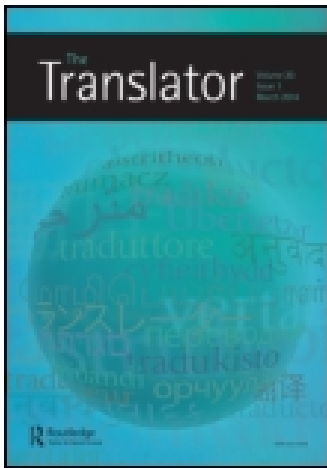


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INTRODUCTION

Law-in-translation: an assemblage in motion

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Law-in-translation, as it manifests itself in either oral or written form, can be usefully described as an assemblage in motion. Oscillating between the generic and the singular, legal translation has gradually affirmed a disciplinary identity of sorts vis-à-vis other well-established genres, such as literary translation or the translation of Scripture. Further, legal translation has been moving from the local to the ‘glocal’ scene. This neologism wishes to capture the idea that while law is more and more subject to translation on the European or international level, it remains unable to escape local forms of understanding. Finally, legal translation has been amplifying its semantic range from the literal to the metaphorical. Long confined to the transmission of oral or written statements across languages, law-in-translation features new instantiations as can be illustrated, for instance, through the ever-expanding circulation of legal concepts from one country to another and the re-formulation of law into economic language within international business relations.

Keywords: legal translation; globalisation; comparative law

In an era marked by processes of economic and political integration arguably unprecedented in their range and impact, the translation of law, whether understood in a narrow or broader sense, has assumed a significance that can hardly be overstated. The following situations are typical.

As the expression of a strong post-colonial commitment, Hong Kong has introduced a unique bilingual legal system where the common law can be practiced in either Chinese (often meaning Cantonese in oral expression and Standard Modern Chinese in the written context) or English (Ng 2009). Elsewhere, an influential group of European lawyers is seeking to develop a common private law for the European Union (EU) that stands to be translated in 24 official languages (Sacco and Castellani 1999; Pozzo and Jacometti 2006; Baaij 2012). Meanwhile, former political and military leaders are being prosecuted for genocide before the International Criminal Court, a body consisting of judges from many different legal backgrounds and operating according to a complex multilingual procedure (Tomić and Beltrán Montoliu 2013). Controversially, the US Supreme Court has relied upon foreign law in order to declare unconstitutional a Texas statute criminalising certain forms of sexual behaviour and a Missouri statute imposing capital punishment for crimes committed while under the age of 18 (Posner 2009; Jackson 2010; Waldron 2012).¹

Since they raise the matter of law in translation, though in different guises, these instances prompt urgent questions. Can legal rules carry identical normative implications in more than one language? Can law achieve uniformity despite requiring to be rendered in many languages? How do interpreting and translation affect adjudication in a multi-lingual courtroom? To what extent can a given legal text make sense in a different legal

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culture? In effect, these interrogations highlight only some of the weighty epistemological issues that inevitably confront the cohorts of lawyers and translators currently acting or thinking across national borders.

In the following, I seek to demonstrate that law in translation can usefully be conceived as an assemblage in motion. I am using the term ‘assemblage’ in a Deleuzian sense, that is, as ‘a multiplicity which is made of many heterogeneous terms and which establishes liaisons, relations between them’ (Deleuze and Parnet 1977, 69). Perhaps, in fact, a hyphenated compound such as ‘law-in-translation’ can better convey my claim about two historic disciplinary figures, law and translation, coming together to form an interdisciplinary hybrid, that is, to operate as an (interdisciplinary) assemblage. As I affirm connectedness, I also want to evoke metaphors akin to mosaic or patchwork or miscellaneity, to emphasise tropes such as montage or contingency or indeterminacy, and to accentuate processes like indefiniteness or fluidity or plasticity. In other words, I seek to indicate at the outset that law-in-translation is neither a strongly rule-governed nor a static configuration. Along the way, I want to eschew any idea of essentialism or reification. Indeed, law-in-translation, as it has been manifesting itself in either oral or written form, has become an increasingly complex and dynamic practice.

With a view to emphasising salient facets of law-in-translation as assemblage, I divide my argument into three parts. First, I show that legal translation, oscillating between the generic and the singular, has gradually affirmed a disciplinary identity of sorts vis-à-vis other well-established genres, such as literary translation or the translation of Scripture. Secondly, I explain how legal translation has been moving from the local to the ‘glocal’ scene. Specifically, I claim that while law is more and more subject to translation on the European or international level, it remains unable to escape local forms of understanding – the neologism ‘glocal’ capturing this situation better than the familiar term ‘global’. Finally, I address how legal translation has been amplifying its semantic range from the literal to the metaphorical. Long confined to the transmission of oral or written statements across languages, law-in-translation features new instantiations as can be illustrated, for instance, through the ever-expanding circulation of legal concepts from one country to another and the re-formulation of law into economic language within international business relations.

