteur était-il conscient de ces différences de forme? On peut l'imaginer, quoiqu'il ignorât sans doute la question dans ses détails. La jurilinguistique, en son temps, n'était même pas en gestation.

Il reste que ce mot : *form*, que le dramaturge a mis dans la bouche de l'aide jardinier, cache sa signification réelle. Car il y a *form* et *form.*

2.1.1 Du sens et des significations

Le *Merriam-Webster Dictionary* présente trente-trois sens possibles du substantif *form*. Lequel Shakespeare a-t-il choisi de faire dire à son personnage? En principe, le contexte devrait aider à trouver la solution, mais est-il aussi éclairant qu'il pourrait l'être? Le jardinier ordonne à son aide :

> Go thou, and like an executioner,
> Cut off the heads of too fast growing sprays,
> That look too lofty in our commonwealth:
> All must be even in our government.

Texte que François-Victor Hugo a traduit ainsi :

> Toi, va, comme un exécuteur, — abattre les têtes des rameaux trop hâtifs — qui s'élèvent trop haut dans notre république. — L'égalité doit être partout dans notre gouvernement…

La réplique du premier aide jardinier à son supérieur étonne, il argumente, conteste l'ordre reçu, se rebelle : à quoi bon faire ce travail (maintenir la loi, l'ordre, la juste harmonie), alors que le pays entier est en friche?

> Pourquoi dans cet enclos — maintenir la loi, l'ordre, la juste harmonie, — et y faire voir le modèle d'un État régulier, — quand notre pays tout entier, ce jardin muré par la mer, — est plein de mauvaises herbes, voit ses plus belles fleurs étouffées, — tous ses arbres fruitiers incultes, ses haies ruinées, — ses parterres en désordre, et ses plantes salutaires — en proie aux chenilles ?

En anglais comme en français, les mots sont voilés, les allusions et sous-entendus, probables dans les répliques. Sous les métaphores végétales et florales, on perçoit les allusions à la politique et ses désordres. ”C'est l'enchaînement des deux répliques qui est important. Shakespeare ne prend pas parti entre elles, il se borne à représenter leur contradiction.” (*Le Temps* 2016). Le jardinier, en effet, place clairement son propos dans le cadre politique, mais son aide lui réplique par l'argument supérieur du droit : *keep law*... Ce terme, lourd de toute la charge juridique qu'il porte, régit la suite de la phrase : *and form and due proportion*.

Le contexte est installé, il est placé sous le règne du droit. Aussi la signification de *form* prend-elle une... forme imprévue si l'on se contente de la signification de surface, celle que donnent les dictionnaires : ”the shape and structure of something as distinguished from its material.” (*Merriam-Webster*); ”Manière dont une chose est présentée ou traitée, par opposition à ce qui en fait le fond”(*Littré*). Si l'on poursuit dans la ligne juridique, dans la structure profonde des signes et du sens, ce mot pourrait signifier ”*behaviour according to a rule or custom*” ou ”*the correct procedure*” (*Oxford Modern English Dict.).* Il confirmerait ”the apparatus through which the individual comprehends and orders his world and the illusions upon which that order relies” (Stevens 2011:13). [Je souligne]

J'incline à croire que c'est ce que le barde entrevoyait et penche en faveur de l'une ou de l'autre formule, les deux relevant sans équivoque du droit.

Qu'en est-il alors du dernier terme de la phrase, *and due proportion*?

2.2 [keep law and form] and due proportion

Lire les grandes œuvres dramatiques de Shakespeare revient à une mise en abyme du sens. Un esprit aussi affûté que celui de Goethe jetait l'éponge devant les difficultés que lui posait la lecture de *Hamlet* : ”*Allein je weiter ich kam, desto schwerer ward mir die Vorstellung des Ganzen, und mir schien zuletzt fast unmöglich, zu einer Übersicht zu gelangen.*[9]” (Goethe 1795)

C'est à peu près ce que l'on ressent à la lecture du dernier terme de la phrase prononcée par l'aide jardinier : *and due proportion*. Et encore, s'il n'y avait que le seul substantif, mais il est précédé du redoutable adjectif qu'est *due*! Ces trois signes, à eux seuls, portent un univers de sens qui demande, à l'instar de *proportion*, une interprétation en soi.

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[9] Traduction française de François-Victor Hugo: ”Plus j'avançai dans l'étude d'*Hamlet*, plus il me devint difficile de me former une idée de l'ensemble. Je me perdis dans des sentiers détournés et j'errai longtemps en vain […]”, en ligne:https://fr.wikisource.org/wiki/Hamlet/Traduction_Hugo,_1865/Introduction _aux_Deux_Hamlet (consulté le 21 août 2020).

2.2.1 Du sens et de la signification : proportion(s)

Certains mots changent de sens avec l'ajout d'un signe (*damage* / *damages*), d'autres en le perdant (*proportions* / *proportion*). Ce trait caractérise l'anglais comme le français (dommage/dommages). L'emploi du singulier, ici, limite quelque peu la fenêtre sémantique de ce mot. Au pluriel, les dictionnaires lui attribuent cette valeur : ”*dimensions : size*” (*Oxford Dict.),* comme dans l'expression *this house has fine proportions*. Cela ne me paraît pas être celle, avec valeur de qualité, que Shakespeare envisageait pour l'aide jardinier.

Situé dans le contexte général du droit régi par *law*, *proportion* prend un tout autre sens, celui que décrivent les dictionnaires

Tableau 8.

Cambridge English Dict.	*Merriam-Webster Dict.*
the number, amount,or level of one thing when compared to another.	the relationship in quantity, amount, or size between two or more things.

Quand on parle de ‘proportion’, en effet, on compare quelque chose à... quelque chose. Comme j'ai pris la loi comme exemple pour les raisons exposées plus haut, poursuivons dans cette voie. Shapespeare savait-il que les dispositions d'une loi britannique, traduites dans une autre langue juridique — mettons le français du temps d'Henri IV ou l'italien de Giovani Florio —, pouvaient revêtir d'autres ‘proportions’? Ici, le ”Rapport (entre deux ou plusieurs choses)” [le *Robert*] se situe sur un plan quantitatif, et non qualitatif.

Et là encore, je le pense. Shakespeare ayant vraisemblablement lu les *Essais* de Montaigne traduits par ledit Florio (Miller-Blaise 2012 : 4; Desan 2004), il ne pouvait ignorer la différence marquée entre la longueur de l'original et celle de la traduction, Florio ayant tendance à ‘étoffer’ ses traductions (Desan 2004 : 14):

> Si la langue anglaise est par définition plus dense que la langue française – par là nous voulons dire qu'il faut généralement moins de mots et moins de signes en anglais pour exprimer une même idée –, dans le cas de la traduction de Florio nous arrivons à une observation inverse puisqu'il faut à Florio en moyenne 20-25% plus de caractères qu'il n'en fallait à Montaigne pour faire passer les *Essais* du français à l'anglais. [Je souligne]

Cette différence transparaît dans les traductions des lois, particulièrement entre deux langues juridiques telles que celles de la common law et du droit civiliste, ainsi que dans l'exemple montré plus haut (cf. Tableau 6. *Loi d'interprétation* de l'État canadien). Ce constat ne se limite cependant pas aux textes juridiques, mais s'étend à la langue générale des deux idiomes, l'anglais comme le français. S'il fallait les distinguer, on pourrait, en reprenant les termes laconiques – mais si 'parlants' – de Michael Edwards, dire que l'anglais, langue prolifère, est 'centrifuge', alors que le français, cartésianisme aidant, serait plus resserrée : 'centripète' (2004 : 67). On ne peut s'empêcher de faire la comparaison des jardins dans l'une et dans l'autre culture : les jardins « à l'anglaise » contre les jardins à « la française »... Ces traits sont inscrits dans la singularité culturelle des deux traditions, la langue et son écriture. Néanmoins, nous rappelle Desprats (2016 : 13),

> Le français ne dispose pas de l'opposition entre voyelles longues et voyelles brèves sur laquelle repose la musicalité des vers de Shakespeare. Son orientation analytique le pousse à employer plus de mots que l'anglais, plus concis. (Je souligne)

Cela vaut sans doute pour la langue générale, mais pas pour le langage législatif – ou contractuel, comme il a été vu. Le cas du vocable 'proportion', cependant, ne peut être tranché sans avoir réglé celui de son qualificatif, l'adjectif *due* qui lui est assigné.

2.2.2 Du sens et de la signification : due

La polysémie, nous apprend le *Robert,* est le ”[c]aractère d'un signe qui possède plusieurs contenus, plusieurs sens”, ce qui est le cas de la plupart des mots. L'adjectif anglais *due* (14e s.) est un mot d'origine française, venant du vieux français *deu,* participe passé de 'devoir'. C'est un mot polysémique. Le *Merriam-Webster* lui trouve huit sens différents, ce qui n'est pas un record (Littré attribue 27 sens au mot 'pièce'!). Quel sens le Barde d'Avon lui a-t-il insufflé dans l'expression *due proportion*, que François-Victor Hugo a rendue par ”la juste harmonie”, traduction plus littéraire, esthétique donc, que juridique.

L*'Oxford English Dictionary* (OED) lui trouve encore plus de significations que le *Merriam-Webster*, dont ces deux-ci, qui pourraient correspondre à ce que Shakespeare entendait que dise l'aide du jardinier, compte tenu du contexte juridique imprimé par *law* :

Tableau 9.

OED	Merriam-Webster
More generally: that is as it ought to be; occurring, done, etc., as is fitting, expected, or natural; correct, right, proper.	*Such as is necessary or requisite; of the proper quality or extent; adequate, sufficient.*

Il ne s'agit plus uniquement de 'proportion', ce terme étant régi par le qualificatif *due* qui, sous-entendant soit une injonction d'ordre moral ou éthique (*ought to be*), soit une contrainte de nature juridique (*necessary or requisite*), imprime une tonalité pour le moins contraignante à son complément. Faut-il choisir la lettre ou l'esprit? Cela pourrait donner cet équivalent : (et) la proportion requise. Et comme traduction finale : Observer la loi et la procédure et la forme requise.

Néanmoins, il faut donner raison à Victor Hugo lorsqu'il constate, perplexe devant cette 'obscure clarté' des sens distillés par le barde : "Un nuage flotte toujours dans la phrase anglaise." (1865 : 20). Ajoutons : et davantage encore lorsque cette phrase flirte avec le droit, car "le rapport de Shakespeare à l'univers juridique est tout sauf accidentel" (Ost 2011 : 131). Ce qui me détermine à vérifier si, en l'occurrence, le droit que porte cet univers est porteur d'une juridicité de nature à entraîner des effets pour les protagonistes.

2.2.3 L'effectivité de la parole juridique des protagonistes

Dans leur dialogue, le jardinier et son aide échangent des considérations politico-juridiques pleines de sous-entendus. Au

> All must be even in our government...

du jardinier, son aide rétorque :

> keep law and form and due proportion...

Quelle peut-être la portée des mots de l'aide jardinier dans une échelle de juridicité : forte? moyenne? faible? Un juriste s'est penché sur la nature de la juridicité, pour laquelle il a établi les six critères suivants : valeur juridique, validité juridique, qualités nomo-juridiques, sanction juridique, application juridique, effectivité (Barraud 2017 : 98).

Le terme qui régit la nature et la portée de la phrase de l'aide jardinier est sans contredit *law*. De lui découle le contexte juridique de la phrase. Avec *law,* nous avons affaire à un terme fondamental du droit. Si l'on considère ladite phrase comme étant placée dans un contexte 'général', au sens terminologique du mot, comment un dictionnaire de langue générale définit-il ce terme? Selon le *Merriam-Webster* :

> a binding custom or practice of a community **:** a rule of conduct or action prescribed or formally recognized as binding or enforced by a controlling authority.

Si, par contre, l'on envisage ladite phrase comme étant située dans un contexte politico-juridique, comment un dictionnaire juridique définit-il *law*? *L'Oxford Dictionary of law* donne cette brève définition : "The enforceable body of rules that govern any society."

Cette définition 'juridique' diffère de la précédente, plus prolixe et explicative, mais l'essentiel, dans les deux cas, est là : *binding/enforced-enforceable.* C'est donc le caractère 'obligatoire', contraignant, qui ressort de ces définitions. Est-ce le cas de *law* dans la bouche de l'aide jardinier?

Si la *valeur* (premier critère de juridicité) du terme ne fait aucun doute, le fait qu'il soit émis par l'aide et non le maître (le jardinier) érode d'emblée cette valeur. N'oublions pas qu'à cette époque (16e-17e s.), un aide ou apprenti ne dispose pas des mêmes prérogatives que son 'maître'. Quant à la *validité*, ce terme étant prononcé par une personne non habilitée, tels que notaire, juge, avocat et autres gens de loi, elle ne peut être, au mieux, qu'incantatoire. Pour les autres critères de juridicité, soit la qualité de règle, le poids de la sanction, l'application et l'effectivité, aucun d'eux ne peut être retenu en l'espèce, ils ne s'appliquent tout simplement pas. La valeur juridique de la phrase prononcée par l'aide jardinier est pour le moins faible, sinon purement

symbolique. S'agirait-il alors d'un aspect du "*malign language of law-without ethics*" que décrit Toni Morrison (1993)?

Ce qui n'enlève rien au constat établi par Ost selon quoi "le rapport de Shakespeare à l'univers juridique est tout sauf accidentel". Dans ce cas-ci, il n'est pas accidentel non plus, même si sa valeur, dans l'échelle de juridicité, tend vers le neutre. Est-ce ainsi que Shakespeare l'avait prévu ? Instruit des tours et détours empruntés par le barde, il est permis d'en douter.

Conclusion

Alors, la vérité sourd-elle de la bouche des spectres et sorcières que Shakespeare met en scène ? Leurs prophéties sont trompeuses, et pourtant elles "possèdent une prescience qui leur permet de prédire à l'avance, avec des détails très spécifiques, ce qui se passera lors du drame à venir." (Garello 2018 :123). Leurs paroles engendrent confusion (Macbeth), équivoque (Lear) et erreurs (Égéon, Dromio, ...) un peu partout dans les drames, comédies et farces du barde. Elles "semblent brouiller la frontière même entre le vrai et le faux"... (Garello 2018 :123).

La cause en tient-elle au chaudron dont les filles du destin touillent les signes qui, le brouet étant prêt, vont infuser sens et significations dans leurs paroles, fussent-elles équivoques, aux oreilles des protagonistes? On peut le croire. On peut aussi émettre cette hypothèse : dans l'intervalle de temps durant lequel les sorcières brassent les signes dans leur chaudron, le sens est en gestation; en suspens, il repose dans un *tertium quid*, antichambre improbable de l'espace-temps où, le temps étant suspendu, les signes sont en attente de l'émergence du sens de la même façon que la farine, une fois la pâte malaxée, va produire pains et croissants par l'entremise du *tertium quid* qu'est le four du boulanger, qui parachève le processus. Tel pourrait être le parcours – l'odyssée ? – des signes pour faire sens, voire double sens, chez Shakespeare.

Est-ce bien ce que Shakespeare pensait au fond de lui-même? Nul ne le sait, mais il est permis de le croire, parce que

> Shakespeare est notre miroir: c'est en lui et sur lui que nous projetons ou que nous mettons à l'essai nos manières de nous comprendre [...]

[Shakespeare] est encore devant nous, loin, très loin devant. (*Le Temps* 2016).

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TRANSLATION AS A CATALYST IN THE DEVELOPMENT OF MODERN CHINESE LEGAL LANGUAGE

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Abstract: This paper focuses on the translation of legal language and the development of modern Chinese legal language as a translated legal language. It first describes the historical contexts in which China underwent enormous and unprecedented social and political changes including changes to law in the late 1800s and early 1900s. It then discusses how translation played an important catalyst role in introducing Western law, legal practices, legal concepts and terminology in the emerging modern Chinese legal language as we know it today, and in the process, lent a helping hand in negotiating China's transition to modernity through translation and creating a new legal language and legal system. It also considers the issues in translingual and cross-cultural communication and understanding translated Chinese legal language.

Keywords: Chinese legal language, Chinese law, modernity in China, legal translation, legal terminology, legal concept

翻译在现代中国法律语言发展中的催化作用

摘要：本文论述法律语言翻译以及现代中国法律语言作为一种翻译法律语言的演变发展。文章首先描述 1800 年代末和 1900 年代初期的中国经历的前所未有的巨大社会和政治变革的历史背景，然后探讨翻译如何在引入西方法律、法律实践和法律概念和词汇和中国现代法律演变中起到的重要的催化作用，创造出了新兴的现代中国法律语言，并在此过程中，通过建立新的法律语言和词汇和法律体制协助中国向现代社会的过渡。最后文章还考虑了跨语言和跨文化交流以及如何理解和诠释中国法律语言等问题。

关键词：中国法律语言，中国法律，中国现代性，法律翻译，法律术语，法律概念

1.Introduction

A story was told from the 1940s in China. An American official delegation was visiting China. A Chinese host in conversation asked about the American ‘Empire’ and its ‘Emperor’ to the amazement of the American visitors. It turned out that the Chinese host was under the impression that the U.S.A. was an empire and it had an emperor as the head of state because the word ‘President’ in English had been mistakenly translated as *huangdi* (皇帝 emperor) as an equivalent (Cao 2007)[1]. Now, in more recent times, in a reverse situation, a question has been raised as to the accuracy of the translation of the title for the Chinese head of state into English. It is noted that in all the major American and other English language media outlets, the Chinese head of state is invariably referred to as China’s ‘President’, but it may sound bizarre to some because China has no president (Fish 2019)[2]. Xi Jinping, the current Chinese Head of State, officially holds three key titles: General Secretary of the Central Committee of the Communist Party of China, Chairman of

[1] The English word ‘president’ was believed mistakenly to be the equivalent of the Chinese *guojun* (monarch) in China in the early days, and it has since been translated as *zongtong* (president). Similarly, ‘administration’ was translated as *chaoting* (imperial court), which is now translated as *xingzheng*.

[2] See https://slate.com/news-and-politics/2019/08/xi-jinping-president-chairman-title.html

the Central Military Commission, and Chairman of the People's Republic of China (PRC). In Chinese, the third title uses *zhuxi* 主席, which means 'chairman', but this title has been translated, or mistranslated, as 'president' in English. As pointed out (Fish 2019), just like no one in the United States calls the President of the U.S.A. the chairman of America, no one in China calls Xi or his predecessors President. In China, Xi and his predecessors are always called Chairman in Chinese, but he is now called Mr President in English. One may say that this is just a title, a minor point of nomenclature. However, as suggested, this mistranslation is pernicious and problematic because it allows people or more precisely the Chinese to tell two radically different stories (Fish 2019). In China, General Secretary and Chairman Xi Jinping rules over a tightly controlled, illiberal system, but internationally, while President Xi Jinping is portrayed as an advocate for globalization, openness, and free trade, and this also obscures what is unique about China's authoritarian political system, so Xi should be called Chairman, a title he actually holds, and a title he deserves (Fish 2019).