I. Oscillating between the generic and the singular

Whatever delineation one is able to identify between legal and other translators, the governing division of labour can only be the result of an unceasing interaction between the two groups. ‘Prominent in this interaction is competition, although there are also accommodation, alliance, absorption, and all the other processes of group ecology’ (Abbott 2001, 136–137).

To this day – a fact which militates against the specificity of law-as-translation – there is no text on translation in the field of law that has acquired a historical value comparable to Martin Luther’s famous ‘On Translating: An Open Letter’ (1530), Friedrich Schleiermacher’s influential essay ‘On the Different Methods of Translating’ (1813) or Walter Benjamin’s ground-breaking reflections on ‘The Task of the Translator’ (1923). Indeed, the study of the epistemological issues arising from the transposition of a given law-text in a different language constitutes a relatively recent phenomenon (Sacco 2005, 8). Surprisingly, though, the translation of legal texts enjoys a longer tradition even than Bible translation (Šarčević 1997, 23). In this regard, the peace treaty between Egyptian Pharaoh Ramesses II and Hittite King Hattusili III (ca. 1259 BCE), a copy of which written

in Akkadian is displayed above the entrance to the Security Council Chamber of the United Nations (UN) in New York,² and the *Corpus Juris Civilis* (529–539), an exhaustive compilation of Roman law featuring one of the first known legal rules on translation,³ offer two age-old illustrations of law-in-translation. Nevertheless, the history of legal translation remains to be written, a lacuna which cannot but have a detrimental impact on disciplinary self-assertion. To be sure, some studies provide a brief historical overview (Šarčević 1997, 23–53; ASTTI 2000), while others develop an in-depth analysis of a specific period (Lavigne 2002). Yet, as one scholar underlines, ‘too little is known about the various translational strategies and techniques used through the ages in translating legal texts to be able to make general statements on the evolution of legal translation’ (Lavigne 2006, 158).

It is not before the second half of the twentieth century, specifically on the occasion of the XIIth International Congress of Comparative Law in Sydney in 1986, which featured a range of national reports and a general report on legal translation (Beaupré 1987), that one witnesses a concerted attempt by lawyers to assert a measure of jurisdiction over legal translation. At the time, however, detailed studies on legal translation were still only slowly emerging, and these first monographs proved essentially to be the work of translation studies scholars having developed an interest in law. Jean-Claude Gémard’s two-volume text, *Traduire ou l’art d’interpréter* (1995), thus discusses legal translation from an interdisciplinary perspective. For his part, Walter Weisflog’s *Rechtsvergleichung und juristische Übersetzung* (1996) addresses legal translation from a comparative standpoint. And Susan Šarčević’s book, *New Approach to Legal Translation* (1997), offers a fully-fledged examination of the problems surrounding the transposition of legal texts across languages in particular within a plurilinguistic context. Only later would one encounter an affirmation of the idea that lawyers themselves should claim control over translation, or that the translation of legal texts should be subjected to the ‘master’ discipline of law (Abbott 2001, 137). Though translation studies scholars have maintained their interest in law-in-translation (Varó Alcaraz and Hughes 2002), nowadays one can point to a number of studies devoted to the translation of legal texts and written specifically from the vantage point of law (Legrand 2005; Pommer 2006; Cao 2007; Bocquet 2008; Megale 2008; Bailleux et al. 2009; Glanert 2011).

Yet, the lawyers’ structuration of a discrete socio-intellectual space – inevitably featuring such a disciplinary ‘marker’ as the organisation of international conferences (De Groot and Schulze 1999; Olsen, Lorz, and Stein 2009; Cornu and Moreau 2011; Glanert 2014) – cannot hide the fact that the translation of law is not always easily distinguishable, epistemologically speaking, from other forms of translation: a perceived lack of singularity which may help to explain its lack of recognition within translation studies (as in Bermann and Porter 2014). To be sure, scholars have long debated to what extent legal translation constitutes a special case (Harvey 2002). Weisflog, for example, argues that ‘as regards the matter of legal translation, we are dealing with a separate category of translation, so to speak “independent”’ (1996, 52). Other authors adopt a more nuanced point of view. Thus, Gémard asserts that ‘due to the specific character of law (*locus regit actum*) [legal translation] derogates in part from the rules and principles usually followed in translation’ (1995, II, 143). Along similar lines, Šarčević maintains that ‘[s]ince legal texts are subject to legal criteria, it follows that a theory for the translation of legal texts must take account of legal considerations. By the same token, it cannot disregard basic issues of translation theory’ (1997, 5).

In many respects, legal translation is akin to acts of translation pertaining, say, to scientific or sacred texts. The language of law, like that of science or religion, comprises a

characteristic conceptualism and technicity, an identifiable unfolding of intralingual and phenomenological pathways, an ascertainable terminology and style. Although compelling scholarly evidence is available in support of this claim (Mertz 2007; Mellinkoff 2004; Tiersma 2000), I shall be content to quote from Jonathan Swift's satire. In *Gulliver's Travels*, making special reference to lawyers, Swift exclaimed that:

... this Society hath a peculiar Cant and Jargon of their own, that no other Mortal can understand, and wherein all their Laws are written, which they take special Care to multiply; whereby they have wholly confounded the very Essence of Truth and Falsehood, of Right and Wrong; so that it will take Thirty Years to decide, whether the Field, left me by my Ancestors for six Generations, belongs to me, or to a Stranger three hundred Miles off. (1735, 265)

But matters are more complicated than may initially appear to be the case for the number of legal languages is in fact endless, each legal language – be it French law, Chinese family law or Quebec contract law in English – revealing an infinite number of particularities, most notably a singular brand of discursivity, intertextuality and indeterminacy (Glanert 2011, 132–144).