The two examples, although from two different eras, illustrate the kind of problems and sometimes profound misunderstandings that translation, particularly, the translation of institutional terms, can cause. In this essay, the roles of translation of law and legal terminology in modern Chinese legal language are examined. The focus is on the translation of legal language from the West into Chinese during the transitional period from traditional to modern society and its enabling roles in the development and evolution of modern Chinese law and legal language. It also considers the issue in translingual and cross-cultural communication and understanding translated language in law.

2.Translation and introduction of Western law laying the foundation for modern Chinese law and legal language

Translation has always played an important part in the Chinese cultural evolution throughout history. Contact and exchange between China and the West in the intellectual sphere in the late nineteenth and early twentieth centuries were instrumental to the long modernization process of China in transition, often mediated through translation. Legal

translation was a relatively late comer but critical and fundamental to the development of modern Chinese law and legal language.

Chinese law is one of the oldest legal traditions in the world. Traditional Chinese law refers to the laws, legal rules, and legal cultures of imperial China up to 1911 when the last imperial dynasty ended. For the most part of the history of traditional China, its legal system and laws were based on the Confucian philosophy of social control through moral education as well as the Legalist emphasis on codified law and criminal sanction (Cao 2004, 2018). In modern China after the end of the imperial dynasties, the Republic of China adopted a largely Western-style legal code in the 1920s and 1930s, with the core of modern Chinese law heavily influenced by the European civil law, and later socialist law, in additional to traditional Chinese thoughts. The establishment of the People's Republic of China in 1949 and the period up to 1960s saw influence from the former Soviet Union and its system of socialist law. Since the end of the disastrous and chaotic Cultural Revolution (1966-1976), especially since the reform and opening policy in the 1980s, Chinese law has been influenced by Western law. In the past two hundred or so years, modern Chinese law in both formation and transition can be considered a hybrid in many ways, but it has always retained the underlying Chinese perspective and mindset towards law in its classical tradition. After all, the Chinese language functions as the constant thread and the instrument of communication negotiating between the past and the present (Cao 2018). In this respect, translation plays a very important role. The transplant or borrowing of Western laws in China was assisted and facilitated through the medium of translation. It is proposed that translation plays an important role as a catalyst in translating and introducing Western laws into Chinese and creating a modern Chinese legal language and legal vocabulary. This facilitated, motivated, and enabled the creation of new meanings and, more importantly, new legal realities in the Chinese society in transition.

2.1 Historical backdrop for law reform and learning from the West

First of all, a few words about the background and context for modernizing or transforming the traditional Chinese legal order in the late 19th and early 20th centuries.

China's push towards modernization began in the late Qing Dynasty. In the late 19th century, there was a desperately felt need and urgency in China for modernization, among many in the imperial government and the intellectual circles. Here modernization is used in a broad sense to refer to various types of social change and their related issues or problems, entailing multidimensional scientific, technological, political, economic, institutional factors, and it also refers to intangible (or non-material) factors of social change, such as values, modes of thinking as well as the historical, cultural and spiritual heritage (Soo 1989). Thus, China's modernization is seen as a historical process of transformation from a traditional to a modern society, which began with the advent of modern China in mid-19th century with social change, both evolutionary and revolutionary, in all major areas of Chinese society, and continuing today (Soo 1989).

In the mid-19th century, China lost two Opium Wars (1839-1842, 1856-1860) to the United Kingdom (U.K.) and France, which resulted in the conclusion of various treaties between China and Western powers, including the Treaty of Nanking between China and the U.K. after the first Opium War (see Fairbank 1940; Wong 2018). The Treaty of Nanking was branded as having begun a century-long victimization of the Chinese people (Wong 2018)[3]. It was the first of many unequal treaties that China signed during this period, and with them, came the imposition of extraterritoriality and loss of territorial sovereignty among other things (including the cession of Hong Kong as a British colony). These were seen as a major devastating national humiliation that the Chinese bitterly felt and still feel today. The imperial officials and the intellectual class began to debate and then accepted the need for change as a matter of urgency and national salvation. In particular, there were fierce debates as to how to change

[3] For images of the Chinese version of the Treaty of Nanking, see Wong (2018), taken from the digitized images of the original Chinese copy of the Treaty of Nanking held in the National Palace Museum Library in Taipei, Taiwan.

and transition China to modernity while retaining Chinese traditional values and culture. It was felt necessary to learn from the West, but Western technology alone was deemed insufficient. At the same time, it was admitted that the Chinese traditional system was hindering China's progress and modernization and its ability to deal with the West and to deflect the threat posed by them. Then came the idea that borrowing from the West and Japan for economic development or modernization while preserving the essence of Chinese culture, the famous notion of *zhong ti xi yong*, that is, 'Chinese learning as the essence and Western learning for application', first proposed by Feng Guifen (1809-1874), a Qing scholar, after the Second Opium War. Feng wrote: 'What could be better than to take Chinese ethical principles of human relations a and Confucian teachings as the foundation (*ti*) and supplement them with the techniques (*yong*) of wealth and power of the various nations?'[4] The ideas were further elaborated on by Zhang Zhidong (1837-1909), an influential Qing official. Then *zhong ti xi yong* became a popular slogan during much of the transitional period, especially widely accepted among intellectuals. The basic idea was that China could achieve its self-strengthening and modernization through learning and borrowing Western technology and other advanced knowledge, while retaining the core Confucian or traditional Chinese moral and cultural values[5]. As is noted, with the Self-Strengthening Movement or Westernization Movement (1861-1895), and the debate over 'Chinese essence and Western application', 'the Chinese experience entailed a protracted struggle through which the Chinese forfeited many of their culturally distinctive features in the name of modernization and mobilization' (Wong 2018), and for our purpose, reformed and forfeited some of the features in traditional Chinese law that were incompatible with modern society.

[4] For Feng's ideas in English, see http://afe.easia.columbia.edu/ps/china/feng_guifen_western_learning.pdf

[5] There was a Self-Strengthening Movement (*ziqiang yundong*), also known as the Westernization Movement (*yangwu yundong,* 1861–1895), when institutional reforms were implemented during the late Qing dynasty following the defeat of the Opium Wars. Previously, another well-known related idea was 师夷长技以制夷 (*shi yi chang ji yi zhi yi*), literally, 'learning from the advanced technologies of the foreigners in the West in order to resist their invasion'.

2.2 Law reform and translation and introduction of Western law

Of the debates and efforts to modernize China, law reforms and the need to establish a new or modern legal order with modern laws to deal with the West became a matter of urgent priority. As pointed out, after the Opium Wars, China felt compelled to come to terms with Western normative order and its fundamental assumption (Carrai 2017). As a direct and immediate result of the lost Opium Wars, extraterritoriality and loss of territorial sovereignty demanded by the Western countries in the treaties China signed meant foreigners and foreign entities in China would not be governed by Chinese law, and Westerners would not accept the jurisdiction of the Chinese imperial laws which were deemed barbaric[6], forcing the imperial Qing government to initiate fundamental change to the law of the land and law reforms (Wu 2013). It was also believed that those unequal treaties were signed by China partly out of expediency and partly because Qing officials did not even understand international law and the long term consequences of those treaties. Starting from around 1900, the Qing government started various law reform programs to change the traditional Chinese legal codes to adopt and adopt modern Western style laws. A series of government initiated and sponsored efforts and programs were undertaken towards this end. Among them, the training of Chinese translators and interpreters, the translation of foreign works into Chinese, particularly, Western works in social sciences and laws, establishment of educational institutions and pollical and law reforms (He 2004b). More specifically, Shen Jiaben (1840-1913), a late Qing Chinese official and jurist, became the Secretary of Enactment in charge of translation of foreign laws and codification of new laws. He later served as the Minister of Justice who was responsible for the 1905 revision of the Qing Code, abolishing much of the traditional Chinese criminal punishment such as various cruel and inhumane forms of the death penalty including 'slow slicing' (*lingchi*) of condemned prisoners. The Imperial Law College in Beijing was established in 1906. As a result, a large number of Western legal codes and legal scholarly works

[6] At the time of the Chinese-Western contacts and interactions around the 19th century, the Chinese imperial officials called Westerners 'barbarians' (*yi*), while Westerners regarded the Chinese, especially some aspects of the Chinese criminal laws, as barbaric.

were translated into Chinese, introducing the Western legal system, legal science, and laws to China (He 2004b).

The introduction and translation of Western legal texts into Chinese is believed to have been started under an imperial official, Lin Zexu (1785-1850), around 1839 (He 2001). (For detailed discussion of Chinese translation of foreign legal works during the late Qing period, with a list of the major translated works, their translators and other publication details, see Tian and Li 2000). In 1839, Lin Zexu, a Qing imperial commissioner, organized and commissioned the translation of international law texts into Chinese by an American medical missionary Peter Parker (1804-1884) and a Chinese imperial interpreter by the name of Yuan Dehui (For Parker's translation activities in China, see Zhou Zhenhuan, 2000). Together, they translated sections of E. De Vattel's (1714-1767) *The Law of Nations* (Vattel 1863). The result was *Wanguo lüli* later published in Wei Yuan's (1794-1856) *Hai guo tu zhi* (*Illustrated Treatise on the Maritime Countries*) in 1847, which consisted of translations on various subjects from the West (see He 2001, 2004b; Svarverud 2001; W. Wang 1985). *Hai guo tu zhi* briefly touched on Western legal systems. This is believed to be the earliest piece of a Western legal text translated into Chinese (Chang 1950; Svarverud 2001). Then systematic introduction of Western law together with Western science and social science on a much broader scale followed with the establishment of Tongwenguan (Combined Learning College, or Peking Imperial College) in Beijing in 1862 for the purpose of disseminating Western knowledge. Tongwenguan was initially set up as a college for training Chinese translators and interpreters. It was later expanded to include the teaching of Western science and technology.

It was during his tenure in Tongwenguan that the American missionary and legal scholar, W.A.P. Martin (1827-1916), produced *Wanguo gongfa* 万国公法, the Chinese translation of Wheaton's *Elements of International Law* (Martin 1864; Wheaton 1916), under his Chinese name Ding Weiliang, regarded as the most influential and important first major translation of Western law into Chinese. Martin's translation of Wheaton's Elements of International Law (1864) has had profound and far reaching impact on the development of modern Chinese law, and the development of modern Chinese legal language (Cao 2004, 2017; He 2001). It was the first translation of a complete Western legal work on international law into Chinese. As pointed out, it introduced Western international law to China in terms of legal system, structure,

contents, institutional principles, ideological concepts and conceptual terminology, bringing a new system of international law to the Chinese people (He 2001, 2004b). According to Biggerstaff, other Chinese translations of writings on international law published by Tongwenguan included the translations of de Martens' *Guide diplmatique*, Woolsey's *International Law*, Bluntschli's *Droit international codifié*, and an article by Martin on the practice of international law in ancient China, and also *Faguo lüli*, the translation of *Code Napoléon*, translated by Anatole Adrien Billequin (1826-1894, his Chinese name being Bi Ligan), and the translation of the *Penal Code of Singapore*. In short, from the time around the Opium Wars to 1989 (the failed Wuxu Reform that lasted one hundred days), the period represents the start of the translation of Western legal works into Chinese introducing Western legal thoughts to China.

Following this to around Xinhai Revolution (1911) which saw the overthrow of China's last imperial dynasty and the establishment of the Republic of China (ROC), a rapid progress was made in the translation of more foreign legal laws and legal works. In 1900, Liang Qichao (1873-1929), a jurist, historian, philosopher, and an influential intellectual figure in modern Chinese social and legal development, advocated the idea of borrowing from Western law as a fundamental policy for governance in China. In particular, he promoted the translation of Western political and legal works. Another influential and prominent scholar and thinker around this period was Yan Fu (1854-1921) who was also a major translator of Western law into Chinese. He translated, among others, Montesquieu's *De l'esprit des lois* (*The Spirit of Law*s) into Chinese. Ya Fu was known for his translation and introduction of Western thoughts to China including Darwin's theory of evolution. His other seminal translations around this period included *Evolution and Ethics* by Thomas Henry Huxley, *The Wealth of Nations* by Adam Smith, *The Study of Sociology* by Herbert Spencer, *On Liberty* by John Stuart Mill, and *A System of Logic* by John Stuart Mill[7]. The impact of these translated works extends far beyond their time in China's modern intellectual and social development including today.

In terms of the Chinese legal language, I suggest that the efforts in translation of Western law from the second half of the nineteenth century till the 1930s prepared the building blocks for modern Chinese

[7] Yan Fu developed his famous translation standards during this period: faithfulness, expressiveness, and elegance.

legal language and Chinese law (Cao 2004). It is around this period that modern Chinese legal language started to take shape. Another distinctive and critically important aspect in the development of modern Chinese legal language and legal translation is the role and medium of the Japanese legal language (Cao 2004). Relevantly, Japanese law developed during the Meiji Period (1868-1914) involved in large part the Japanese translation of Continental European laws. Due to the closeness between the Chinese and Japanese writing systems, Chinese translators resorted to borrowing directly from the Japanese legal terms without the need to creating entirely new Chinese words on their own. This speeded up the translation process and this turned out to be very effective and efficient (see more in 2.3). Early modern Chinese dictionaries included *Xin er ya*, a dictionary published in 1903, with a section on politics and a section on law, explaining new political and legal terminology, and *Han yi xin falü cidian* (*New Legal Dictionary Translated into Chinese*) published in 1905 (Yu 2001: 24-66).

In terms of the development of modern Chinese law, in the history of legal translation in China, a noteworthy and significant area is the practice called *yijie*. *Yijie* literally means 'translation and introduction' or 'introduction through translation' (Cao 2004). This can refer to any types of translated texts, but in legal translation, 'introduction' includes not only introducing and describing foreign laws and legal systems, but more importantly, 'introduction' is also intended for making Chinese laws through transplanting foreign laws. *Yijie* was started towards the end of the nineteenth century, and was very significant from 1896 to 1936 during which period the Chinese absorbed and codified their version of Western laws, largely through the translation of Western laws and scholarly legal works (Henderson 1970: 158). Thus, the translation of foreign legal works and laws had a definite purpose, that is, to transplant or to create Chinese laws modelled on the foreign laws to replace the ancient Chinese laws that were deemed outdated and ineffectual in dealing with modern realities and other countries.

In short, by the 1920s and 1930s, the basic framework for a new Chinese legal order modelled on European Continental civil law was taking shape together with the newly created Chinese legal language. The vast amount of translation and lawmaking activities by the reform minded Chinese scholars and jurists in translating and introducing Western law to China were seminal in laying the foundation of modern Chinese law and modern Chinese legal language as we know it today.

2.3 Creating a new legal vocabulary in Chinese through translation

It can be said that the broad framework was drawn up and the foundation for modern Chinese law was laid through translation and introduction of Western law and legal science around the turn of the last century. Now we look more specifically at the building blocks of that framework, that is, the actual words, the legal concepts, and other expressions that were translated into or created in Chinese during this formative era, how the early Chinese translators translated Western legal words and concepts, and how they mediated and facilitated cross-cultural communication in the process. This can throw some light not only on translation, but also on how language, culture, and ideas evolve and interact, and how diffusion of knowledge and values occur across national boundaries.

First of all, in the early translational activities of Western law, three main methods were used: the new words and foreign concepts were integrated into the Chinese language by way of using existing Chinese words, neologisms were created with new legal meanings, and direct borrowing. Most of the terms introduced then have now become established in the Chinese lexicon as an integral part of the Chinese legal language and political discourse. For instance, in the translated *Wanguo gongfa* (*Elements of International Law*) by Martin and his collaborators, many Western legal concepts, in particular international law concepts, were introduced into Chinese for the first time (see Chiu 1968; Henderson 1970; Liu 1995). In *Wanguo gongfa* two major translation methods were employed: creating neologisms and using existing Chinese terms for new legal meanings. For instance, newly created legal concepts and terms that were used for the first time in Chinese include *zhuquan* 主权 (sovereignty), *minquan* 民权(civil right), *fayuan* 法院(court), *zeren* 责任 (responsibilities, liabilities, duties), *liyi* 利益(interest), *renmin* 人民 (people), *guoti* 国体(system of government), among others see He (2001); (He 2004a, 2004b); (Li 1997). These were entirely new and foreign concepts and words to the Chinese then. They have since become an integral part of the Chinese language, and are some of the most commonly used words in Chinese legal, political and everyday language today. Most Chinese are not aware of their foreign origin. However, at the time of Martin's translation, due the large number of newly created words of various kinds with entirely foreign concepts and ideas and how

laws were described, the translation was thought to cause verbal confusion and difficulty to comprehend to the Chinese. Martin and his translation team created other neologisms in their translation, but some were very awkward. They did not catch on at the time and are on longer used in Chinese, for instance, *juwai* (neutrality, now *zhongli* has replaced it), *xingfa* (natural law, now it is *ziran fa*), *shouling* or *boliyingtiande* (president, now it is *zongtong*), *lüfa* or *fadulueli (*law, now it is *falü*), *fashi* or *gongshi* (judge, now it is *faguan* (see Chiu 1968; Henderson 1970).

For other translations at the time, the translators also encountered many problems as to how to create new words in Chinese. One of the methods that turned out to be unsuccessful was transliteration for foreign terms, for instance, in Wei Yuan's translation *Hai guo tu zhi* (*Illustrated Treatise on the Maritime Countries*), some basic institutional legal terms were transliterated into Chinese, *ba li man* 巴厘满 (parliament) (Qu 2013; J. Wang 2005; W. Wang 1985). Such transliterated words in Chinese made little sense, and were extremely awkward, carrying no meaning to the Chinese readers. They never caught on or were used (J. Wang 2005). Thus, transliteration as a translation method failed and was soon dropped. Instead, a new and more effective method was found in its place, that is, direct borrowing from the Japanese language.

Around the end of 1800s and the beginning of 1900s, the focus and efforts started to shift to the translation of Western legal works via Japanese which turned out to be an ingenious shortcut. Under the auspices of Shen Jiaben and other officials commissioned by the Qing government as mentioned earlier, translation began to focus on Western laws and legal codes for the purpose of drafting and making Chinese laws. The various laws in different countries in Europe and U.S.A. were translated into Chinese as the blueprint, including laws from the U.K., U.S.A., Germany, France, Russia, and others, but some of the translations were not translated from English or other European language. Instead, they were translated from the Japanese versions which had previously been translated from English or other European languages. Chinese legal scholars, many of whom were trained in law in Japan, made selective use of the Japanese law and legal language, which were modelled on the European civil law. In this process of Chinese translation from the Japanese translations, a large number of legal terms were directly taken or borrowed from Japanese into Chinese as the Japanese language used and still uses many

Chinese characters[8]. The borrowing to China from Japan was largely successful due to various reasons, including the fact that there was a shared core of linguistic and legal traditions between China and Japan with the latter heavily influenced by Chinese culture before the mid-nineteenth century, the need for modernization of both societies under similar historical circumstances, and the success of the Westernization of Japanese law at the time before China started its modernization and law reform (Hao 1997; Henderson 1970).

Thus, as we have seen, translation of Western laws and borrowing from Japanese enriched the Chinese legal language. Together with the new language, the basic legal science, legal philosophy, legal principles and legal practices and basic legal concepts in Western law including the rule of law, separation of powers, judicial independence, jury, constitutionalism, presumption of innocence, legal person, rights, obligations, among others, were introduced to China for the very first time. Modern Chinese legal system based on Western law and legal thinking and practice were taking shape. The translation activities in introducing Western law to China by reform minded Chinese scholars and jurists were seminal in laying the foundation of modern Chinese law and modern Chinese legal language as we know it today.

3. Cultural mediation and understanding modern Chinese legal language as a translated language

There are a number of implications from the foregoing discussion. First, modern Chinese legal language is largely a translated language as we have seen in the forgoing. It developed and evolved rather rapidly within a short period of time thanks to translation of Western laws, and in the process, this was greatly assisted by direct borrowing from the Japanese language.

[8] It is noted here that for the borrowing from the Japanese, there was 'reborrowing', as well as 'direct borrowing' from Japan. In most of the cases, it was reborrowing, that is, the Chinese reborrowed the Japanese characters that had been borrowed by the Japanese from the Chinese many centuries earlier. Reborrowing may have contributed to much of the confusion in the minds of the Chinese as to the meaning of the 'newly' created legal words, given that some characters that were originally Chinese were then borrowed to the Japanese, and finally re-imported to China with new referential objects assigned to them in the legal context. Acknowledgments are made here to an *anonymous reviewer for pointing this out.

In a sense, modern Chinese legal language is a hybrid. Translation is a motivating force and empowering medium for reforming and transforming the Chinese society in transition. Translation played and is still playing a vital and indispensable role in the development of modern Chinese legal language.

Secondly, for the English reader of translated Chinese law, even though modern Chinese legal language is a translated language heavily influenced by Western law and terminology, many Chinese legal terms of foreign origin have unfolded a life of their own in the Chinese social, political and legal contexts (Cao 2004)[9]. As we know, translation is never made in or into a vacuum. The act of importation in translation can potentially dislocate or relocate the whole of the target linguistic and cultural structures as it introduces in the target language an alternate existence, a 'might have been' or 'is yet to come' into the substance and historical conditions of the target language and culture, with the foreign sense and its domestication in a new linguistic-cultural matrix (Steiner 1975/1998: 351). George Steiner noted further that no language and no traditional symbolic set of cultural ensemble imports without risk of being transformed (Steiner 1975/1998: 415). Similarly, while translation imports and naturalizes the source language content in the target language, it at the same time simulates and challenges the original of that content in the source language (Steiner, 1975/1998: 351). As suggested, translation involves an encounter, if not a confrontation, between two sets of norms, which correspond to the two codes involved (Toury 1986: 1123). There is the source language code, the target language code and something in between that travels between the source and target language and there are linguistic as well as legal norms. There is 'a perpetual shuffling' back and forth between the source text and target text in the act of translation. Indeed, translated words or texts constitute a third code, arising out of the bilateral

[9] In some fundamental ways, the Chinese legal language as a 'translated language' is different from, for instance, the translated language of science between Chinese and European languages when scientific words and concepts were first introduced to China and translated into Chinese, because scientific words and concepts referring to the physical realities were and are the same irrespective it is in Europe or in China and elsewhere. Laws and legal words and concepts are indigenous and often unique to the country, culture and jurisdiction where they are used and are culture bound. However, a situation that may be similar to translated legal language in Chinese is found in the Chinese Buddhist language, largely translating Sanskrit terms and notions, before they were localised in Chinese culture. Acknowledgements are made here to an anonymous reviewer for pointing this out.

consideration of the source and target codes, a new code with new information (Frawley 1984: 161). The source code provides the essential information to be recodified, and the target code provides the parameters for the re-rendering of that information. Translation is a complex de-codification and re-codification process of semiosis, a sign producing activity that effects consequences, not just in language (Cao 2007).

In China's case, the translation of foreign laws has produced consequences beyond the original texts and laws, effecting outcomes in Chinese culture and generating new meanings in Chinese and elsewhere, in a semiotic productive act, a 'dialogic thought development' to borrow the phrase (Kevelson 1988). In its 'afterlife', that is, a work brought to reality by the act and result of translation as is described by Walter Benjamin (1923/2000), the translated law takes on meanings from the two associated sign systems linguistically and culturally, both the West and China. Moreover, the Chinese legal language and its terminology, far from serving as simple equivalents of imported ways of understanding, have often acquired new meanings that can 'creatively alter, extend or even undermine established European conceptions' (Kurtz 2001: 10). In our understanding of Chinese law, we may need to see and learn about 'the multilayered process of translation and appropriation from which these terms have emerged, not merely as deviations from the original Western meanings' (Kurtz 2001: 10). Take for example the legal concept of 'constitution'. The concept and practice of 'constitution' as in constitutional law did not exist in China until around the turn of the twentieth century when it was first introduced from the West.

The term *xianfa* (constitution) we use in Chinese today, as mentioned earlier, was borrowed from the Japanese phrase translated from the Western notion using Chinese characters (Hao 1997). Separately, *xian* means order, ordinance, law in classical Chinese, (in Japanese also using the same Chinese character), and *fa* also means law. They had different meanings from *xianfa* (constitution) in modern language in both Japanese and Chinese. During the Meiji Restoration period (1868-1914, also called Meiji Renovation or Reform), the Japanese translated and introduced Continental European law and the Western concept of constitutional government. The word *xianfa* was first used in 1882 in Japan as a new translation for constitution in the Western sense. The Meiji Restoration led to enormous changes in Japan's political and social structure and Japan industrialized and

adopted many Western ideas and laws including creating a Western style Japanese Constitution that would redefine Japan as a modern nation in 1889. In China, in 1880s to 1990s, Chinese reformers wished to learn from Japan and to create a constitution and constitutional monarchy modelled after the Japanese. In 1908, the Qing government promulgated the Constitution Outline by Imperial Order based on the blueprint of the Japanese Constitution. This is the first time when the word *xianfa* and *xianfa* as the country fundamental law came into existence in China.

If we look at the meaning of the word *xianfa*, although the two characters in *xianfa* were used in traditional China, as said above, they have different meanings from the *xianfa* used to refer to constitution. Thus, *xianfa* could be considered a new semantic form in Chinese, and its referential meaning was based and found in Western constitutional law. This linguistic existence of *xianfa* was given a conceptual and referential object, a functional equivalence, in the Chinese system, only when constitutional practice was adopted and the first constitution was promulgated in China in the early 1900s and when the concept was incorporated into the Chinese political and legal system. Now *xianfa* in Chinese has a generic meaning, that is, a constitution is a legal document with supreme legal force, setting out the basic structures of government, and this meaning originated from the Western liberal tradition. But when we talk about the Chinese constitution and Chinese constitutional practice in the People's Republic of China, *xianfa* specifically refers to the Chinese context as opposed to others, and its referential object is found in China, not in Japan, or Europe or elsewhere. It is commonly acknowledged that the Chinese 'Constitution' differs significantly from constitutions in liberal democratic societies. However, this does not prevent *xianfa* from being an equivalent to 'constitution', as the basic idea of *xianfa* in Chinese corresponds to that in English. A core conceptual equivalent meaning exists linking the English and Chinese linguistic signs. It would be an absurdity to suggest that the Chinese *xianfa* cannot be translated back into English as 'constitution'. The constitutions or constitutional laws in European countries are different. Many legal terms in English and their definitions are not identical in these jurisdictions. In the case of *xianfa*, they are and should be translated into the corresponding 'constitution', as they share a core semantic and conceptual meaning with the English counterparts. This does not prevent people from agreeing or disagreeing as to whether the constitution or constitutional

law as practised in China are different or similar to those in a Western liberal democracy (for the discussion of *quanli* (rights) and its Chinese and English meanings, see Cao (2017)).

Regarding the issue of understanding translated legal terms, after the initial linguistic transfer, it was once remarked, 'a word never – well, hardly ever – shakes off its etymology and formation. In spite of all changes in and extensions of and additions to its meaning, and indeed rather pervading and governing these, there will persist the old idea' (Austin 1970: 201). It is proposed that legal translation is a space of possibilities, an autonomous real of 'cross-cultural events' within which the 'system-bound' of legal concepts and notions deeply rooted in language, history and societal evolution of one country are transformed and integrated into the language of another, and as a result, stratified over the course of time. As said in this special issue, the legal translation process can be seen as constituting the 'Third Space', a space-in-between, which enables other positions to emerge and where all forms of cultures are continually in a process of hybridity, of evolution (see Bhabha 2012), and other authors in this issue), and in this process, 'cultural mediation' is an essential pillar as it opens up a series of promising ways, alternatives, and compromises to create encounters and crossroads between disciplines for practical possibilities in the legal translation process (Wagner 2018; Wagner & Gémar 2013, 2014a, 2014b). As pointed out, words can take different meanings when injected in a different context, being it political, social, historical, or individual. Concepts thus are always culturally and historically embedded, and the meanings of a term change both diachronically and synchronically according to the various interpretations that people, depending on their particular formation and context (Carrai 2017). It was suggested that idea of translingual practice may be useful, which is understood as a process through which concepts and words are translated, adopted, and appropriated in other languages, and the gradual legitimization of a new word and concept in a given host language takes place in an arena where there are constant struggles of political and ideological nature for asserting different interests (Liu 1995).

For our purpose, despite the seemingly insurmountable conceptual and linguistic gulf, alleged and real, between the Chinese and Western laws and languages, the Chinese interpreters of the late 1800s and the early 1900s, collectively and individually, interpreted and absorbed an otherwise unfamiliar law in translated Chinese. In modern

China, through translation and interpretation, new knowledge and new realities were brought into existence. The modernization of Chinese law symbolizes a kind of death and rebirth, that is, both the death and regeneration of ancient Chinese law (He 2004b: 300-302). However, the death of a legal culture or legal order is unlike that physical death of a living being as the ways of thinking and ideas will linger in people's minds and in society, continuing to exert influences in different ways, even if the old laws no longer function; and the new laws and legal order were built and injected into the old system in the last one hundred years or so in China (He 2004b: 300-302). This is particular true with regard to the Chinese legal language. The old Chinese characters from two thousand years ago describing entirely different eras and the now dead system and practices were revived or re-coded and re-engineered so to speak, to signify new and foreign legal concepts, legal thinking and practices. In modern Chinese legal language, the traditional inherited meanings related to law and the more recent introduced foreign meanings are encoded and superimposed.

4. Conclusion

In the history of modern China, language and translated language play an important part in the migration of knowledge, across linguistic and temporal boundaries. When new knowledge or information was initially introduced into the Chinese environment, the words that were coined or redefined to carry that knowledge also carry with them potential transforming power. In a little more than one hundred years, the Chinese language absorbed or devoured the nomenclatures of the most diverse branches of Western knowledge whose formation had taken millennia in the Occident (Lackner, Amelung, & Kurtz 2001: 1-2). These words have created not just new meanings but also new realities in Chinese culture and Chinese law. The translation of foreign laws into Chinese is not a mechanical equation of the abstract and absolute equivalence, not a replica but a developmental stage, 'a further step in the growth of the expressive life to which the first word or text gives birth' (Montgomery 2000: 284). Translation has been a powerful means to create and manage change in modern China. The Chinese people have been constantly engaged in two kinds of translation: translating foreign

ideas and laws into Chinese in both new and recycled Chinese, and translating traditional Chinese meanings within a new and changed context. Chinese communicative practices are one of translation, of both diachronic and synchronic transfer of significance, and both inside Chinese and between Chinese and Western languages. Chinese 'interpretive horizons' (to borrow Gadamer's phrase) are built on the basis of Chinese and Western discourses, with new meanings and realities are generated on such basis.

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ON THE FORMS AND THORNS OF LINGUISTIC INDETERMINACY IN CHINESE LAW

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Abstract: This study addresses the different types and implications of linguistic indeterminacy in Chinese law. It firstly draws on the studies of scholars of different disciplines, such as linguistics and philosophy of language, to provide a taxonomy of indeterminacy in language. It then provides examples of each type, highlighting the implications in law and legal interpretation. It uses linguistic data from various texts, such as statutory laws and judgements, and analyses them with various methods, including discourse analysis and corpus linguistics. This study argues that when the language of the law is indeterminate, the legal outcomes may be particularly uncertain. It suggests that although it is difficult to ascertain whether the degree of indeterminacy is higher in some languages more than in others, some linguistic mechanisms at the word-formation level in Chinese, such as portmanteaus and the modifier-

modified structure, are remarkably ambiguous. When uncertain terms are in key parts of the law, the consequences may be more serious. The study of linguistic indeterminacy in Chinese has implications for the study of forensic linguistics, and Chinese studies in general.

Key words: Linguistic vagueness; linguistic ambiguity; Chinese law; Chinese legal language; cross-lingual studies

论中国法律中语言不确定性的形式与苦恼

摘要: 本篇文章浅析中国法律中语言不确定性(linguistic indeterminacy)的各种类型及其在法律方面的影响。首先，笔者借鉴了语言学和语言哲学等不同研究方向的学者的研究对语言不确定性进行分类。其次，对每种类型提供了例子和阐述，并着重阐述法律中语言不确定性与法律和法律解释的关系。本研究里所使用的数据主要来自成文法和判决书，并对其通过不同方法进行了分析，包括语料库语言学分析和话语分析。笔者认为，当法律的语言不确定时，法律结果也会随之变得不确定。尽管很难判断某种语言中的不确定性程度是否同其他语言的一样，本研究却显示，中文里构词的一些方式(例如混成词和定语-中心语)所致使的语义却尤其含糊不清。若法律的关键部分存在着语言不确定性，其影响会更加严重。中文里的语言不确定性研究，对法律语言学以及整个中国研究都有启示。

关键词: 语言的模糊性；语言歧义；中国法律；中文法律语言；跨语言研究

FORME E TORMENTI DELL’INDETERMINATEZZA LINGUISTICA NEL DIRITTO CINESE

Abstract: Il presente studio si propone di indagare le diverse tipologie e le implicazioni dell’indeterminatezza linguistica nel diritto cinese. Dapprima forniamo una tassonomia dell’indeterminatezza linguistica sulla base di alcuni studi afferenti alle principali aree di ricerca in cui il tema è stato tradizionalmente trattato, quali la linguistica e la filosofia del linguaggio. Per ciascuna delle categorie tassonomiche individuate vengono poi forniti alcuni esempi di modo da sottolineare le implicazioni per il diritto e per l’interpretazione giuridica. I dati linguistici utilizzati ai fini di questo studio sono stati tratti da diversi testi, tra cui sentenze e testi normativi, e sono stati analizzati con vari metodi, tra cui quelli propri dell’analisi del discorso e della linguistica dei corpora. Lo studio sostiene l’esistenza di una correlazione tra incertezza del linguaggio e incertezza del diritto. Sostiene inoltre che nonostante sussista una generale difficoltà nello stabilire se il grado di indeterminatezza sia più alto in alcune lingue rispetto ad altre, in cinese, per esempio, alcuni meccanismi nella formazione del lessico, tra cui parole

macedonia e il costrutto determinante-determinato, sono particolarmente ambigui. Quando punti chiave di norme giuridiche presentano un lessico indeterminato, le conseguenze giuridiche possono essere particolarmente significative. Lo studio dell'indeterminatezza linguistica del cinese può contribuire allo studio della linguistica forense e della sinologia in generale.

Keyword: Vaghezza linguistica; ambiguità; diritto cinese; linguaggio giuridico cinese; studi interlinguistici

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1. Introduction

On March 1, 2016, China enacted its first national law against domestic violence (2016). In Article 37, the law stipulates to safeguard any victims of domestic violence besides family members, including those who *live together* (*gongtong shenghuo* 共同生活)[1]. It was thought at first that by using such a vague wording, China was implicitly recognising homosexual co-habiting families. It was not. Even though that same legal term may include gay couples in some societies, the Chinese authorities provided a more restrictive interpretation. This kind of *intra*lingual indeterminacy in the Chinese legal terminology is not rare and has legal implications. When the Chinese statutes or the legal documents drawing from them are translated into other languages, *inter*lingual indeterminacy arises, making the original uncertainty of some terms even more evident, or making terms that were not uncertain at first become so.

This study addresses the different types and implications of linguistic indeterminacy in Chinese law. It firstly draws on the studies of scholars of different disciplines, such as linguistics and philosophy of language, to provide a taxonomy of indeterminacy in language. It

[1] See D'Attoma (forthcoming) for a discussion on the legal aspects of this provision.

then provides examples of each type, highlighting the implications in law and legal interpretation. It uses linguistic data from various texts, such as statutory laws and judgements, and analyse them with various methods, including discourse analysis and corpus linguistics. This study argues that when the language of the law is indeterminate, the legal outcomes may be particularly uncertain. It holds that some linguistic mechanisms at the word-formation level in Chinese are especially ambiguous. When uncertain terms are in key parts of the law, the consequences may be more serious. The study of linguistic indeterminacy in Chinese has implications for the study of forensic linguistics, and Chinese studies in general.

2. On the forms of linguistic indeterminacy

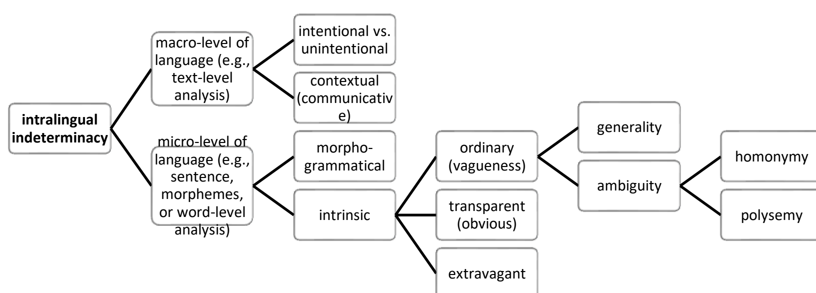
Following Cao (2007a:70), in this study I use "indeterminacy" interchangeably with the term "uncertainty" to cover any indeterminacy of language, including vagueness, generality, and ambiguity (see also Chang 1999). As has been pointed out, uncertainty is part and parcel of language and law and cannot be avoided. It has been said to be functional to law, to be detrimental to law, or to have no function at all in law (Asgeirsson 2015; Simonnæs 2007; Waldron 2011; Schneider 2007; Schane 2002). Such different opinions notwithstanding, it is ubiquitous in any natural language, as well as in many specialised languages, including the language of the law (Endicott 2000), where precision and clarity has been traditionally and popularly expected. In legal practice, legal disputes are often caused by real or allegedly different interpretations of one term, phrase, or syntactic structure (Shuy 2008; Triebel 2009: 154; Schane 2002), and they may lead to different verdicts, and different punishments. The legal position of one may change depending on the uncertain language used about or by them, as may happen in statutes and private documents. When legal texts are translated into another language, for private legal purposes or for the purposes of multilingual jurisdictions, the legal translator may be prompted to face uncertainty about the legal meaning of a term or wording. As said, this latter type of indeterminacy is called *inter*lingual indeterminacy.