Not only does legal language, then, behave like other specialised languages in the way in which it harbours a singular array of epistemological features but, as is the case with other disciplinary vocabularies also, the language of law displays an important measure of cultural embeddedness (Terral 2004; Mattila 2013). Indeed, every legal language reflects a certain '*Denkhorizont*' – a 'mental horizon' (Stolze 1999, 47). Consider the fact that the EU features two major legal compositions – the civil-law tradition embracing most of the countries of continental Europe, on the one hand, and the common-law tradition comprising much of the UK and Ireland, on the other – each reflecting a singular scheme of intelligibility. As Pierre Legrand observes, 'the common law *mentalité* is not only different, but irreducibly different, from the civil law *mentalité*' (1996, 63). Of course, in the same way as one should not minimise the differences between the various civil-law jurisdictions, one ought not to presume too rapidly the existence of resemblances between countries that are part of the common-law world. For example, the law of sales is not conceived identically in Germany and France. Further, US tort law differs in many respects from its English counterpart. Nevertheless, civil-law countries, contrary to those of the common-law tradition, partake of the same epistemological ancestry. Indeed:

... the histories of the civilian legal systems all share the common denominator of Roman law; and the study of the Roman texts has throughout continental Europe from the 11th to the 20th centuries resulted in a particular methodological outlook based on the codification of laws. The common law countries do not on the whole share this history or mentality. (Samuel 2013, 1)

For example, the civil-law and common-law traditions conceive of rules very differently. Whereas German or French lawyers suppose that legal knowledge is essentially grounded in rules, English lawyers' fashioning of the law emphasises facts. In English law, 'legal reasoning is a matter not of applying pre-established legal rules as such, but of pushing outwards from the facts' (Samuel 2002, 104). Again, my point is that legal languages carry cultural specificity very much as do, say, literary or religious languages.

Still, despite important epistemological commonalities with other disciplinary discourses, I suggest that legal translation must ultimately be regarded as a *sui generis* case of intercultural communication. Crucially, law fulfils unique normative and performative roles (Glanert 2011, 149–153). Typically, legal texts purport to regulate behaviour

and impose sanctions for non-compliance. In other words, law does not content itself with descriptions of the world but regularly accomplishes concrete and consequential acts within it (as when the statute says ‘unless otherwise agreed, the buyer of goods is not bound to accept delivery of them by instalments’, or when the judge declares that ‘the assumption of responsibility by the solicitor towards his client should be held in law to extend to the intended beneficiary who [...] may, as a result of the solicitor’s negligence, be deprived of his intended legacy’). It behoves legal translation therefore to be understood as ‘an act of communication in the mechanism of law’ (Šarčević 1997, 55). Accordingly, the translation of law must demand specific legal expertise on the part of the translator (Stolze 1999; Lavoie 2003). It has become trite to recount that in law the implications of translation are so significant that the choice of one form of words over another can mean peace or war (Gémar 1995, II, 141). Unsurprisingly, ‘[f]or the lay person, legal language is a minefield’ (Newmark 1993, 17).

On account of its normative character, legal translation inevitably discloses a heightened concern for exactitude, a preoccupation which is acutely felt whenever more than one linguistic version enjoy equal legal authority. This is why legal translators tend to pursue semantic effects that would be identical across languages rather than attempt faithfully to reproduce, say, stylistic attributes. With the goal of identical normative implications in mind, legal translators have developed specific translation strategies, most notably joint or co-drafting. Gémar reminds us that:

Canadians in particular, have followed a long and difficult path, painfully testing several methods and different approaches, from extremely literal translation of statutes and other legal instruments to much freer ways of achieving the desired textual equivalence, and eventually to co-drafting of laws. (2014, 67)

Indeed, Canada, due to its bilingualism and bijuralism, stands as a fascinating case-study allowing one to probe the practice of legal translation a little further.