Different authors propose different classifications of uncertainty and vagueness, sometimes making a distinction between the

two. The taxonomy I propose in this study includes the instances of scholars from various disciplines, such as linguistics and philosophy of language in which uncertainty, and especially vagueness, has been theoretically addressed. It is aimed at showing that there are various types of uncertainty, and that they require different solutions. It also serves as a caveat not to extend any of the statements in this study to any other types of uncertainty rather than to the ones they are specifically intended for.

The structure of my taxonomy is outlined in Table 1 below and is described in greater detail hereafter:

Table 1: Taxonomy of Intralingual Indeterminacy



At the macro-level of language, i.e. the level at which we analyse an entire text rather than smaller units such as words or morphemes, there is intentional vs. unintentional indeterminacy, and contextual indeterminacy. At the micro-level of language there is grammatical indeterminacy, and intrinsic indeterminacy, which occurs at the word level. It is noted that since the composition of Chinese words largely reflects the Chinese syntax, grammatical indeterminacy in Chinese includes morphological uncertainty, and can be termed morpho-grammatical indeterminacy. This will be illustrated in the next section. Although the different types of linguistic indeterminacy I am presenting here display distinct features, they are also relative, and may sometimes overlap or co-exist (Cao 2007a: 70).

With respect to the intention of the producer of a text (whether written or spoken) towards their text, we can distinguish two types of indeterminacy in language, i.e. intentional vs. unintentional indeterminacy. As the names suggest, the first is determined by the speaker's intent to purposely speak vaguely. For instance, intentional indeterminacy has been found in deceptive ambiguity used by police or prosecutors (Shuy 2017), or when the uncertain meaning of a term is intentionally used as a form of negotiation to paper over the fact that the parties or the legislators had conflicting views and have not reached a sound agreement (Cao 2007a: 71; Marmor 2014: 97). Importantly, intentional uncertainty is part and parcel of the speaker's message and has to be preserved in translation. As we will see, the same does not go for unintentional uncertainty, which needs to be solved in interlingual translation if the target language so requires. This level of analysis includes the further types of indeterminacy that we find at the micro-level of analysis.

In communicative uncertainty, the speaker's words may not necessarily be vague, but the speaker's communicative attitude is, whether intentionally (Keil and Poscher 2016: 6) or not (Marmor 2014: 91). This type of indeterminacy is a form of underspecification (Keil and Poscher 2016: 7) and is contextual (Marmor 2014: 90–91). One phrasing can be deemed as sufficiently clear in one context, but unclear in another. This study will show that besides non-technical words with ordinary meanings, and legal words with technical legal meanings (Cao 2007a: 73), another source of uncertainty in the Chinese law is ordinary words with legal meanings, being clear in ordinary language, but unclear in the legal context. This is a recurrent source of interlingual indeterminacy for the translator who translates the Chinese legal language.

Morpho-grammatical indeterminacy is the uncertainty arising from the way words are composed or arranged in a sentence. It is common in Chinese legal language. Various reasons have been identified for this, including that Chinese characters are more like root words or morphemes than words (Cao 2018a: 150). Additionally, Chinese is a prototypical analytic language: it has no inflection, no gender, no number, and the semantic relationship between the morphemes of a word is largely opaque. Due to the intrinsic linguistic features of the Chinese language, grammatical uncertainty in Chinese is often unintentional. When ascertaining the meaning of many Chinese words, the translator needs to *arbitrarily* attribute grammatical markers,

such as gender, number, or verb tense, to a word. As we will see in the following section, a semantically obscure modifier-modified structure occurs in the Chinese legal lexicon, and it cannot be maintained as implicit in translation. The resulting translation of a lexical item into any less analytic and more explicit target language will, therefore, necessarily be less uncertain than in Chinese.

In intrinsic uncertainty, the speaker's words or terms are inherently indeterminate, regardless of the context. Drawing from Marmor (2014)'s taxonomy, we can identify three sub-types of intrinsic uncertainty: ordinary uncertainty, transparent (or obvious) uncertainty, and extravagant uncertainty (a term coined by Endicott, cited in Marmor 2014: 88). It is noted that Marmor's classification addresses vagueness rather than uncertainty. As said, vagueness can be considered a subtype of uncertainty, as Cao's maintains (2007a). In fact, as Marmor's examples of vagueness are analogous to those made by Cao, I include Marmor's taxonomy for vagueness within the broader category of uncertainty and indeterminacy.

A word is ordinarily uncertain if its indeterminacy is not manifest and evident, yet when we are prompted to state whether its meaning includes an entity or a concept, we cannot say for sure, and we realise that its meaning is uncertain. This definition is sometimes similarly used for vagueness (e.g. Antia 2007: xv), although Simonnæs holds that "vagueness is a property of concepts", rather than words (2007: 22). Ordinary uncertainty includes the sub-types of generality and ambiguity. A general word is one that refers to "any one of a number of things whose differences are not denied or necessarily overlooked" (Cao 2007a: 70). An oft-quoted example is H L A Hart (2012: 126)'s word 'vehicle' (cf. Marmor 2014: 92). If a city ordinance stipulates that no vehicle is allowed in the park, entrance is very likely to be forbidden to motor vehicles; but are bikes or skateboards also forbidden? This type of indeterminacy is frequent in law but is not evident. A term is ambiguous when it has more than one possible meaning. Ambiguity thus includes homonymy and polysemy (see Andersen (2002)'s taxonomy, used by Rogers 2007: 17). As we will see hereafter, some of the Chinese key legal terms are ordinarily uncertain.

Obvious (transparent; Marmor, 2014) uncertainty is easier to observe. Obviously vague words imply a sorites sequence, that is to say, they have a fictitious minimum and a maximum point, but there is no clear cut-off point in between (cf. Alston 1964: 87–8). In law, they may be a complication and lead to legal disputes.

The third type of intrinsic uncertainty is even more obvious, but more complex – it is, thus, extravagant (Endicott 2011: 24–5). As Marmor notes (2014: 89), its main feature "consists in the fact that they designate a *multidimensional* evaluation with (at least some) *incommensurable* constitutive elements." Law is packed with extravagantly uncertain words. Legal terms such as "reasonable", "fair", "just", "legitimate", "prudent", "cruel and unusual", etc. are frequent in law and they are extravagantly uncertain.

The degree of indeterminacy may not be the same in every language. Some scholars maintain that one language may be more uncertain than another (but see Balley 1944, in Cao 2007a: 81 for an opposite thesis). Chinese has been said to be vague, and vaguer than other languages, such as English (Cao 2004; 2018a; but cf. Triebel 2009). Due to the quantitative nature of the question as to whether one language can or cannot be said to have a *higher* degree of indeterminacy than another language, it is acknowledged that it takes extensive comparative quantitative data to answer the question. This is not my aim here, although, whenever possible, I offered statistical indications about my data, with an eye to prompting quantitative research in the field. When two languages are considered and compared, such as in bilingual law and legal translation, intralingual uncertainty becomes especially visible. When crossing two languages as in bilingual legislation, and two legal systems and cultures as in translation, translators are prompted to face uncertainty. This further type of indeterminacy has been termed interlingual uncertainty (Cao 2007a).

3. On the thorns of linguistic indeterminacy

To illustrate the foregoing taxonomy, we can use empirical linguistic data from legal texts of various kinds, such as statutes and court decisions. For the purposes of this study, these texts were found in different databases. As to Chinese statutes, they can be accessed online at different Chinese governmental websites such as the *Digital Repository of Laws and Regulations* and *The Central People's Government of the People's Republic of China*. The laws and regulations of China have also been collected and stored in a corpus (hereinafter ChinLaw) created at the University of Verona under the "Departments of Excellence" plan granted to the Department of Foreign

Languages and Literature for the project “Digital Humanities Applied to Foreign Languages and Literatures” (2018-2022). The ChinLaw corpus so far counts around 1.5 million tokens and 466 statutes of the People’s Republic of China with the exclusion of territorial entities where different laws are in force, such as Macau and Hong Kong.

From the perspective of corpus search methodology, it is noted that, at present, there is no way to access linguistic data such as that in a corpus from general rules (Deignan 2005: 92), thus one cannot search for indeterminate wordings, by say, inserting “vague words” or similar keywords in a search box. Two approaches are instead possible: bottom-up, i.e. from words to observation, and top-down, i.e. from our prediction about language to words. I took both approaches in this study. In the first, I used various methods of corpus search, such as identification of the most frequent words and collocates to then make considerations about them. In the second, I searched for wordings that I presumed to be indeterminate, and then verified whether they in fact were in my data and discussed them accordingly. Relevantly, it is acknowledged that, as noted by Sinclair, people’s intuition about impressions of language is largely unreliable and shows significant differences between the data retrieved objectively from texts (1999: 178). This is why corpus linguistics is particularly useful, for it enables the researcher to confirm or disprove their intuitions. As is known, corpus linguistics has been significantly garnering legitimacy in forensic studies and practice (Volokh 2015; Solan and Tammy 2016; Marmor 2014: 93). These methods are illustrated in greater detail in the next section, where they are used. The corpus software I used is LancsBox, developed at Lancaster University by Brezina, Timperley, and McEnery (2018).

As to court decisions, a few years ago the Chinese government began to upload them to a public database called *China Judgements Online* (hereinafter CJO), containing around 92 million court decisions from China as of the time of this writing. The databank makes it possible to look for judgments by keywords. So, by inputting a word such as, say, *cheliang* 车辆 (‘vehicle’) in a search box, the system retrieves all the court decisions including that word.

In the following subsections I am going to illustrate the various forms of linguistic indeterminacy by retrieving examples using the methods I have just described.

3.1. Intentional vs. unintentional indeterminacy

Starting from the macro-level of language analysis, there is, as said, intentional vs. unintentional indeterminacy, and contextual indeterminacy.

The first aspect to observe is that it may be complex to determine if a wording has been *willingly* used in an indeterminate fashion. We need to either rely on an honest declaration by the producer of the uncertain wording, such as a layperson in the case of private legal documents or court depositions, or that of a government representor in the case of nationally enacted laws. In the absence of such a declaration, we may try to determine whether the linguistic indeterminacy was deliberate basing on context. The same is done by the judge before whom a case of linguistic indeterminacy is argued.

Intentional indeterminacy in law appears when someone wants to achieve a purpose by using uncertain language. When there is an intention to speak or write vaguely, there is an end one aims to reach. This is true for the lawmakers, and for the single individuals who are the subject of the law. As has been noted in the philosophy of legal language, indeterminacy is purposeful to law (Simonnæs 2007), as, inter alia, it ensures that one broad theoretical principle is applied to an indefinite number of concrete matters. In the court process, a litigant or a witness may be intentionally vague in order to hide the truth from the judge. This is termed reticence and is a crime under many jurisdictions. As said, in bilateral agreements, whether at the national or international governmental level, intentional indeterminacy has been observed to be used to paper over the fact that the parties have not reached a sound agreement (Cao 2007a: 71). The same applies to private agreements: by resorting to linguistic indeterminacy, the parties can include their contrasting views under one general phrasing, while nonetheless reaching a more general objective. When *one* party proposes a vague phrasing in the contract drafting without the other party being aware of the possible implications, the contract is more likely to privilege the party who proposed the phrasing. Many jurisdictions based on Western law around the world have specific provisions regulating this case, in order to protect the party who has not proposed the indeterminate clause. This is a doctrine of contractual interpretation, termed *contra proferentem* in Latin, or “interpretation against the draftsman” in English. This doctrine provides that the language of a contract should

be interpreted against the party who caused the uncertainty to exist, as indicated in Article 41 of the Contract Law of China, which transplanted the doctrine from the West (Fu 2011: 82) (cf. e.g. Article 1370 of the Civil Code of Italy) (any English translation in this paper is my own):

> "第四十一条 【…】对格式条款有两种以上解释的，应当作出不利于提供格式条款一方的解释【…】。
>
> Article 41. […] If one clause has two or more possible interpretations, it should be interpreted against the interest of the drafter […]."

Intentional indeterminacy is thus connected to the concept of *will*, which plays a key role in law. Once one has found what the intention behind the wilful indeterminacy is, any legal deed can be interpreted and regulated accordingly. I will provide other examples of intentional uncertainty in the following analysis, showing the legal effects that it can have, and contrast it with unintentional uncertainty.

To illustrate unintentional indeterminacy, we can use Article 37 of the Domestic Violence Law (2016; my emphasis), mentioned at the beginning of this study:

> "第三十七条　家庭成员以外*共同生活的人*之间实施的暴力行为，参照本法规定执行。
>
> Article 37 Any violent act between *any persons who live together* besides family members is regulated by the provisions of this law."

As said, when the law was publicly announced, many Chinese and foreign people thought that China was intentionally using an equivocal wording such as "any persons who live together" (*gongtong shenghuo de ren*) to include any persons who actually live together, regardless of their sexual orientation and genders. The legal meaning of the phrasing had to be publicly clarified by the authorities in a public press conference right after the Plenary Meeting that passed the law had finished. As reported by *The Observer*, Mr Guo Linmao (郭林茂), responsible person of the Social Law Department of the Plenary Meeting, replied as follows to a journalist of the Associated Press, the American first national press agency:

> "美联社记者：关于反家庭暴力法当中的第 37 条，家庭成员以外共同生活人实施的暴行。我想问一下，在这个定义当中，包括不包括同性恋的居住者？谢谢。
>
> 社会法室负责人郭林茂：【…】我前面说了，*我们*这种家庭成员之外共同生活的人，包括监护、寄养、*同居生活的*，但是对同性恋的到现在我们的法律没有规定，也*没有这个事情*。谢谢。
>
> Journalist of APTN: "I'd like to ask you if the phrase 'violent act between any persons who live besides family members' as used in Article 37 of the Law Against Domestic Violence includes same-sex cohabitants or not. Thank you."
>
> Lin Mao, responsible person of the Social Law Department of the Plenary Meeting: "[…] As I've said earlier, *our* '*anyone who live together besides family members*' includes guardianship, foster care, *people living together*, but as to same-sex couples, as of today, our law has no provisions, and *there is no such thing*. Thank you.""
>
> (He Shurui (ed.), 2015; my emphasis)

As can be seen, the authority declared that same-sex couples were *not* protected by the newly enacted law, as the way they intended the indeterminate wording differed substantially from its contextual meaning in ordinary language. This is understood from the use of the possessive adjective *women* (我们), meaning 'our', used by Mr Guo in the above excerpt. In other words, by using this adjective, the spokesman confirmed that the indeterminacy was contextual and unintentional, being that a wording that includes anyone who lives under the same roof in ordinary language, but that has a much narrower interpretation in the law against domestic violence.

Additionally, in clarifying the meaning of the uncertain words in the law, Mr Guo used other phrasings whose meaning was unclear nonetheless: for instance, he used the term *tongju shenghuo* that similarly means 'people living together' to explain the meaning of the other uncertain phrasing, thus creating confusion between two seemingly synonymic terms (i.e., *gongtong shenghuo* and *tongju shenghuo*, both meaning 'to live together'). In fact, neither of them is useful to clarify the other. He also used the ambiguous phrase 'there is no such thing': What does 'there is no such thing' mean? There is no such thing as same-sex couples? Or there is no such a thing as violence between same-sex couples? Whichever the case, in clarifying the unintentional and contextual linguistic indeterminacy of the law, the

Chinese government spokesperson used other vague phrasings, suggesting a general embarrassment about the question, or that the topic was sensitive, and no further indications could be given as of that time.

In the next parts of this study, we will notice that when the topic is sensitive, uncertainty is in fact more likely to be found. We will also see other examples of unintentional and intentional indeterminacy, since, as said, this macro-level of analysis is reflected at the word-level.

3.2 Morpho-grammatical uncertainty

At the micro-level of analysis, there is morpho-grammatical indeterminacy and intrinsic indeterminacy. We shall begin by looking at the first of these types.

Morpho-grammatical indeterminacy is especially present in Chinese, due to many linguistic factors that are unique to the Chinese language. Chinese is the prototype of analytic language, so words generally have no number, no gender, and no verb tense indication, as Cao points out (2018a: 150–1). Additionally, Chinese characters are not words in the strict English sense, but they resemble more root words or morphemes than words. They can combine in different orders and in different words almost like morphemes do, and from their broad meanings uncertainty originates (see also Wong, Li, and Xu 2009: 37–8). Two phenomena of morpho-grammatical uncertainty in Chinese have not been addressed explicitly by scholarship and deserve our attention: linguistic blends (aka portmanteaus) in contrast to compound words, and the modifier-modified structure.

A linguistic blend or portmanteau consists in the fusion of different parts of words into one new word. Examples of portmanteaus in English are the words “smog” and “netizen”, being the fusion of *sm*oke + f*og*, and inter*net* + cit*izen*, respectively. Linguistic blends are present in many languages, but are pervasive in the Chinese language, including the legal language. The more formal the register, the more portmanteaus we find. As formal Chinese tends to be extremely concise, abbreviated forms of wordings are preferred. For instance, instead of *zhe bu falü* (这部法律, ‘this law’), four syllables, one finds *ben fa* (本法), two syllables that mean the same. The portmanteau resulting from the blend of two disyllabic words can have any of the following

structures in Chinese (in the following scheme, each capital letter indicates a syllable):

(1) AB + CD = AC
(2) AB + CD = AD
(3) AB + CD = BC
(4) AB + CD = BD

The above combinations may not be equally possible, some being more frequent than the others. In true portmanteaus, the parts of the words blended in the new word maintain the meaning of the words each of them stand for. Reversely, in compound words each component has an independent meaning. For instance, in the English portmanteau "netizen", *net-* stands for internet, and *-izen* for citizen. Conversely, in the compound word "fireman", "fire" actually means "fire", and "man" means "man". Since Chinese does not have letters, but characters, each character generally represents a syllable and a morpheme. The vast majority of disyllabic words consists in two morphemes. Hence, the uncertainty arises as to *how to* interpret a disyllabic word; one may well wonder, *Is it a portmanteau, or a compound word?* Uncertainty arises because one cannot be sure if the disyllable is in fact a portmanteau, whose meaning is that of the two words it stands for, or a compound word, whose meaning is that resulting from the combination of its morphemes. In other words, when finding, say, AD as in (2) above, the question is: *Is AD a new word with an independent meaning, or has AD the meaning of AB+CD?*

To illustrate we can use the term *quanyi* (权益), which is often translated as 'rights and interests': for instance, the *Xiaofeizhe* Quanyi *Baohufa* 消费者*权益*保护费 is translated by the Ministry of Commerce of China as "Law on the Protection of the *Rights and Interests* of Consumers". The term appears in various legal wordings, such as *hefa quanyi* (合法权益, 'lawful rights and interests'), *zhengdang quanyi* (正当权益, 'proper rights and interests') and, intriguingly, *feifa quanyi* (非法权益, 'illegal rights and interests') (Cao and Mannoni 2017; Mannoni 2018; Mannoni and Cao 2018; Mannoni 2019). Under the portmanteau interpretation, *quanyi* is the short form of *quanli he liyi* (权利和利益, 'rights and interests'), a phrase appearing in many legal texts, including Article 50 of the Constitution. In the phrase *quan*li *he* li*yi*, the two identical syllables *li* and the conjunction *he* ('and') are removed for brevity, hence we find *quanyi*. This follows the tendency exemplified

in (2) (i.e., AB + CD = AD). Reversely, under the compound word interpretation, *quanyi* would be a specific notion, and a different word to *quanli he liyi* 'rights and interests.'

From the legal perspective, these two interpretations have been shown to be equally possible, but have different implications (Benney 2013: 42–3; Mannoni 2018). Under the first "portmanteau" interpretation, *quanyi* is 'rights and interests', with the correspondent legal notions of rights and interests having a major role in the Roman and German tradition, under which systems, rights are *lawful* by definition. If it is illegal, it cannot be a right. Consequently, a phrasing such as *feifa quanyi* 'illegal rights and interests', appearing at the time of this writing in 924 court decisions in the CJO database (i.e. 807 more than in a 2017 study conducted by Cao and Mannoni 2017), would be a strong oxymoron. Benney (2013: 42–3) seems to plead for the word-compound interpretation, as he argues that *quanyi* is a notion weaker and more alienable than ordinary rights. As said, both interpretations are plausible: in the first, we can use the Sapir-Whorfian hypothesis (Hoijer 1954) to interpret the wording, and argue that *feifa quanyi* indicates that rights in China, i.e. *Chinese rights,* are not equal to Western rights. This has implications for the debated concept of universality of rights: Is there such a thing as universal rights if the very notion of right has no traces in some countries, such as ancient China (cf. Cao 2017)? In the second, *feifa quanyi* is to be interpreted with *quanyi* as a compound word, and translated with a neologism, or a loan word such as 'illegal *quanyi*' – obscure as this may sound. As can be seen, when two languages are contrasted, such as in legal translation, intralingual indeterminacy may result in interlingual indeterminacy.

The other phenomenon of morpho-grammatical uncertainty is the modifier-modified structure, which is reflected in the relationship between the component of compound words. In this regard, it has to be noted that Chinese word formation largely reflects that of Chinese grammar. For instance, Chinese is an SVO language; accordingly, at the word formation level, the word for "to legislate" is *lifa* (立法), literally 'to create + law', a VO compound. Similarly, in Chinese syntax, the modifier comes ahead of the modified; accordingly, the word for "cold war" is *lengzhan* (冷战), literally 'cold + war', with 'cold' being an adjective modifying, and thus coming ahead of the word for 'war'. This modifier-modified structure is especially difficult to make meaning of, because it is highly implicit and contextual. It is, thus, a source of linguistic indeterminacy. In their famous work on Mandarin

Chinese grammar, Li and Thompson (1989: 48–53) identified twenty-one types of semantic relationships between the components of a word compound, some of them being applicable to the modifier-modified structure. For instance, in a N_1N_2 structure (where N indicates a noun), N_1 may denote the place where N_2 is located, or the material of which N_1 is made, or a place where N_1 is sold, or a person who sells or delivers N_1, etc. (Li and Thompson 1989: 48–53). There is no certainty as to how N_1 semantically connects to N_2. This complicates meaning making in the Chinese language of the law.

To illustrate the semantic complications of the modifier-modified structure, we can go back to the *feifa quanyi* term: *Are the 'rights and interests' or* 'quanyi' *illegal in nature? Or does the modifier* 'feifa' *indicate something different about the modified?* For instance, Cao and Mannoni (2017) have pointed out that the modifier-modified structure in the term may imply *a causal relationship*. Under this interpretation, *feifa quanyi* is not 'illegal rights and interests/*quanyi*', but 'rights and interests obtained through illegal means'. In a decision made by the Supreme People's Court in 2018, the justice affirmed the following:

> "孙[…]系先建房，然后*通过伪造*户籍资料等方式*骗取*《集体土地使用证》，其*权益*并不是株洲县政府的授益性行为而产生，而是想*通过非法手段使其非法权益披上合法外衣*，不应当受到法律保护。
>
> Mr/s Sun […] is the one who first built the construction, and then *by various means, such as falsification* of residence documents, *falsely obtained* a permit to use the collective land. Her/his *quanyi* are not the result of an award of benefits from the County Government of Zhengzhou, but of his/her use of *unlawful means to cover his unlawful quanyi with a lawful veil*. As such, the law does not protect them."
>
> (Decision no. 3528 of the Supreme People's Court[2]. Available at CJO, accessed May 27, 2020; my emphasis)

As can be seen, the rights and interests argued in this case are in fact obtained through illegal means, and the court decided not to protect them. From the legal perspective, this creates legal uncertainty: *how*

[2] Chinese title and number of the cited court decision: 頪洲县人民政府、孙伏良资源行政管理:土地行政管理(土地)再审审查与审判监督行政裁定书 / 2018）最高法行申 3538 号.

come a right is not protected? If it is a right, the law protects it, one may argue. Reversely, as we have seen and as has been affirmed (Cao and Mannoni 2017; Mannoni and Cao 2018), the Chinese court may claim that your rights are indeed rights, but they are not right (in the sense of being correct) – and may not be protected. This creates uncertainty about the legal outcome of the court process and amplifies the discretion of the court.

Another example of this type of indeterminacy at the lexicon level is found in the Chinese law of agency, broadly defined as the relationship that arises when one person (*principal*) assents to another person (*agent*) that the agent shall act on the principal's behalf (American Law Institute, in Munday 2010: 1). In the various laws that currently regulate agency in China, such as the Common Principles of the Civil Law (MFTZ), the General Principles of Civil Law (MFZZ), and the Contract Law (HTF), two key terms appear, *weituo* (委托, 'to entrust') and *daili* (代理, 'to represent'). Due to the linguistic features of the Chinese language at the word formation level, these words combine into compound words in an opaque modifier-modified structure. Uncertainty about the meaning of the compound words arises because one cannot easily ascertain the semantic relationship that connects the modifier to the modified. For instance, *daili ren* (代理人; e.g. article 63 MFZZ) literally means 'a person OF *daili'*), and *weituo ren* (委托人; e.g. article 65 MFTZ) 'a person of *weituo'*; then there is *weituo daili ren* (委托代理人; article 163 MFZZ), meaning 'a person of *weituo* and *daili'*: *but who are these persons? Which is the principal, and which the agent? Or do these terms designate somebody else?* In any less analytic language, such as Italian, these terms would be clearer. As anticipated, the degree of uncertainty may not be the same across various languages. For instance, the Italian word for principal is *rappresentato* – literally 'he who is represented'; the one for agent is *rappresentante* – literally 's/he who represents'. The meaning of these legal words is clearer in Italian than it is in Chinese. Although it is surely true that both for intralingual and interlingual communication one can look up these words in the legal provisions and see how they are used in context to make meaning of them, it is also true that the Chinese law use them in an unprecise and inconsistent fashion: in fact, *weituo ren* is also used in Article 2 of the Trust Law which transplanted the Anglo-American institute of trust – that has nothing do with agency. It seems that the Chinese tendency to translate every foreign-spoken word with Chinese characters, complicates, rather than simplifies,

comprehension. In transplanting foreign legal notions, other languages use much clearer and more transparent strategies. For instance, as can be seen in the German and Italian Translations of the 1985 Trusts Convention, these languages have maintained English "trust", "trustor", and "trustee" as the key terms in trust law, so they cannot be confused with any other indigenous fiduciary relationship, where German and Italian are used. It is not a matter of Chinese characters, but one of imprecision. To avoid semantic indeterminacy, the Japanese language, which also uses Chinese characters, uses the agentive suffix *-sha* (者) at the end of the designations for the trustor, trustee and beneficiary. For instance, "trustor" is *itakusha* (委託者), literally meaning 's/he who entrusts' – a solution that could have, but that has not, been used by the Chinese as well, which also uses *-sha* (read *-zhe*) in many words but the above. This type of indeterminacy is unintentional, for it does not serve any purpose. When the target language is more transparent and less indeterminate than the source language, unintentional morpho-grammatical indeterminacy needs to be solved interlingually by the legal translator. Thus, one uncertain term such as *dailiren* will be translated into a more precise term in a more transparent language, such as Italian.

It seems that although one cannot empirically measure if Chinese is vaguer than other languages, as has been argued (Cao 2018a), some lexical choices at the word formation level seem to be less transparent than others, as in the Chinese examples that I have discussed.

3.3 Intrinsic uncertainty

The last type of linguistic indeterminacy that we are looking at in this study is intrinsic indeterminacy. As we have seen in the taxonomy proposed earlier, this kind of uncertainty has several subtypes.

To make sense of the ordinary uncertainty in Chinese law we can use corpus linguistics. A search in ChinLaw for the most frequent words with LancsBox lists the words *qita* (其他) 'other', and *deng* (等) 'etc.' among the most relatively frequent words (having a coefficient of variation (CV) of 0.604190 and 0.874944, respectively, with *de* 的

being the most frequent word with a CV of 0.181771)[3]. Both these words create open-end lists of items that the citizens – i.e. the subjects of the law – and barristers alike can interpret one way, whilst the judge in another (see also the findings of Cao 2018a: 151-*passim*). This type of generality creates uncertainty in the interpretation of the law. To illustrate we can use the ChinLaw corpus. In order to provide significant examples, I set *qita* as my node (i.e., the word we search for in a corpus with any software specifically designed for the purpose) and retrieved its collocates (i.e., the words that most frequently appear along with it). The association measure I used is logDice, which "favour[s] collocates which occur exclusively in each other's company but do not have to be rare" (Brezina 2018: 70; see also Gablasova, Brezina, and McEnery 2017: 162–6). LogDice operates on a pre-set scale of 14, a value that we may obtain for words that co-occur only exclusively with each other, such as *zig zag* in English (Gablasova, Brezina, and McEnery 2017: 164). I set a threshold at logDice = 8.0, and a collocate frequency higher or equal to 10; I also set a span window of 5 words right of the node, where the modified element appears (as in Chinese one says 'other materials' (*qita cailiao*), and cannot say 'materials other').

Figure 1: Strongest collocates of qita (其他 'other') in Chinese laws (LancsBox)

▼ Span 0<>5 ▼ Statistics 09 – Log

其他

Freq: 8,091 Collocates: 74

Index	Status	Stat (09 –...	Collocate	Stat
1	○	R	责任人员	11.162154080...
2	○	R	直接	11.035458634...
3	○	R	给予	10.530683107...
4	○	R	组织	10.298488443...
5	○	R	依法	10.072645301...
6	○	R	有关	10.052078104...
7	○	R	的	9.6088101236...
8	○	R	方式	9.5202959868...
9	○	R	个人	9.4584416158...
10	○	R	有关部门	9.4515633741...
11	○	R	行政处分	9.4475581401...
12	○	R	单位	9.3497589088...
13	○	R	行为	9.3283160224...
14	○	R	法律	9.2587781810...
15	○	R	事项	9.2420624007...
16	○	R	资料	9.2067661873...
17	○	R	形式	9.2044181844...
18	○	R	条件	9.2013064692...
19	○	R	应当	9.1902625986...
20	○	R	财产	9.1313978911...
21	○	R	人员	9.0993097059...
22	○	R	情形	9.0962153146...
23	○	R	机构	8.9968015454...
24	○	R	或者	8.9854009129...
25	○	R	警告	8.9697508773...
26	○	R	经营者	8.9508417187...
27	○	R	在	8.9503270776...
28	○	R	文件	8.8586803110...

[3] Although these figures may change while the corpus enlarges, they should not be expected to change significantly, due to the corpus being almost finished.

The above Figure 1 shows the first twenty-eight strongest collocates of my node, *qita*. In the figure, I highlighted the collocates *fangshi* (方式 'method, mean, way'), *xingwei* (行为 'act, action'), *qingxing* (情形 'circumstances'), and *wenjian* (文件 'documents'), for it is useful to discuss them here. The implications of the presence of these collocates of *qita* may be that it is up to the court to decide which are, in more concrete terms, the *other* methods, actions, circumstances, or documents that have to fall within the scope of the relevant provisions. By right clicking on any of these words, it is possible to see the instances when the selected collocate and the node appear together in the corpus. For instance, by right-clicking on *fangshi*, I found the following Article 15 of the National Anthem Law (my emphasis):

> "第十五条　在公共场合，故意篡改国歌歌词、曲谱，以歪曲、贬损方式奏唱国歌，*或者以其他方式*侮辱国歌的，由公安机关处以警告或者十五日以下拘留；构成犯罪的，依法追究刑事责任。
>
> Article 15 Intentionally distorting the lyrics or the rhythm of the national anthem in a public place […], *or* dishonouring the national anthem *in other ways* results in a warning from the Office of Public Safety or in detention up to fifteen days. In the event that this constitutes a crime, the offender shall bear criminal liability."

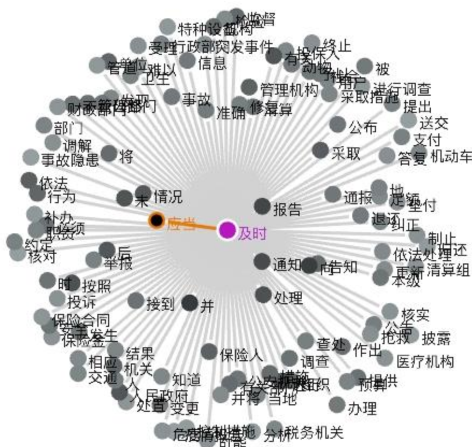
While of course we may have an idea of what "intentionally distorting the lyrics" means, it is hard to understand what the concrete circumstances in which one may be held criminally liable for "dishonouring the national anthem *in other ways*" are, and punished accordingly. This is open to interpretation, either by the citizens, the police, or the court.

An often-mentioned ambiguous Chinese word is *quan*, that we have seen earlier. It means 'authority', 'privilege', 'power', and 'rights'. They are not synonyms in the legal language. Although these meanings are often equally possible in the legal context, sometimes even in the same phrase, they are not the same (Cao 2018b; Mannoni 2018; Yang Chao 2018). The differences between them are especially palpable in cross-lingual communication, when one has to translate ambiguous legal words in a less ambiguous language. Whilst it is true that "[t]he legal translator is not the lawyer […] and must always resist the temptation to clarify or make a word more precise" (Cao 2007b, 81), this is not possible when the target language requires more clarity than the source. As is known, translated texts tend to be clearer and less

vague than source texts, and are thus translated accordingly. For instance, since no English legal word is as ambiguous as *quan* is in Chinese, whichever its translation, the result will be clearer, and so will the legal meaning. In ChinLaw, the phrase *you quan* ‘to have *quan’* has 1,542 occurrences distributed in 306 texts out of the 466 texts that so far constitute the corpus. *How do we translate the phrase? ‘To have the right’, ‘the privilege’, or else what?* No univocal answer can be given.

To illustrate transparent indeterminacy, we can use a top-down approach and search for any transparently uncertain word, such as *jishi* (及时), in ChinLaw, and see if it appears in the data and how it is used. *Jishi* means ‘timely, promptly’, and is imprecise in the legal context: what does the word mean in practice? How many seconds, minutes, hours have to pass so that one can be judged, say, to have acted in a timely fashion, or accused of the contrary? A search of *jishi* retrieves 1,176 distributed in around half of the texts of which the corpus is composed (i.e. 272/466). A search for the collocates of *jishi* in ChinLaw, using the same settings indicated above, but this time searching for them both left and right of the node, finds that the most frequent collocates of *jishi* include *baogao* (报告 ‘to report’; LogDice: 10.55) and *tongzhi* (通知 ‘to notify’; LogDice: 10.49) right of the node, and the performative *yingdang* (应当 ‘shall’) ahead of it. These suggest that *jishi* may mostly occur in phrases such as ‘to promptly report’, ‘to promptly inform’, and ‘shall promptly [do something]’. Figure 2 below is a graphical representation of the collocates of *jishi* obtained with the GraphColl function of LancsBox that better illustrates the bond between the node and its collocates.

Figure 2. Illustration the collocates of jishi (及时 'promptly') in Chinese laws (LancsBox)



The closer the collocates to the node, the stronger their bond with it. As can be seen, *yingdang* (coloured in orange), a legal performative (Cao 2018b), is particularly close to *jishi*. For the purpose of this study, it is important to see how legal meaning varies due to its semantic indeterminacy. So, I right clicked on *yingdang* and retrieved instances of it together with *jishi*. I found various provisions, including the following Article 33 of the Criminal Procedure Law (my emphasis):

> "第三十三条 […] 犯罪嫌疑人、被告人在押期间要求委托辩护人的，人民法院、人民检察院和公安机关*应当及时*转达其要求。[…]
>
> 辩护人接受犯罪嫌疑人、被告人委托后，*应当及时*告知办理案件的机关。
>
> Article 33 […] If a suspect or a defendant asks to be represented by a defense lawyer, the People's Court, the People's Prosecutor's Office, and the Department for Public Safety *shall promptly* notify the request. […]
>
> After the defense lawyer has been instructed by the suspect or the defendant, the attorney *shall promptly* inform the competent authority for the case."

As can be seen, it is unclear what the time limits indicated in the provisions are. One can have a sense of what the word for 'promptly' means in the context, say, 24 hours, but if we keep adding even just

a couple of minutes to that time, we will end up in any longer period of time that the competent authority may then deem as late – and hence invalid.