In Canada, translators are closely involved in the drafting of bilingual federal legislation (Lavoie 2002). Every Canadian federal statute is indeed simultaneously produced in the two official languages, English and French. Both versions are meant to convey the legislator’s message in identical fashion while attesting to the singularity of each language. In the 1980s, the Canadian Ministry of Justice, having translated statutes from English into French for two decades after French had become Canada’s other official language in 1969, created a system of bilingual co-drafting, a strategy which had already been tested in other plurilingual countries such as Switzerland (Šarčević 2005). In Canada, all legislative texts are now drafted by a team consisting of two lawyers, one francophone and generally hailing from the civil-law world, the other an anglophone usually trained in the common-law tradition. The co-drafters, who are in principle assisted by a team of jurilinguists, have to attempt the fabrication of identical meaning for the two linguistic versions of a given federal statute. Of course, the legislator’s choice in favour of co-drafting is not innocent. In fact:

... the instauration of co-drafting was grounded in a desire to repair the inequalities of the past. [...] With a view to respecting the two official languages in Canada, it was decided to change the old practices in order to offer the francophone lawyer a status equal to that of his anglophone counterpart. Such a project was therefore informed by political stakes. (Lavoie 2002, 205)

While '[t]he new methods of bilingual drafting have succeeded in modernising legal translation by swinging the pendulum to idiomatic translation and even beyond to co-drafting' (Šarčević 1997, 46), it is still the case that legal translators and translators in general are facing common problems at the most primordial level. In particular, law-in-translation cannot overcome the lack of equivalence across languages nor can it surpass the indeterminacy of meaning inhering to any linguistic formulation – two crucial limits which all translation endeavours have to address (Glanert 2011, 165–203). Despite significant efforts by legal translators and notwithstanding the more recent initiatives of the Canadian legislator in favour of legal bilingualism, the epistemological fact remains that two or more languages do not signify identically – indeed, that they *cannot* signify identically. In this respect, Martin Heidegger aptly reminds us that 'language *is* monologue' (1959, 134; emphasis in original). Even the juxtaposition on the same page of the two linguistic versions of a Canadian federal statute that would have been simultaneously drafted cannot guarantee 'true' bilingualism. Jacques Derrida reminds us that since the Canadian co-drafters, say, one francophone and one anglophone, do not speak the same language, there cannot have been any genuine dialogue between these interlocutors. At best, legal languages – but Derrida's remark applies to all languages – will therefore feature a 'negotiation', which implies the idea of a power relation and the opportunity for the more powerful language or interlocutor to carry over the other (1986, 85).

Although legal translation appears to share affinities with the full range of translatable situations, it retains significant singularity since the inability for two languages to signify identically and the indeterminacy of meaning pertaining to each language will have a different impact if we are talking, say, of the regulation of criminal behaviour or of a translation of Camus's *L'Étranger*. Let me explain. It is one thing to have the first sentence of Camus's French text read '*Aujourd'hui, maman est morte*' and an English version of it transpose the words as 'My mother died today' (Messud 2014, 6), but it is quite another matter to have Canada's Criminal Code define a dangerous sexual offender, in English, as an individual who 'has shown a failure to control his sexual impulses' and, in French, as a person who '*a manifestement une impuissance à maîtriser ses impulsions sexuelles*'.⁴ Inequivalence and indeterminacy have a profoundly different impact when it comes to a regulatory scheme like criminal law than when the discrepancy across languages concerns a novel. I am evidently not advocating the epistemological supremacy of law over literature or anything of the kind. Rather, I want to emphasise that even as law's translators are seen to be facing the same challenges as the translators of other genres – all of them having to contend with inequivalence and indeterminacy – law's struggle with inequivalence and indeterminacy remains singular in as much as it entails singular implications.

As it has tried to carve a disciplinary niche that would distinguish it from other genres of translation, law-in-translation has been incessantly oscillating between the generic and the particular, that is, it has been operating as an assemblage pertaining to the two configurations, one or the other holding the upper hand depending on the situation, but neither managing fully to exclude the other from the relevant semantic zone. Another defining feature of law-in-translation concerns the way in which it has been moving from the local to the 'glocal'.

II. Moving from the local to the 'glocal'

Not least because of the progressive integration of economic markets and the rapid development of new technologies, law has become one of the key vectors of

transnationalism. The proliferation of private contracts involving companies and individuals from different countries and the multiplication on the supranational and international levels of agreements and treaties aiming at the development of common rules and principles, not to mention the official institution of courts and tribunals composed of national judges called upon to adjudicate on crimes committed in different places in the world, offer some salient examples of what is probably an irreversible trend towards law beyond boundaries. As they raise a host of legal questions, transnational initiatives also imply an interaction of languages – beyond, that is, the kind of ‘neo-Babelianism’ that lawyers have been practising and which a translation studies scholar charitably describes as reflecting ‘the desire for mutual, instantaneous intelligibility between human beings speaking, writing and reading different languages’ (Cronin 2003, 59). Now, I claim that even the most purportedly universal, planetary or global legal enterprise is, as a matter of epistemological fact, unable to circumvent translation. And, given inequivalence across languages and the indeterminacy of meaning inherent to language, with every linguistic instantiation must come a measure of localism. Through language the presence of the local within the global is ultimately inescapable – hence the neologism ‘glocal’, which I borrow from sociologist Roland Robertson (1995). On the world stage, too, law-in-translation can thus be seen to operate as an assemblage: it combines a transnational fabric with linguistic iterations that compel the law-text to get re-acquainted with the localism it had sought to overcome. A few illustrations drawn from well-known examples can exemplify my point.