Finally, here we see the last type of indeterminacy that I have identified in the taxonomy proposed earlier, i.e., extravagant indeterminacy. When ascertaining the meaning of extravagantly indeterminate wordings, factors that differ in nature and that are not measurable have to be considered. This makes the word or phrase obscure in meaning, and thus particularly open to interpretation. When extravagant words are in key parts of the law, such as the Constitution, judicial discretion is high, as no specific provision limits the extent of their interpretations. To illustrate we can use the extravagantly uncertain terms *shehui zhixu* (社会秩序 'social order'), *shehui hexie* (社会和谐 'social harmony'), and *shehui wending* (社会稳定 'social stability'). They are key terms in the Chinese culture and have no univocal definition in scholarship, let alone in Chinese law (see e.g. Guo and Blanchard 2008). They are used in many provisions where the law indicates that a certain law is enacted in order to maintain them, or that nobody shall disturb them. For instance, Articles 36 of the Constitution provides the following (my emphasis):

> "第三十六条 任何人不得利用宗教进行*破坏社会秩序*、损害公民身体健康、妨碍国家教育制度的活动。宗教团体和宗教事务不受外国势力的支配。
>
> Article 36. Nobody shall use religion to disturb the *social order (shehui zhixu)*, harm the health of citizens, obstruct the educational activities of the State. Religious groups and affairs do not receive the control of foreign powers."

Since no truth of the matter can be established as to whether someone is disturbing the social order with their religious activity, this type of linguistic uncertainty creates uncertainty about the law. The Chinese people seem to be particularly afraid of these wordings, for they know that the accusation of disturbing social order *et similia* can be applied to an indefinite number of circumstances by the police or the court. Linguistically, this results in metonyms, by which some of these words stand for their effects. For instance, the word 'harmony' (*hexie*) can be used to mean that censorship has been applied, as in 'has been harmonised' (*bei hexie le* 被和谐了). Additionally, since *héxié* ('harmony') is a quasi-homophone of the word for 'river crab' (*héxiè*),

sometimes 'has been river crabbed' (*bei hexie le* 被河蟹了) is used as an euphemism to indicate that censorship has been applied by the Chinese government (Link and Qiang 2013: 251). This also shows that the effects of these vague words are particularly clear to the Chinese, who are scared of them.

In 2019, a case of domestic violence was submitted to a court in Chengdu: "The beatings were so brutal that Dong Fang (not her real name) was left partially deaf, and her daughter needed three stitches in her hand." (*The Economist* 2019). Thanks to the enforcement of the first national law against domestic violence, Mrs Dong did obtain a restraining order from the Chinese court, but her petition for divorce was rejected at first instance (although it was accepted at second instance; see *Hubei Luntan Wang* 2019). The case caught the media attention, both in China and abroad. The decision at first instance may echo the intentions behind the wordings of the first article of the law against domestic violence, which provides that

> "第一条 为了预防和制止家庭暴力，保护家庭成员的合法权益，维护平等、和睦、文明的家庭关系，促进家庭和谐、*社会稳定*，制定本法。
>
> Article 1 This law is enacted in order to protect the *hefa quanyi* of the family members, to maintain equality, harmony, and civility in family relationships, and to improve family harmony and *social stability (shehui wending)*."
>
> (my emphasis)

If 'social stability' is interpreted in the Confucianist acceptation of family-oriented society, then divorce may be more difficult to obtain than if the phrase is interpreted differently (see D'Attoma 2013). The interpretation of such an indeterminate term such as 'social stability' affects the overall interpretation of a statute, and, ultimately, the way it is enforced.

In some cases, a vague phrasing 'disturbing social order' has been reportedly used by the police to falsely accuse somebody, when the accusations seem to hide a more ample agenda. That was the case of two Uyghur men, belonging to a Turkic Muslim diaspora community living in the Xinjiang Region in China, recognised as one of the fifty-six ethnic groups of the country besides the Han (汉), the major Chinese group. In the following excerpt from a report by the Human Rights

Watch, which has accused the Chinese government of carrying out repressive policies against the Uyghurs (2018, Summary), we can note that the phrasing was used in the accusations that policemen made to two Uyghur men:

> "The [Chinese] police also accused the two men who were held in detention centers of "*disturbing social order*," "endangering state security," and "harboring terrorists." However, *the police did not provide evidence of criminal behavior.*"
>
> (Human Rights Watch 2018: 29; my emphasis)

It is noted that I could not find and, hence, could not consider the Chinese version of the police report. Based on the Human Rights Watch report, 'disturbing social order' here seems to be used by the police to falsely accuse and arrest the two Uyghurs. Under this interpretation, the use of the wording by the Chinese police may *not* be intentional, but its presence in the Chinese law may be, allowing for a multitude of interpretations and applications, and leaving space to judicial discretion.

4. Conclusions

This study has proposed a taxonomy of linguistic indeterminacy and has exemplified its various types with examples from the Chinese statutes and court decisions. The linguistic data used in this study has been retrieved from various sources, including statutes and court decisions, and has been analysed by means of different methods, both quantitatively and qualitatively. This study has found that different types of indeterminacy have different implications, and when the language of the law is particularly vague, those who enforce it have ample freedom of interpretation. Additionally, the Chinese lexicon as used in Mainland China seems to be formed in a more obscure fashion than it is in other languages.

It is important that we do not draw a hasty conclusion from the above and believe that China has the vaguest laws and language. For such a proposition to be maintained, extensive *quantitative* data analysis has to be carried out in a comparative perspective, comparing the Chinese data with those of other countries. This kind of analysis

may be difficult or even practically impossible to carry out, for indeterminacy and vagueness alike may not be empirically measurable. In the absence of such research, the argument put forward in this study cannot go beyond the simple but fundamental principle that the more uncertain the language, the more uncertain the law.

On January 1, 2021, circa one thousand five hundred years after the *Corpus Iuris Civilis* was compiled, China will enact its first Civil Code (*Minfa Dian* 民法典). Expectations on it are sky-high, and so are the demands by the international community: China is expected to better protect the rights, including human rights, of its citizens. This, by just merging into one code different laws that already exist as of now. In linguistic terms, a precise and less uncertain language can improve the understanding of the law and diminish the gap between law in the books and law in action. Nevertheless, as we have seen, not everything is about language: even more is about the *will* behind it. For starters, Article 1 of the new Civil Code provides that the code is enacted to protect the *lawful rights and interests* (*hefa quanyi*) of the civil subjects, *subordinately* to the Constitution[4], whose Article 15, in turn, stipulates that "The State forbids any organisation and individual to disturb the *socioeconomical order* (*shehui jingji zhixu*)"[5]. We will see what the combination of these two provisions *means* in legal terms.

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[4] 第一条 为了保护民事主体的*合法权益*,调整民事关系,维护社会和经济秩序,适应中国特色社会主义发展要求,弘扬社会主义核心价值观,根据宪法,制定本法。

[5] 第十五条 […] 国家依法禁止任何组织或者个人扰乱*社会经济秩序*。

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RECONCEPTUALISING THE THIRD SPACE OF LEGAL TRANSLATION: A STUDY OF THE COURT OF JUSTICE OF THE EUROPEAN UNION*

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Abstract: This paper explores the concept of legal translation as a Third Space through the lens of the 'multilingual' Court of Justice of the European Union (ECJ). In many ways legal translation at that Court fits readily with the characterisation of translation as a Third Space. Due to complex internal production processes the ECJ produces texts which are undoubtedly hybrid in nature, and which exhibit distinctive features on a lexical and textual level marking them out as a product of cross-fertilisation of influences from source and target languages and legal cultures. Even the teleological approach taken towards legal reasoning at the ECJ occupies a space outside the strict confines of the texts involved. Both the processes and the product of the ECJ's language system appear to bear all the hallmarks of translation as a Third Space. However, translation at the ECJ also challenges the concept of a Third Space. The prevailing definitions of translation as a Third Space fail to effectively conceptualise additional nuances of the specific nature of drafting and the complex nature of translation at the ECJ. This paper uses original empirical data to demonstrate that translation at the ECJ places constraints on the undefined, vague and fluid nature of the Third Space, warping the forces at work within that space. In this regard, rather than an amorphous space, the Third Space is better thought of as a determinate area which is delimited by elements of translation process which constrain it. This adapted framing of the Third Space can consequently be used to better understand and illustrate the dynamics at play in other areas of legal translation where the current concept of the Third Space is equally inadequate for encompassing the specific nature of translation practices which impact on that space-in-between.

Keywords: legal translation; translation theory; translators; ECJ; CJEU; legal cultures; Third Space; teleological interpretation;

1. Introduction

This paper explores the concept of legal translation as a Third Space in the context of translation theory, and investigates whether the environment of legal translation at the Court of Justice of the European Union (ECJ) occupies such a Third Space. That environment of legal translation includes explicit translation processes as well as "hidden"

layers of translation involved in the production of ECJ case law (McAuliffe 2016), and the distinctive legal reasoning processes employed by that multilingual Court. The ECJ is unique among international courts insofar as it produces case law in up to 24 languages, applicable throughout 27 member state legal systems. The factors of production of that multilingual case law – comprising collegiate judgments, drafted in a language which is usually not the mother tongue of the drafter, finalised in secret deliberations and which have, as the case proceeds, undergone many permutations of translation into and out of up to 23 languages – undoubtedly fulfil many of the criteria of a Third Space. The culture of compromise at all stages of production of that case law results in the creation and use of a hybrid language with autonomous terminology, consistent with the idea of a Third Space. However, in this paper we argue that while translation at the ECJ does exist in a Third Space, it also challenges the concept of the Third Space owing to the specificities of the Court's processes and hierarchical linguistic structures. Translation at the ECJ places constraints on the undefined, vague and fluid nature of the Third Space, warping the forces at work within that space. The analysis in this paper delineates the concept of the Third Space in the context of legal translation at the ECJ. This concept, as more precisely defined, may also be applicable to other multilingual legal contexts. We argue that if translation at the ECJ is to be considered a Third Space, it must be understood as constituting a special case. This paper presents an overview of the theory underpinning the concept of the Third Space, its relation to translation theory and its application to legal translation, before examining how the specific setting of translation at the ECJ conforms to the notion of legal translation as a Third Space. It then sets out the various elements inherent in the ECJ's processes and structures which challenge the current concept of the Third Space by setting constraints on the freedom of action in that space and distorting the dynamics by which it is usually characterised.

In this paper we draw on original empirical data, namely interviews carried out at the ECJ between 2012 and 2016, to highlight the features of the Third Space in relation to the production of ECJ case law, as well as to support our claim that translation at the ECJ challenges the notion of the Third Space as currently articulated. Interviews are uniquely suited to uncovering factors that impact on the culture of an institution, and can shine a light on processes within an organisation which are otherwise invisible (McAuliffe, Muntean and

Mattioli, forthcoming 2021). The interviews included in this study formed part of a wider research methodology for a larger research project: the Law and Language at the European Court of Justice (LLECJ) project. That project investigated the impact of multilingualism and translation on ECJ case law[1]. The interview techniques used in the interviews allowed for restraint and a focus on listening – respondents were allowed to tell their stories with little interference or guidance from the interviewer (Reinharz 1992: 21). No interview schedule was followed, instead, open questions, based on pre-identified themes were used. Those themes included: processes and functioning of various departments (including judges' chambers) at the ECJ; the roles of various actors in the production of that Court's multilingual jurisprudence; translation procedures and processes; checking and quality assurance processes; the impact of language and culture on work processes in a multilingual institution; the role, autonomy and power of translators. Where respondents were not receptive to open questioning, more focused, closed questions were used. Using such interview techniques resulted in responses that were also very open, and that themselves raised issues relating to concepts beyond the project's research questions. This approach allowed us to analyse the interviews from the perspective of the Third Space, which highlighted aspects of translation at the ECJ that set it apart from other legal translation contexts. The interview sample for this paper consisted of 43 interviews in total (3 judges, 21 référendaires and 19 lawyer-linguists). All interviews were conducted in Luxembourg, in person, and anonymously in accordance with Chatham House Rules[2]. The majority of the respondents agreed to an audio recording of the interview and they were provided with transcripts of the interviews. They were free to edit those transcripts as they saw fit, before the researcher proceeded with coding (in NVivo) and analysis of the data. Quotes from interviews are included in this paper only where they are indicative of a majority view.

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[1] European Research Council, FP7 – Project Number 313353. See the project website, www.llecj.karenmcauliffe.com, for further details, including results and other outputs.

[2] When a meeting is held under the Chatham House Rule, participants are free to use the information received, but the identity of participants may not be revealed.

2. Theoretical Framework: What is the 'Third Space'?

The notion of a Third Space was first developed in the field of postcolonial theory in order to address questions of identity and belonging through language (Bhabha 1994). By envisaging a sphere outside the rigidities of binary cultural structures, a more fluid space can be created where "we will find the words with which we can speak of Ourselves and Others" (Bhabha 2006: 209). Occupying the gap which divides cultural spheres, the Third Space represents a 'space-in-between' where two or more cultures interact and where the dominant culture and language can be subverted (Wolf 2000: 141). This concept of a Third Space can also be applied to broader situations of linguistic and cultural interaction and transfer, in which the translator plays a pivotal role. Through translation a new 'hybrid' language occupying this space in between is forged through a process of "culturo-linguistic layering" (Mehrez 1992: 121). It is therefore within this Third Space, located between two cultural and linguistic poles, that hybridization comes into being. Taking Bhabha's original concept of the Third Space from post-colonial studies and expanding it to encompass a broader spectrum of culturo-linguistic mixing and recombination will inevitably produce hybridity. These complementary notions of Third Space and hybridity, which this paper seeks to explore in the context of translation at the court of justice of the European Union, place the translator at the centre of a cultural interaction, operating within a liminal space in order to mediate between different languages and divergent cultures. Spivak characterises translation as a process where "meaning hops into the spacy emptiness between two historical languages" (2012: 313), envisaging a vaguely defined site for the negotiation of linguistic and cultural dynamics. This concept has long been attractive to translation studies scholars: the translator is often characterised as moving constantly back and forth between two poles rather than being a fixed and static entity simply processing a source text and producing a target text (e.g. Cronin 2000). Operating within this space characterised by a hybridity of language and culture, the translator becomes "shaped by a sort of exile, involved in, yet still on the borderline of, culture" (Wolf 2000: 142). Rather than imagining translation as a bridge between cultures, it is within this dynamic Third Space where cultures encounter one another and new meanings are created. This interpretation fits more readily with a perspective of communication as *inter*cultural rather than

cross-cultural (see Schaffner & Adab 2001). Whereas the concept of cross-cultural communication envisages a simple one-directional transfer of information across linguistic and cultural boundaries – a conveyance of ideas from one place to another within a binary framework – the concept of a Third Space is intercultural in that it is built around the idea of a "process of fertilisation" from each language and culture in all directions, resulting in a product which is linguistically and culturally distinct (Schäffner & Adab 2001: 167). Indeed, this concept reflects the reality of today's multicultural world made up of heterogeneous groups where hybrid texts are "a natural result of our international, intercultural, globalised lives" (Snell-Hornby 2001: 208). EU texts in particular, are considered to be intercultural and hybrid because of the unique manner in which they are created, since "in the course of… multilingual negotiations (with or without the involvement of translation), the specific linguistic and cultural conventions get mixed up and infiltrate each other" (Schäffner and Adab 2001).

The development of translation theory as a discipline and empirical findings in that area largely reflect and confirm the notion of translation constituting a Third Space. The advent of descriptive translation studies (Toury 1995) triggered the development of a branch of research armed with methodological techniques to allow the findings from individual studies to be replicated and compared in order to provide a more general picture of translation behaviour and the norms in operation during the practice of translation. This approach brought about research examining the specific features common to translated texts, embodied in Toury's "laws of translation" (2012). The "law of growing standardization" (Toury 2012: 267) states that source text patterns in translations are often disrupted and the target text tends to standardize culture-specific or specialised items into more general items in the target language. In opposition to this, the "law of interference" (Toury 2012: 274) refers to source text features being copied over into the target text. The concurrent application of these conflicting laws implies that the translated text will have distinctive characteristics and must exist in a sphere beyond the binary framework of source and target language.

Numerous other studies have shown that translated texts differ from non-translated texts in various ways, both because features of the source language tend to "shine through" (Teich 2003) and processes inherent in the practice of translation often alter aspects of the target

language through explicitation, simplification and normalisation (Chesterman 2004). These subtle differences between translated and non-translated texts have been attested to by a range of corpus-based studies. For example, the *Covert Translation* project sought to use diachronic-contrastive analyses to determine the influence of English on German translations in various different genres (House 2006). It produced several studies demonstrating that a range of German textual norms, such as sentence-initial concessive conjunctions and expressions of modality, had been subverted in German translations of English texts as a direct result of the source language's influence (House 2006; Becher, House & Kranich 2009). Moreover, when examining Greek translations of English popular science texts, Malamatidou (2016) shows that the use of the passive voice in the Greek translations is proportionally higher than in non-translated Greek texts as a result of the more common use of the passive voice in the English source texts. Indeed, that study argues that the translations employ a specific language "characterised by a frequency of the passive voice that is *somewhere between*" the source and target languages (Malamatidou 2016: 27, emphasis added). Although a translation usually appears as the product of the target language, the complex interaction between competing linguistic, semantic and cultural requirements results in a code which is effectively a blend of the source and target languages, and bears features of both – the code is situated 'somewhere between' [3]. This empirical evidence, demonstrating differences between translated and non-translated texts, indicates that translations occupy a distinct space outside the strictures of both source and target languages: a Third Space.

How then does this notion of the Third Space apply more specifically to the case of legal translation? Translation of the law needs to accurately reflect the content of the source text while also respecting the linguistic norms of the target language *and* the legal conventions of the target language legal system. The task of the legal translator is to use a legal text in one language to create an equivalent legal text in another language such that a legal decision-maker will arrive at the same conclusion irrespective of the language version used (Ainsworth 2014). Legal translation thus forms its own discrete category due to the

[3] 'Code' is a neutral term used in linguistics to designate any grammatical system with distinctive characteristics, including languages or subvarieties within them (cf. Malamatidou 2016: 5).

unique challenges associated with it, which are not shared by other areas of translation for special purposes (Felici 2010). Unlike other special-purpose texts, legal texts do not have "a single agreed meaning independent of local context" (Steiner 1998). There is no universal legal language, or even terminology: each legal system has a unique legal language, linked to a view of the social order, within the relevant state, region or organisation. That legal language, by expressing legal norms, determines the way in which the law is applied, and shapes the function of law in that society. Legal translators thus need a clear understanding of complex legal concepts in each of the legal cultures involved, and a sound grasp of how and why legal professionals write in the way they do, so that they can adopt the same sensitivities of language when translating legal texts. To do this effectively, they engage in a "culture mediation" to overcome the problems inherent in translating legal texts (Wagner & Gémar 2014: 2). In addition to cultural transfer (where the focus is on translation as a process of negotiation between texts and cultures), legal translation is concerned with legal transfer, insofar as it must take account of the statement of the law that is at the heart of any legal text (McAuliffe 2015). A translation of a legal text should produce the same effects in the target legal system as it does in the source legal system (Šarčević 1997: 72). Constantly confronted with problems of imperfect or partial equivalence between two legal systems and "conceptual voids" due to the "system bound nature of legal terms" (Biel 2014: 42), legal translators are obliged to engage in the highly complex process of transferring and re-expressing the original text by navigating the space in between. By envisaging the legal translation process as a Third Space, the result of such a process will inevitably be a hybrid of the contributing factors from both source and target directions.