At the time of its creation in 1945, the UN felt it had to account for the diversity of national languages. Specifically, the UN Charter, which takes the form of an international treaty, is written in five official languages enjoying equal status.⁵ For its part, the General Assembly of the UN ensures efficient communication between its 193 Member States through recourse to six official languages. In order to facilitate the day-to-day administration of the organisation, the work of the UN Administration is, in principle, accomplished in two working languages, that is, in English and French.⁶ As regards the International Court of Justice, the statute indicates the use of two official languages, which are also English and French.⁷

At European level, the linguistic project is, if anything, even more ambitious. The EU, currently counting 28 Member States, features one of the largest translation services in the world (Müller and Burr 2004; Kjær and Adamo 2011). From its inception, the European Community opted in favour of a system of equal representation in the four languages of the five founding members. Despite the progressive extension of European Community competences, for instance through the creation of the EU, and notwithstanding successive enlargements implying a multiplication of official languages, the principle of equality between languages has never been seriously disputed. Currently, the staunch institutional commitment to this idea gives rise to a situation which is nothing less than astonishing in the sense that the EU operates on the basis of 24 official languages (note that translations implying 24 languages generate no less than 552 different combinations since each language can be translated into 23 others). As incredible as this fact may appear, every piece of EU legislation has to be translated into all official languages. Moreover, all language versions are equally authentic, which means that each and every one of them potentially offers the basis for an official interpretation of EU law. In a publication devoted to linguistic pluralism, the European Commission explains that ‘the reasons why the European Union needs [so many] official languages are not hard to find: they are democracy, transparency and the right to know’ (2004, 17).

While the outlines of the linguistic workings of the UN and the EU that I have sketched readily show how the institutional decision to function in more than one official language necessarily makes it impossible for any form of global legalism to speak with one voice, I can emphasise the point by making reference to the work of the European Commission. Most of the Commission's legal initiatives are directives, which are strictly delimited in their scope, for example to the field of consumer law. But some projects have been developed with a view actively to promoting the uniformisation of contract law as a whole within the EU. In time, two influential task forces, the 'Study Group on a European Civil Code' and the 'Acquis Group', acting upon a request from the European Commission, produced a *Draft Common Frame of Reference* in the shape of six bulky volumes (Bar, Lando, and Clive 2010). This complex legal framework, comprising a detailed set of rules and principles written in English, is destined to be translated into the different languages of the EU apparently on the basis of the unexamined view that everything is adequately translatable (Müller and Burr 2004; Kjær and Adamo 2011). According to two of the main players in the field of European private law, at the very heart of European legal initiatives must indeed lie the elaboration of a 'common terminology for jurists which overcomes jurisdictional boundaries' (von Bar and Lando 2002, 221).

Unsurprisingly, some critics have responded that any European legal uniformisation must remain utopian on account of the semantic discrepancies across legal languages in force within the different Member States and because of the differences in meaning that interpretation and application of the so-called 'uniform' law at local level will inevitably generate (Sacco and Castellani 1999; Sacco 2002; Pozzo and Jacometti 2006; Kjær 2008; Glanert 2008, 2011; Baaij 2012). A similar observation has been formulated regarding the judicial decisions of the Court of Justice of the European Union (CJEU). In this regard too, the EU's multilingualism is seen to impose an unsurmountable challenge (Paunio 2013; McAuliffe 2013). Karen McAuliffe thus argues that '[t]he approximation and imprecision inherent in language and translation do have implications for the case law produced by the CJEU. The concept of a single EU legal language that allows EU law to be uniformly applied throughout the Union is, in fact, necessarily based on a legal fiction' (2013, 881).

Making specific reference to the EU, some authors, accept the fact of inequivalence across national languages and the further fact of inherent linguistic indeterminacy, and therefore conclude that uniformisation of law cannot be expected to arise given the persistence of more than one linguistic iteration of the transnational law-text; nonetheless, they defend the view that one can envisage the emergence of a common European *discourse*. For example, Anne Lise Kjær asserts that 'what is common, is not the *language* of the European legal actors, but their *discourse* about European law' (2004, 397; emphasis original). The idea of a common discourse within the EU is largely grounded in theories developed by Jürgen Habermas, a leading German philosopher and sociologist commonly regarded as the most famous representative of the second generation of the so-called 'Frankfurt School'. Habermas defends a theory of society articulated around the act of communication understood as emphasising the emancipatory capacities of human reason. In his major work, *The Theory of Communicative Action* (1981), he contemplates a situation in which different individuals, all capable of speaking and acting, are in search of a consensus allowing them to coordinate their endeavours. In Habermas's social model, language plays a central role.