While some see hybrid texts as a transitory stage in the development of new text types, which eventually cease to be hybrid (Tirkkonen-Condit 2001: 261; Schäffner and Adab 2001: 295), others claim that translations are in fact "agents of dehybridisation" (Pym 2001: 205) since they mark the line between (at least) two languages and cultures, thereby perpetuating the separation and purity of those languages and cultures (Pym 1996). However, according to Simon's definition of hybridity through translation, the label of 'hybrid texts' should be applied only to those texts which "draw attention to themselves as the products of two separate meaning systems" (2011: 50). Legal translations are inescapably the product of the interaction

between two or more different legal structures and cultures – they are, by definition, created in this intermediate space of cultural negotiation. Translated legal texts are therefore imbued with hybridity, which should not be negatively equated to contamination but to the positive product of "mixed identities and creative interference" (Simon 2011: 49). Despite this, much condemnation has been directed at the hybrid nature of the language used by the EU institutions, which is frequently derided as "Eurospeak" (Koskinen 2000: 55; Vareine 2015). However, errors aside, criticisms often levelled at hybrid multilingual law as constituting 'translationese' are usually unfounded, and betray insufficient knowledge of the complex conceptual network of EU law and multilingualism-related constraints which are involved in the EU's linguistic processes (Biel 2014: 73). While a hybrid text produced in the context of EU law may not conform to the standard norms and conventions of the target language and culture, it is widely "accepted in its target culture because it fulfils its intended purpose in the communicative situation" (Schäffner & Adab 2001: 169). The question addressed henceforth in this paper does not therefore focus on the merits or shortcomings of the hybrid language used at the European Court of Justice, but instead aims to determine to what extent the ECJ's language processes and outcomes conform to the descriptions of the Third Space as outlined above, and whether those processes in fact challenge the concept of that Third Space. As a consequence, this paper fills a gap in the literature by reinterpreting a theoretical framework conceived in post-colonial studies and commonly used in translation studies, and applying it to legal translation at the ECJ for the first time. In so doing, it is possible to draw comparisons with other translation contexts and gain a deeper insight on how legal translation at the ECJ stands alone as a special case.

3. Legal Translation at the ECJ: A Third Space

The multilingual environment of the EU institutions is a fascinating point of study in this context since legal translation of EU texts represents both a "cross-cultural and interlingual communicative act" and a "complex human and social behaviour" (Cao 2007: 5). The European Court of Justice is particularly interesting since much of the

linguistic and cultural interaction in the 'space-in-between' takes place behind closed doors, in behind the scenes drafting and translation practices, and deliberations which historically have been secret. In a number of ways, the legilinguistic practices undertaken at the ECJ are an example par excellence of legal translation as a Third Space. Both the manner in which case law is created and the end product itself are unavoidably hybrid in nature. This section explores the various facets of this hybridity and consequences of legal translation at the ECJ occupying the Third Space.

3.1 How the ECJ language system operates

The ECJ is, from the outside at least, a truly multilingual institution. It produces case law in up to 24 languages[4] and interactions between parties to a case and the Court can take place in any of the EU official languages. Judgments delivered by the ECJ are inevitably the product of the multilingual and multi-layered processes and procedures which are undertaken within the organisation itself. Understanding the processes of production of that multilingual case law is important when conceiving of hybridity in (legal) translation: if the process itself takes place in a Third Space, then the product will necessarily be hybrid. Translation is a key factor in the production of ECJ case law. Although the ECJ is a multilingual, multicultural institution, in order for it to be able to function efficiently, it uses a single working language: French. All applications lodged, and documents coming into the ECJ are translated, by the Court's Translation Directorate, into French, before being processed further (McAuliffe & Trklja 2018). At the other end of the process, judgments and orders are translated from French into the other 23 EU official languages. The ECJ's Directorate General for Multilingualism is responsible for translation and interpretation[5].

[4] The 24 official languages of the EU: Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Irish, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovakian, Slovenian, Spanish, Swedish.

[5] While interpretation undoubtedly impacts on intercultural communication in the oral part of proceedings before the ECJ, consideration of interpretation in this context is beyond the scope of this paper, which focuses solely on the written production and translation of ECJ case law.

Within that Directorate, 23 language units, plus a 'cellule' for the Irish language[6] cover each EU official language. The various language units are responsible for translating all of the documents relating to a case before the ECJ that are required to be translated under the applicable rules: this can include, the request for a preliminary ruling from a national court, Member State observations, interventions by third parties, procedural documents and Advocates General's opinions (where relevant)[7]. At the end of the process, those units are responsible for translating the judgment (McAuliffe 2012). Given the multi-layered process and the multitude of official EU languages, there is a broad range of permutations of translation into and out of up to 23 different languages (McAuliffe 2008). The translation system at the ECJ is a mixed one: direct translation (i.e. from one EU official language to another EU official language) is preferred whenever possible, but the system also provides for 'indirect' or 'pivot' translation through one of the ECJ's designated 'pivot languages' (French, English, German, Spanish, Italian and Polish) (McAuliffe 2017). The result of each one of these translation stages in every language pair involved is undoubtedly the product of great effort and compromise to reach a social, political and legal harmonisation through the use of language common to multilingual EU legal translation in all institutions. Moreover, rather than occurring only at fixed points in the process (i.e. the beginning and end of procedure), translation is an ongoing practice which occurs at various stages during the Court's work on a case, and which can sometimes even be 'hidden' (McAuliffe 2016). The cultural, legal, and linguistic blending of elements also occurs in the space created by other processes established by the ECJ itself.

[6] For reasons related to recruitment and staffing, Irish has been allocated a 'cellule' rather than a full language unit.

[7] The Advocate General (AG) delivers a reasoned opinion on a case, prior to deliberations on and delivery of the judgment. Article 20 of the Statute of the ECJ allows that Court to determine case without an AG's opinion where no new points of law are raised (Treaty on the Functioning of the European Union Protocol (No 3) On the Statute of the Court of Justice of the European Union, OJ C 202, 7/6/2016, p. 210-229).

3.2 Third Space Highlighted by Process of Production

a. Hybrid Texts

It is well known that ECJ judgments, drafted in French and subsequently translated into up to 23 other languages, are collegiate documents. Judgments are drafted by a single judge rapporteur, together with their team of legal assistants, known as référendaires. The French language draft judgments are then deliberated on by a chamber of judges in secrete deliberations (ostensibly conducted in French). The agreements and compromises reached during those secret deliberations are then reflected in the final version of the relevant judgment, drafted in French. Thus, ECJ judgments are, by their very nature, hybrid documents.

> *The judgments are from the Court, not an individual judge. Yes one judge writes the initial judgment… but in fact it is usually drafted by a référendaire in consultation with the judge… but then* [the judges in a chamber] *deliberate and discuss… so the final version comes from the court but with multiple inputs along the way* (référendaire);
>
> *Of course judgments are a collegiate effort. In the sense that they are finalised by a chamber of judges together in deliberations but also before the deliberations. In my cabinet at least we work very much as a team* [judge];
>
> *I think you could say judgments are hybrids, yes. There are multiple contributors all putting their own input to the text in the end. But the judges take responsibility in the end.* (référendaire)

Furthermore, the majority of référendaires, and indeed judges, are not native French speakers. Empirical data demonstrates that working in a second or third language affects the drafting process, and that référendaires tend to apply methods of reasoning common to their own national jurisdiction, or the jurisdiction where they received their legal education (McAuliffe 2016), thus introducing a further element of hybridity into the process.

> *Well of course when I'm first working on a draft I think in* [mother tongue] *even if I'm writing in French. I suppose I just translate how I am arguing into French* (référendaire);

> *...all my reasoning and thinking about the case is done in my own language and then I translate the gist of what I want to say into French* (référendaire);
>
> *I start off planning the arguments in my own language, and then put them on paper in French* (référendaire).

Finally, the pivot translation process means that some target texts are at the end of a translation chain and may therefore bear the features of both the original source text and the pivot language version. Indeed, the term "multilinguistic superdiversity" has been proposed in order to capture the extent of the hierarchical relationships between languages and the relations between them in this context (McAuliffe & Trklja 2018). These atypical aspects clearly situate the ECJ's translation process outside the usual binary translation framework made up of a fixed and non-hybrid source text and a target text arrived at on the sole basis of that single original source text.

b. Legal Reasoning

Evidence of a Third Space can also be found by analysing the process of judicial reasoning at the ECJ. On the face of it, one would expect such judicial reasoning to be inherently multilingual. After all, this is a Court which produces case law in up to 24 languages, sitting (and deliberating) as a Full Court of 27 judges, a Grand Chamber of 15 judges or in Chambers of three or five judges, all of whom have been educated in different legal systems and who specialise in different areas of the law. However, as Bengoetxea points out "by opting for a common working language, the Court preserves multilingualism as an institution but becomes a monolingual decision-maker" (2016). The exception to that rule is when the ECJ carries out genuine comparison of language versions of legislation in order to reach a more comprehensive interpretation of the relevant norm of EU law – although such comparison often merely confirms an interpretation reached by other means (cf. Section 3.2c). The monolingual decision-making referred to by Bengoetxea is reflected in empirical data, in which the notion of a 'French bubble' at the ECJ emerges time and again:

> *On the outside it's multilingual... but inside the Court it's not really multilingual. All that matters is the French version* [of a judgment]. *The cabinets are in a French bubble* (lawyer-linguist);

> *There's a kind of French bubble. As long as the French version* [of a judgment] *says what* [the relevant chamber] *want it to say, that's all that matters* (lawyer-linguist);
>
> *I suppose you could talk about a French bubble. Certainly all our focus is on getting the French version* [of a judgment] *right* (référendaire);
>
> *Getting the French version of a judgment right is key* (judge).

That is not to say that the ECJ does not engage in multilingual reasoning. According to Bengoetxea that comes later in the process, at the translation stage (cf. Section 4.3).

Even in that 'French bubble' the interaction of (legal) cultures in the 'space-in-between' of the ECJ's legal reasoning processes, creates new meaning. Bengoetxea describes the ECJ as a potential laboratory for comparative law and comparative legal cultures, but notes that comparative judicial dialogue at that Court usually tends towards the supranational, rather than the transnational. i.e. the ECJ is interested in "declaring, drawing from, and developing autonomous concepts and independent meaning to ensure effective and uniform application of [EU] law" rather than having any desire to link with national legal traditions (2016). Thus this unique monolingual but multicultural legal reasoning, carried out in a multilingual setting, creates a Third Space in which divergent legal cultures, underpinned by different languages but working within the framework of an aspirationally uniform EU law can develop autonomous legal principles, and a unique method of reasoning and interpreting that law.

c. Teleological Interpretation

When it comes to interpreting the EU's multilingual legislation, the ECJ also occupies a space beyond the confines of the source and target texts. The ECJ's teleological approach to interpretation of EU law is well established, including in the event of discrepancies between language versions of EU legislation (cf: Bengoetxea, MacCormick, and Soriano 2001; van Calster 1997)[8]. That teleological approach focuses on the purpose of the relevant provision, rather than on a strictly linguistic interpretation, and is what Baaij calls the Court's dominant first-order

[8] Unlike ECJ judgments, all language versions of EU legislation are considered equally authentic (Council Regulation No 1 Determining the Languages to be used by the European Economic Community OJ 17, 6/10/1958. 385-386 (as amended)).

argument in dealing with diverging language versions of legislation (Baaij 2018: 167). Baaij also describes another ECJ first-order argument as systemic or contextual interpretation, which considers a provision in the broader context of EU law relevant to that provision (2018: 167). Such contextual interpretation is generally employed by the ECJ alongside the teleological method, and together they comprise what Solan refers to as the "Augustinian" method of interpretation, whereby the ECJ consults a number of language versions of a given piece of legislation and then triangulates in order to identify the underlying legislative intent (Solan 2014). Thus, no matter which approach is taken, rather than ascribing meaning to legal concepts on the basis of a single underlying text, the ECJ, by comparing the different language versions of the same legislation, plays the role of mediator between a group of texts in different languages. The ECJ made this position clear in its judgment in Case 6/72 of 13 March 1973[9] on the issuing of advance-fixing certificates for agricultural products stating that

> no argument can be drawn either from any linguistic divergences between the various language versions, or from the multiplicity of the verbs used in one or other of those versions, as the meaning of the provisions in question must be determined with respect to their objective.

This position has been confirmed by the ECJ in many subsequent cases, including the well-known *CILFIT* case[10]. By occupying a space outside the strict letter of the law, the Court is able to leave itself room for manoeuvre to overcome discrepancies between language versions (Biel 2014). Alongside these teleological or contextual approaches, however, the ECJ also continues to use a more literal interpretative approach, giving preference either to the meaning attributed to the majority of language versions or to the language versions deemed the clearest or less ambiguous (Baaij 2012). According to the majority variant the language version(s) which deviate from the majority must be read in accordance with the other versions. The clarity variant requires that the less ambiguous of language versions should be followed (Baaij 2018:

[9] Case 61/73 *Mij PPW Internationaal NV* v *Hoofdproduktschap voor Akkerbouwprodukten* [1973] ECR 301.
[10] Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA* v *Ministry of Health* [1982] ECR 3415.

168). Consequently, the process and product of legal translation at the ECJ itself occupy the Third Space while the interpretation of EU law undertaken by the Court in the course of its work also occurs within the same Third Space.

3.3 Third Space Highlighted by Language and Style of the Texts Produced

a. Hybrid Language

One of the clearest signs of translation at the ECJ occupying the Third Space is the emergence of new sub-genres of languages brought about as a result of the multilingual processes at work within the organisation. Researchers argue that the large-scale, long-term translation of legislative texts within the EU has led to the emergence of new, hybrid varieties characterised by patterns of usage which differ from standard legal varieties in the various languages involved and are often referred to as “eurospeak” (Robertson 2014: 160) or “eurolects” (Goffin 1994). These varieties emerge from the sui generis multicultural and multilingual contact scenario leading to a convergence on lexical, terminological, structural and textual levels (Mori 2018). In this way, the EU forms “a territory where global (European) meets local (national) to create a hybrid pan-European culture synthesising constituent national cultures” (Biel 2014: 67). This is particularly evident at the ECJ with the appearance of so-called “Court French” - an abstract and opaque variety which differs significantly from ‘standard’ legal French (McAuliffe & Trklja 2018). This arises from the fact that those drafting documents in French are not working in their mother tongue and that numerous legal and linguistic compromises need to be struck. The highly formulaic and repetitive nature of the language used in ECJ case law also contributes to the ‘Court French’ phenomenon (cf. Section 4.1). Over time, this sub-genre has emerged, comprehensible to all those working at the Court, but distinct on various levels from the legal French that is used in national courts.

> *The Court has its own language, its own French. This makes it easier when you’re writing in your second or third language. You just follow the formula.* (référendaire);

> *Once I know what I want to say in a judgment and have spoken with* [the judge rapporteur] *I need to write it in French, well the French of the Court. I have my own glossary of phrases the Court uses and work from that. It's not like the French of the Cour de Cassation, believe me!* (référendaire, interviewee's emphasis);

On a terminological level, some branches of EU law are still in flux and lack their own supranational terminology (Cavoski 2017). New terms constantly need to be created in the EU context in order to find terms for EU autonomous concepts, to account for new supranational realities (Doczekalska 2009), and to avoid borrowing national terminology, which may lead to ambiguities (Bajcic 2011). Indeed, country-specific legal terms will inevitably result in discrepancies between the language versions (Biel 2014), hence the need for terminologically distinct and culturally neutral EU language varieties. This distinction was highlighted in the *CILFIT* judgment, which stated that "legal concepts do not necessarily have the same meaning in Community law and in the law of the various member states"[11]. That terminologically distinct EU legislative language is inevitably reflected in the language of ECJ judgments, which deal with the validity and interpretation of such legislative acts.

> *Often you have no choice in the language you use because you have to refer to the legislation. If the legislation uses particular terminology you have to use that too.* (référendaire);

> *We're tied to the same terminology that is in the legislation that the case is reviewing*. (référendaire).

b. Hybrid Style

Looking beyond terminology, the format and style of the ECJ's judgments are also a hybrid of the French technique and the more flexible dissertation method (Berteloot 1988). In the first few decades following its inception, the style of the Court's judgments closely mirrored that used in the French Cour de Cassation (Arnull 2018: 907). They were split into two parts containing a small number of very long sentences punctuated by the recurrent phrase "attendu que", with one part setting out the facts and arguments of a case and the other explaining the Court's ruling and its reasoning (Arnull 2018: 907).

[11] Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA* v *Ministry of Health* [1982] ECR 3415, para 19.

However, by the late 1970's, with an ever-increasing case load, the style of long sentences was abandoned, and by the 1990's, judgments no longer followed the French Cour de Cassation's approach of setting out separate accounts of the facts and arguments of a case (Arnull 2018: 908). These macro-textual features of style and format serve to further enhance the hybrid nature of the texts produced. It seems that in its quest to produce a homogeneous discourse, the multilingual negotiations which take place within the Court create a blending together of various different linguistic and cultural conventions. However, although the hybrid nature of the language used at the ECJ in both source and translated texts seems clear, the level of hybridity is not necessarily uniform across all EU languages and may be more marked in some languages than in others (Trklja and McAuliffe 2019)[12].

c. Atypical features

Far from concealing such hybridity, the atypical elements used in the texts produced by the ECJ serve to highlight the distinct nature of these texts, situating them in a separate sphere from national legal documents. The lawyer-linguists who are then responsible for using these Euro-varieties to translate the ECJ's texts do so in such a way as to remind the reader that the law in question is European law (McAuliffe 2011). It is important that they preserve the unusual features from the source text in the target text rather than opting for more conventional translations which might paper over the 'strangeness' which signposts the origin of this law. Indeed, it is the "*foreign* element which reveals the interstitial" and "becomes the *unstable element of linkage*…that has to be engaged in creating the conditions through which *newness comes into the world*" (Bhabha 2004: 326). In this case, these 'foreign elements' are the atypical linguistic features which occur in all language versions of documents produced by the ECJ. Examples of such features on a lexical level include the use of 'administrative organ' instead of 'board of directors' in EU English (Biel 2014: 64); in EU Dutch, the use of 'asielzoeker' [asylum-seeker] is preferred to 'vreemdeling' [stranger], which is more common in Dutch national legislation and case law (De Sutter & De Bock 2018: 55); and in EU Italian, there is a preference for the use of 'direttiva' [directive] as opposed to 'decreto'

[12] Biel (2014) argues that the textual fit of EU legislative language is likely to be more convergent for procedural languages and more divergent for genetically different languages such as Slavonic or Ugro-Finnic languages.