According to Habermas, 'the communicative model of action presupposes language as a medium of uncurtailed communication whereby speakers and hearers, out of the context

of their preinterpreted lifeworld, refer simultaneously to things in the objective, social, and subjective worlds in order to negotiate common definitions of the situation' (1981, I, 95). However, one must ask whether individuals who do not share the same lifeworld – which is the case with people living in the various Member States across the EU – can effectively be in a position to operate 'simultaneously', that is, to communicate with each other. In particular, one has to ask if national languages must not be regarded as an obstacle to communication for actors originating from different cultural communities – a matter which connects to the larger issue concerning the feasibility of Habermas's injunction that individuals should move 'out of the context of their preinterpreted lifeworld'. Here, one comes back to Derrida's claim that interlocutors operating in different languages effectively articulate a negotiation rather than a dialogue. In Derrida's words:

... my here-now is absolutely untranslatable and [...] the world in which I speak is absolutely heterogeneous. It has nothing in common with that of anyone, here. What I feel within me, what I live within me, the way in which words come to my mind, all of that is absolutely incommensurable. With the multiplicity of those who receive it, understand it each more or less in their own way and each from a here infinitely different from my here, there is no common space; this distance between his here and mine is infinite [...]. Between two 'here', there is a properly infinite irreducibility, an infinite heterogeneity. (1998, 247)

But one is also directed to Hans-Georg Gadamer's Heideggerian argument casting pre-judgments as culturally-situated anticipatory structures allowing what access to the world there can be and what understanding of it is possible, such epistemological encumbrances proving in fact essential for any understanding to take place at all, and pointing to '[t]he recognition that all understanding inevitably involves some prejudice' (1986, 272).

Habermas's theory raises other difficulties too. First, there is simply no consensus among scholars working in the fields of linguistics and sociology with respect to the meaning to be ascribed to the term 'discourse'. Though Habermas himself may not be to blame for this dissonance, it is problematic, to say the least, that the defenders of discourse theory should be advocating consensual communication even as they themselves appear unable to reach a consensus regarding the meaning of 'discourse'. Secondly, individuals who wish to participate in a discourse must make use of a given language. And if participants to a discourse come from different cultural backgrounds, as is the case within the EU, more than one language will have to be mobilised. Those who advocate the possibility of developing a common discourse in a transnational situation cannot therefore escape the problems caused by translation, which I have already addressed. Thirdly, in as much as it inescapably features an object, a discourse assumes a *local* act of interpretation and application. Imagine two European lawyers engaging in a conversation having as its object the concept of 'human rights'. The interpretations that will be propounded of this concept, as the two lawyers earnestly pursue their discussion, will inevitably mobilise relevant cultural values, for example ideological commitments, which cannot but manifest themselves as forms of *local* knowledge.

It becomes necessary, then, to ask to what extent Habermas's ideas can be of any significant use in a transnational context. Interestingly, a critical comparison of Habermas's discourse theory with Gadamer's philosophical hermeneutics and Derrida's deconstruction shows that, contrary to what some European lawyers have been suggesting, any mobilisation of the Habermasian concept of 'discourse' is ill-adapted to a situation featuring 24 official languages, such as prevails within the EU (Glanert 2013). Ultimately, there are no reliable criteria allowing one to conclude that interlocutors addressing each other in different languages could ever operate consensually (in the

meaningful sense of the term). Rather, it is the epistemological case that any interpretation of the supposedly uniform legal text will persistently be coloured by the languages, not to mention the cultures, in which it finds itself being iterated. Indeed, any interpretation that takes place will have to manifest itself through the filter of the specific language into which the legal text will have been transposed (not to mention the further filter of the interpreter's own language). In sum, understanding is always already, if perhaps unconsciously, fashioned according to the language into which the allegedly uniform text has been framed and then again according to the language into which its interpreter has been enculturated.

Let me briefly emphasise the matter of the interpreter's language. It must go without saying that an interpreter, say, a lawyer, cannot apprehend a text, a situation or a person in any other way than through the prism of language, which is not an external and neutral tool but the medium of an interpretive tradition. 'Our languages speak historically', which means that, in the end, '[t]he language speaks, not the individual' (Heidegger 1957, 96). Thus, the lawyer's interpretations are never objective, but always conditioned by the tradition that she inhabits and that inhabits her and that forms the substance of her 'pre-judgments'. Hermeneutical theory aptly concludes that 'one understands *differently*, if one understands at all' (Gadamer 1986, 297; emphasis in original; I have modified the translation). Although hermeneutics has experienced a contentious relationship with deconstruction, Derrida agrees with Gadamer on this important point as he says that '[t]here is no world, there are only islands' and notes that 'all attempts at passage, at bridge, at isthmus, at communication, at translation, at trope, and at transfer' must accept defeat *ex ante* (2002, 9). The epistemological fact is that no matter how earnestly the partisans of legal uniformisation seek to achieve their goal, it remains true that on the ground, so to speak, irrespective of any proclaimed uniformisation, so-called uniform laws are written in more than one language and are ascribed meaning by individuals such as lawyers operating in more than one language. In these situations, it must uniformly be the case that uniformity cannot obtain as a matter of law. In the final analysis, the claim for a common discourse, as advocated by Habermas, or the argument in favour of a common legal discourse, as defended by some European legal scholars, has to be regarded as an exercise in wishful thinking. Even conceding the commendable motivations presumably animating the idea, one is bound to accept that one faces a project that cannot be achieved: the self-in-language and the other-in-language are destined for agonism, not consensus.