[decree], which occurs more frequently in domestic law in Italy (Mori 2018: 211). While these examples are taken from research focusing on legislation and studies using corpora consisting of a range of EU text types, they have been cross-referenced with corpora consisting solely of Court judgments (using SketchEngine and the EU Case Law Corpus)[13]. That triangulation verifies that these examples apply equally to ECJ judgments in comparison with national court judgments. These atypical elements serve to alert the reader that the law in question is situated outside the usual sphere of domestic law. In this way, the unusual features contained in the ECJ judgments serve as symbols which flag to the reader that they need to be interpreted in light of the European context in which they have been produced (McAuliffe 2011).

3.4 Third Space Highlighted by the Status of the Translated Judgment

Another element which clearly situates translation at the ECJ in a distinct Third Space is the nature and status of the final judgments which the court produces. During their secret deliberations, the judges agree their final judgment in French, which then has to be translated into the language of the case, unless this also happens to be French. In most cases it is therefore usually a translated version of the original judgment which is signed by the judges and which constitutes the single authentic version of the judgment (McAuliffe and Trklja 2018). As a result, the final product of the entire legal process enacted by the court is itself, in the vast majority of cases, a translation. This is in stark contrast to many other legal translation contexts, such as international contract translation, where the original is translated into one or more languages purely for information purposes, while the original always maintains its status as the one authentic and legally-binding text. Indeed, in practice, in most contexts, a translated legal document remains entirely subordinate to its original and very rarely has the status of an authentic text (Garzone 2000). In the case of the ECJ however, the definitive legal judgment is the result of a final act of hybridisation

[13] https://www.sketchengine.eu/; www.llecj.karenmcauliffe.com/euclcorp

through the translation of the French version as agreed in the deliberations.

4. Challenging the Concept of the Third Space

Although elements of ECJ legal translation certainly fulfil the criteria of the Third Space in a number of ways, as set out above, translation at the ECJ also challenges that concept. For various reasons discussed below, translation at the ECJ does not conform to the prototypical conception of legal translation as a Third Space. Notions of the Third Space as an undefined, vague and fluid space characterised as a kind of "spacy emptiness" (Spivak 2012: 313) in which linguistic and cultural dynamics can be freely negotiated do not sit easily with the constraints within which translation at the ECJ is carried out. Translation at the ECJ is constrained in both linguistic and legal senses, and, at its core, strives to achieve unity and consistency in EU case law. This section sets out how ECJ translation, in fact, warps that Third Space, and thus should be considered a special case.

4.1 Language constraints: repetition and formulaicity

First, a key founding idea of the notion of a Third Space is the theory that

> [i]t is that Third Space, though unrepresentable in itself, which constitutes the discursive conditions of enunciation that ensure that the meaning and symbols of culture have no primordial unity or fixity; that even the same signs can be appropriated, translated, rehistoricized, and read anew (Bhabha 1994: 37).

However, the linguistic processes at work within the ECJ are at odds with this idea of constant reinvention and fluidity. Indeed, far from constituting an example of a "protean" and "moving" process (Wagner & Gémar 2015), ECJ judgments demonstrate a high degree of formulaicity and repetition. For a number of different reasons, there is a strong tendency to constantly repeat the same expressions (McAuliffe

2015). First, the fact that the majority of référendaires, who draft judgments at least in the first instance, are working in a language that is not their mother tongue, leads in many instances to a reliance on phrases from 'settled case law':

> *Because I'm not working in* [my mother tongue] *I rely a lot on what the Court has said before* (référendaire);
>
> *Lots of what I write is* [made up of] *stock phrases from the settled case law* (référendaire);
>
> *It's easier to write in the French of the Court if you follow what it has said before. There are lots of connecting phrases, sentences defining legal principles, the bits around the new part of the judgment, that you can copy over* (référendaire, interviewee's emphasis).

Furthermore, there is a perceived pressure to cite previous case law in order to aid or speed up the translation process:

> *If you use phrases that have been used already in judgments,* [those phrases] *have also already been translated. It is simpler and quicker in the end.* (référendaire);
>
> *I feel like there is a certain pressure to use the same sentences from earlier case law to help speed up the process* (référendaire).

Also, in the digital age it is quite simply easy, quick, and convenient to find phrases in the 'settled case law' that may fit a particular argument:

> *Well, it's easy to do a search for the subject of your case and find how the Court has said it before. Why change it?* (référendaire).

Finally, it is often argued that since the ECJ is (still) building an EU rule of law, it is necessary to use the same terminology, and formulaic phrases consistently throughout that case law (McAuliffe 2015). However, while it may be legitimately argued that legal language by its very nature needs, to some extent, be formulaic in order to ensure legal consistency, Trklja and McAuliffe's corpus-based study (2019) empirically demonstrated the unusually high level of formulaic expressions used in ECJ judgments in comparison to domestic supreme court judgments. Indeed, the process of drafting judgments is "inherently conservative", with whole phrases remaining untouched from one judgment to another, thus limiting, in the name of linguistic

consistency, the amount of original drafting which occurs (Arnull 2018: 912).

That formulaic repetitiveness is, naturally, reflected in the subsequent translations. Interestingly, however, the linguistic consistency in the French language version of ECJ judgments is not reflected consistently across all languages (Trklja and McAuliffe 2019). This may be attributable to the relatively late adoption by the ECJ of computer tools (most computers at the ECJ were running MS-DOS operating systems until as late as 2002, with more user-friendly systems, including easily searchable databases being introduced incrementally in the early 2000s), and computer assisted translation tools (The ECJ developed its own matrix known as the Generic Text Interface (GTI) in the late 1990s, which allowed users to incorporate previously translated phrases from earlier case law, and full-function CAT tools were introduced at the ECJ in 2015) In the absence of digital tools, it would have been an extremely difficult task to ensure such consistency across all languages. Conversely, the introduction of CAT tools certainly contributes to repetition and formulaicity in ECJ case law:

> *With* [CAT tools] *a lot of the traditional style translating is already done. Since the Court's language is already so formulaic* [the CAT tools] *can just pull out the relevant phrases, so everything is repeated ad eternum* (lawyer-linguist);

Indeed, where référendaires have previously worked as lawyer-linguists (something which is not unusual) CAT tools can exacerbate the repetitive 'cut and paste' approach even before the translation stage:

> *I was very used to translating the judgments and* [CAT tools] *were always giving me the same phrases. So when it comes to writing the judgments I already have those phrases. I can search for the translations into French and start from there* (référendaire, former lawyer-linguist).

4.2 The influence of the source language

As explored above, the original concept of the Third Space, emerging from post-colonial studies, is "embedded in a priori power relations" (Wolf 2000: 134), in which the dominant role may be (but is not

necessarily) subverted, allowing for “different types of hybridizations” (Wolf 2000: 134). On the surface, therefore, the influence of the source language – French – in ECJ translation would appear to fit with the notion that a language or culture can remain predominant within the Third Space. However, in spite of this, the hierarchical structure of the languages used at the ECJ, and the linguistic processes it follows, produce an outcome which falls outside the scope of what would be expected from any standard interpretation of the Third Space. Indeed, any conception of the Third Space implies some degree of inevitable rebalancing towards the target language or culture, which is constantly counteracted by the predominant position of French at the ECJ. In ECJ case law, French holds a hierarchically superior position over the 22 other languages by virtue of its special status as sole working language of the Court (McAuliffe & Trklja 2018). Since the founding of the ECJ, its judgments have always been drafted in French and then translated into the other official languages – French has always occupied the source language position for judgments and the other languages have always been in the target position. The relationship between the languages has therefore always been fundamentally unbalanced. This predominance of French undermines the notion of a process of intercultural fertilisation, since French exerts linguistic and cultural influence over all the other languages used. This hierarchical system warps the concept of the Third Space, changing it from a space “located between existing referential systems and antagonisms” (Wolf 2000: 135) to one where a single referential system eclipses all others and the ‘antagonisms’ impinging on the process, as examined in Section 3 of this paper, are overridden.

As discussed above, in the context of translation, the features of the source language can often manifest themselves in one way or another in the target text. If this phenomenon occurs repeatedly in translations, these features may begin to exhibit themselves with increasing frequency even in non-translated texts in the target language, eventually becoming established in that language (Kranich 2014). In other words, if languages are in contact in a translation scenario for a sufficiently long period and, as is the case in ECJ judgments, the translation direction is always the same i.e. from French, certain features of the target language may change under the influence of the source language, in much the same way that language contact occurs in other settings (cf. Thomason & Kaufman 1988). This influence of French on EU varieties of other languages can be seen, for instance, in

the use of certain lexical items in judgments, such as *stagiaire* and *domiciliataire* in the English version of judgments, even though English-language terms for these concepts readily exist (Kermas 2010: 56–7). French 'language creep' can also been observed through the Court's references to the Council's or Commission's "legal service" rather than to the legal department or division; "missions" instead of business/work trips; "detached" instead of seconded. Lawyer-linguists are also encouraged not to break up or combine sentences differently from the original French texts. This inevitably means that, as well as the terminology used, the structure of the target texts will also be heavily influenced by the source text, in some cases leading to target texts with unnatural sentence lengths and structures. On top of this, Bobek, Advocate General at the ECJ, argues that such

> *linguistic* domination spills over into *intellectual* domination, which leads to ideas, notions, or solutions from outside the Francophone legal family not being genuinely represented within the institution, and not being systematically translated into its cases (Bobek 2015: 307).

Indeed, it appears that the status of French as the working language permeates all aspects of the Court's work putting members who do not have proficient command of French at a disadvantage (Arnull 2018). This predominant position of French in the ECJ's processes has a major impact on the nature of the Third Space in this context, significantly limiting the degree of freedom in the cultural and linguistic negotiation occurring within it.

4.3 Challenges to the translator's neutral space

Following Bhabha's initial conception of the Third Space, Spivak further developed the notion within translation studies to envisage translators as "intimate readers" willing to "surrender to the text" (Spivak 2012: 315). Moreover, in her 2005 paper *Narratives in and of Translation*, Mona Baker discusses the tendency in translation studies discourse to depict translators "as honest and detached brokers who operate largely in the *spaces between* cultures" (Baker 2005: 11). The notion of the Third Space can therefore tend to envisage a kind of "idealised no-man's land" lying between discrete cultural groupings

(Baker 2005: 11). Here again, the processes at the ECJ challenge this notion of translation as a Third Space, since the role of the lawyer-linguists responsible for translating the ECJ's judgments differs significantly from that of a conventional translator (McAuliffe 2016). To be eligible to apply for a job as a lawyer-linguist one must have: a law qualification (degree or equivalent, or be qualified to practice as a lawyer in the relevant jurisdiction) from the jurisdiction whose language is the 'target' language (ECJ lawyer-linguists always translate into their mother tongue); a thorough knowledge of at least two other EU languages (one of which should be French); and a good knowledge of EU law. Thus, the majority of the lawyer-linguists working at the ECJ come from a legal background since they need comprehensive knowledge of the various legal systems involved, while also requiring proficiency in a number of EU official languages (McAuliffe 2016). The role of 'lawyer' or 'legal professional' is founded on upholding legal norms, such as the need to remain faithful to the law and ensuring precision so as to avoid ambiguity and uncertainty (McAuliffe 2016). In contrast, the role of the translator inevitably involves a degree of indeterminacy as a result of the culture-bound nature of language. Despite efforts to develop a more precise "science of translating" (Nida 1964) to systematise the translation process and overcome such imprecision, it is widely accepted that the objective of achieving an "equivalent response" through translation is implausible (Hu 1992). The dual roles of lawyer and translator therefore pull in different directions – something which is keenly felt by the ECJ's lawyer-linguists:

> *Sometimes it's like walking a tightrope. On the one hand I'm a lawyer and my role is to make sure that the law as set down by the Court is clear and precise and is exactly what the judges intended. On the other hand, as a translator, I feel very constrained a lot of the time. Even if I knew exactly what the judges intended… because, you know, the deliberations are secret… I don't really have the freedom to get that message across in the way I would like. My hands are tied to a large degree* (lawyer-linguist).

Bengoetxea goes as far as to say that it is through translation that "genuine multilingual reasoning occurs" at the ECJ. In order to replicate the legal effect of the base French language judgment, discursive interactions between lawyer-linguists and the judges' chambers acquire a new critical dimension (2016). Ideally, judges and their chambers

should encourage dialogue with lawyer-linguists not just about terminology but also about the most appropriate ways to articulate various arguments in order to ensure uniformity of legal effect across all EU member states. This is unfortunately not always the case: translation is, arguably, perceived more as an obstacle than an asset by the ECJ (Bengoetxea 2016). However, there is little doubt that the remit of the lawyer-linguists at the ECJ goes far beyond a linguistic rendering of texts from one language to another and requires them to juggle the tasks of a translator with the role of legal specialist. Indeed, the vast majority of lawyer-linguists interviewed (14 out of 19) identified as a lawyer 'first' and a translator second. Even those who identified primarily as translators immediately qualified that by pointing out that they were "*not just a translator*" and/or "*a lawyer too*". As legal specialists, most lawyer-linguists interviewed view themselves as fulfilling a "checking" or "gatekeeper" role to ensure the correct application of EU law (McAuliffe 2016: 24). The results of such gatekeeping are never visible in the final text of a judgment, but can be very important. For example, it was a lawyer-linguist who, in the Order of the Court in the *Saetti and Frediani* case[14], noticed the inconsistent use of the terms *réemploi* and *réutilisation* in French, in the context of hazardous waste disposal. If left unchecked, the order could potentially have created a legal loophole in the hierarchy of EU waste management (McAuliffe 2016: 24–25). In that case, the lawyer-linguist in question had to draw upon her expertise as a linguist and her expertise in EU (environmental) law, and intervene to request the relevant judge/référendaire to change the original French language order. Thus, the consequence of the multifaceted role of the lawyer-linguist is that the neutrality of the Third Space, as is frequently inferred in translation studies, is somewhat hindered as they seek to ensure the legal coherence of the texts being translated.

5. Conclusion

As this analysis has shown, in many regards, legal translation at the European Court of Justice is consistent with the characterisation of

[14] Order of the Court (Third Chamber) of 15 January 2004 in case C-235/02 *Criminal Proceedings Against Marco Antonio Saetti and Andrea Frediani* [2004] ECR I-1005.

translation as a Third Space. The texts produced at each stage are inevitably hybrid in nature as a result of the complex processes at work within the Court. On both a lexical and textual level, the texts exhibit features which mark them out as distinct and the product of a cross-fertilisation of influences from both source and target languages and legal cultures. Indeed, the use of autonomous EU terminology in ECJ judgments has the effect of signposting to the reader that the text occupies a separate space, outside the sphere of national legal texts. Moreover, the teleological approach taken towards legal reasoning at the Court also occupies a space outside the strict confines of the texts involved. Even in the case of the final judgment, the one text which is upheld as authentic and binding is, in most circumstances, a translation. Both the processes and the product of the ECJ's language system therefore appear to bear all the hallmarks of translation as a Third Space. Nevertheless, the specific nature of drafting and the complexities involved in translating at the ECJ place constraints on the Third Space, which means that legal translation at the ECJ must be considered a special case that does not fully conform to the prevailing definitions. Indeed, previous descriptions of translation as a Third Space fail to effectively conceptualise the additional nuances inherent in the case of the environment in which translation at the ECJ occurs. By examining legal translation at the ECJ through the theoretical framework of the Third Space, this paper is ultimately able to highlight the aspects which set it apart from other legal translation contexts.

Rather than constituting a fluid and ever-changing space, the processes in play at the ECJ actively create and perpetuate high levels of formulaic language, which is frequently repeated and reused in documents produced by the Court. The supposed fluidity of the Third Space is thus heavily constrained in this regard, leading to formulaicity where one might expect versatility. Moreover, while the Third Space framework allows for a certain degree of dominance to remain apparent between source and target language, the hierarchical supremacy of French in this case is such that the concept of the Third Space is definitively skewed. Translation at the ECJ places French in an unassailable position of linguistic and legal dominance and constantly acts against any kind of rebalancing that would usually be expected according to the standard notion of the Third Space, which then further limits the linguistic and cultural negotiation that is a central tenet of that notion. Finally, the role of the lawyer-linguist introduces another significant caveat into the standard model of translation as a Third

Space since the function fulfilled by the lawyer-linguists at the ECJ goes far beyond the typical role of the translator. Instead, lawyer-linguists bring their own legal expertise to the task to ensure the legal coherence of the texts, thus not conforming to the model of the translator as a neutral go-between.

In light of this analysis, the concept of legal translation as a Third Space must be amended and more precisely defined in the context of the ECJ: the concept, thus adjusted, may then be applied to other international or supranational multilingual legal settings on the same basis. This new conceptualisation requires the specific processes and structures within the Court to be taken into account when determining the form and the degree of freedom for linguistic and cultural negotiation within this space. It is insufficient in this context to refer to legal translation as an autonomous and fluid site of intercultural communication since it is impinged upon by various factors related to the institutional processes and the role of the individuals responsible for carrying out the translation. With this in mind, an examination of the ECJ reveals that the dynamics within the Third Space can be altered and warped by the particular characteristics of the translation environment in question. Therefore, although invariably characterised elsewhere as a site for "the negotiation of incommensurable differences" (Bhabha 2004: 312) in which "all forms of culture are continually in the process of hybridity" (Rutherford 1990: 211), the Third Space does not always take the same shape and the dynamics within it do not always entail the same degree of freedom for every type of legal translation. To some extent, the notion of translation as a Third Space is a useful model for conceptualising legal translation at the ECJ, but, as currently articulated, it is unable to fully capture the specificities of legal translation at the Court. In that environment, rather than an amorphous space, the Third Space is better thought of as a determinate area which is delimited by elements of the translation process which place constraints upon it. This adapted framing of the Third Space can consequently be used to better understand and illustrate the dynamics at play in other areas of legal translation where the current concept of the Third Space is equally inadequate for encompassing the specific nature of the translation practices which impact on this space in-between. This analysis also opens up further avenues for the possible exploration of how the Third Space can be shaped and constrained by features of legal translation in other areas outside the ECJ, which in turn will advance our

understanding of the flexibility and limitations of the notion of a Third Space in a wide range of legal translation environments.

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