Though one appreciates how the development of a common legal language would ideally constitute a necessary part of international or supranational politics, the epistemological fact remains that lawyers and translators simply cannot jettison local knowledge as it informs every linguistic manifestation. It follows that every instance of alleged globalisation consists, on closer analysis, in a case of 'glocalisation' (Robertson 1995). As regards law-in-translation, this finding means that it exists as an assemblage featuring both local and global valences, one carrying over the other according to the circumstances at hand but neither ever managing to occupy the full semantic zone. In the next section, still addressing the theme of law-in-translation in motion, I show that law is no longer confined to acts of translation in a traditional literal sense but that it has increasingly become subject to modes of translation in more metaphorical ways.

III. Expanding from the literal to the metaphorical

For centuries, legal translation has been understood to imply rather straightforwardly the transposition of legal texts from one language to another – the word 'language' being

taken in the conventional sense to include English, Portuguese, Indonesian and such like. Although legal scholars accept that legal translation should not be reduced to the mechanical transfer of words from one language to another, the emphasis within law remains on the transmission of oral or written statements across traditional linguistic systems. In this sense, Šarčević notes that '[a]s in other areas of translation, the basic unit of legal translation is the text' (1997, 5). Over the past years, however, the meaning of law-in-translation has expanded to help make sense of phenomena such as the circulation of legal rules or the transformation of law into economics.

In this respect, one of the most controversial debates within the field of comparative legal studies relates to what has commonly come to be called 'legal transplant theory' (Nelken and Feest 2001). The term 'legal transplant' is taken from legal scholar Alan Watson, who coined it in the 1970s to refer to 'the moving of a legal rule [...] from one country to another, or from one people to another' (1993, 21). According to Watson's influential theory, most changes in a legal system are the result of legal borrowing. He argues that 'law develops by transplanting, not because some such rule was the inevitable consequence of the social structure and would have emerged even without a model to copy, but because the foreign rule was known to those with control over law making, and they observed the (apparent) benefits which could be derived from it' (1978, 135).

Watson's theory is far from being unproblematic. First, Watson seems to believe that law is largely independent of society, that it somehow leads a life of its own. He appears to regard legal rules as bare propositional statements that are not connected to any legal culture in particular. According to Watson, law is an autonomous entity unencumbered by historical, epistemological or cultural baggage. For this reason, rules can easily travel across jurisdictions and find themselves at home anywhere in the world. Watson is adamant: '[L]egal rules are not peculiarly devised for the particular society in which they now operate' (1978, 96). Predictably, Watson's brazen assumptions have been vigorously challenged (Kahn-Freund 1974; Abel 1982), and objections point to striking shortcomings. Consider Richard Abel's observation to the effect that 'many of [Watson's] examples deal only with law in the books' (1982, 786), or his remark that '[Watson] rejects the study of legal institutions and processes in order to concentrate upon substantive rules' (787). Secondly, Watson uses a misleading metaphor that does not aptly account for the circulation of legal ideas. Law cannot be 'transplanted' from one place to another like a tree, an image which suggests that the law will remain the same object and continue to grow as before. Again, every legal text is formulated in a language. As it finds itself being incorporated in a new environment, the text is bound to undergo a significant change in meaning, not least if it finds itself being formulated in a different language along the way. The word 'translation' describes the phenomenon more adequately as it conveys not only the idea of transfer, but also that of transformation.

For Pierre Legrand, Watson's theory is grounded in an over-simplistic understanding of the law in general and of legal rules in particular (1997). Rather than having an independent empirical existence, rules are always embedded in a specific culture. They are a cultural output. And rules are never self-explanatory. Relying on Gadamer's philosophical hermeneutics, Legrand shows that the meaning of a given legal rule is in important ways fashioned by its interpreter, who is a historically, epistemologically and culturally situated being. As a result:

At best, what can be displaced from one jurisdiction to another is, literally, a *meaningless* form of words. To claim more is to claim too much. In any *meaning-full* sense of the term,

“legal transplants”, therefore, cannot happen. [...] This is because, as it crosses boundaries, the original rule necessarily undergoes a change that affects it *qua* rule. (Legrand 1997, 120)

In other words, the initial rule becomes a different rule.

For his part, Gunther Teubner has also offered a critical assessment of ‘legal transplant’ theory. In a key article, Teubner examines the various ways in which the concept of ‘bona fides’, which originates from Roman law, has undergone significant change since its incorporation into English law, through a European directive, in the guise of ‘good faith and fair dealing’. Rejecting, like Legrand, the idea of ‘transplant’, Teubner describes the foreign element as a legal ‘irritant’. According to Teubner, the transfer of a legal concept from one law to another will have unpredictable affects, because structural couplings will change in unforeseeable ways:

When a foreign rule is imposed on a domestic culture [...] it is not transplanted into another organism, rather it works as a fundamental irritation which triggers a whole series of new and unexpected events. [...] ‘Legal irritations’ cannot be domesticated; they are not transformed from something alien into something familiar, not adapted to a new cultural context, rather they will unleash an evolutionary dynamic in which the external rule’s meaning will be reconstructed and the internal context will undergo fundamental change. (1998, 12)

As I read Teubner, one of his key claims is that the host legal system needs to ‘translate’ the import into its own legal culture if the change is to prove at all effective.

Consider ‘plea bargain’, an important feature of US criminal procedure, and its translation into various Western European laws that are grounded in the civil-law tradition. In the US, the expression ‘plea bargain’ refers to an agreement in a criminal case between the prosecutor and the defendant whereby the defendant agrees to plead guilty to a particular charge in return for some concession from the prosecutor. In the United States, approximately 90% of criminal cases are resolved through recourse to plea bargain rather than by jury trial. Though every state and jurisdiction has a different set of rules dealing with the practice of plea bargain, US courts always have to approve the specific arrangement being reached in any given case. On account of increasing pressure on their courts because of a combination of higher litigation rates and lower staffing budgets (not to mention overcrowded jails and, again, insufficient resources), some European countries, including France, became interested in plea bargain as an efficiency measure.

On 9 March 2004, the French legislator introduced into the French Code of Criminal Procedure (*Code de procédure pénale*) a form of ‘plea bargain’ known as ‘*comparution sur reconnaissance préalable de culpabilité*’ or CRPC and often abbreviated to ‘*plaider coupable*’ (Articles 495–7 to 495–16 and 520–1).⁸ Inevitably, the French ‘*plaider coupable*’ differs in substantial respects from the US ‘plea bargain’ (Papadopoulos 2004; Babacar 2014). For example, in France the public prosecutor cannot modify the categorisation of the offence. All that the prosecutor is able to offer the defendant is a sentence reduction, which cannot exceed half of the maximum contemplated by law. If a deal is struck, the court must still approve the arrangement. To be sure, the court may take the view that the agreed sentence is either too low or too high or that there is no sufficient evidence to show guilt. Further, the ‘*plaider coupable*’ initially concerned only relatively minor offences entailing a maximum sentence of five years of imprisonment. On 13 December 2011, the French legislator considerably widened the scope of the procedure by allowing the use of ‘*plaider coupable*’ as regards most offences, some outstanding exceptions having to do with causing bodily harm with or without intent, manslaughter or tax evasion (Article 495–7).⁹

Upon translating a foreign legal idea, it is necessary for the host legal system to transform it so as to adapt it to local circumstances, and this for two reasons at least. First, the concept has to fit into the existing legal framework, which means that the legislator needs to draft the new rules in such a way that they do not contradict other local rules or infringe, say, certain rights and freedoms that would be guaranteed by the Constitution. For example, in France the *'plaider coupable'* must abide by the principle of equality before the law (*'principe d'égalité devant la loi'*), one of the most important achievements of the French Revolution. Article 1 of the 1789 Declaration of the Rights of Man and Citizen (*'Déclaration des droits de l'homme et du citoyen'*), a document which now enjoys constitutional value, ensures that everyone is subject to the same laws, with no individual or group enjoying special legal privileges. The idea that a litigant could have his crime re-categorised into a lesser one or that he could have his sentence substantially reduced would run contrary to the French idea of 'equality'. Also, the legal community and indeed society at large have to approve the new legal practice, something which can only be achieved if the concept is adjusted to fit local values and patterns.

The French example shows that legal ideas, such as 'plea bargain', are not transplanted from one legal culture to the other. Neither the law's expression nor its meaning remain the same. What happens is rather a translation, which through the idea of 'transformation' allows for the necessary fit within the host culture. Indeed, the acculturation that has happened in France has also featured in other civil-law countries which have introduced the US legal concept of 'plea bargain', such as Italy (Grande 2000). It is hardly surprising therefore that Máximo Langer, in his extensive comparative legal study on the reception of 'plea bargain' in Germany, Italy, Argentina and France, concludes that 'the paradoxical effect of American influence on the criminal procedures of the civil law tradition may not be Americanisation, but rather fragmentation and divergence within the civil law' (2004, 4). Generally speaking, there is evidence that references to 'legal transplant' are now being cast aside. At least in some circles, the critiques of the expression are seen as having demonstrated 'the inaptness of the legal transplant metaphor' (Choudhry 2011, 19).

A more recent form of law-in-translation concerns the reformulation of law in economic language. I have in mind 'legal origins' theory, which developed in the United States in the 1990s – and which has in fact been branded an instance of 'over-translation' (Legrand 2014). According to 'legal origins' theory, to frame the matter somewhat economically, a country's economic performance is closely linked to whether its legal system is rooted in the common-law or civil-law tradition. Since 2004, the International Finance Corporation (IFC), a member of the World Bank Group, has been issuing reports effectively grounded in 'legal origins' theory, measuring and comparing the ease of doing business in more than 130 countries.¹⁰ The so-called *Doing Business* reports purport to show that, from an economic standpoint, common-law countries are generally performing better than those that historically hail from the civil-law tradition.

Problematically, though, recourse to 'legal origins' theory implies the articulation of the legal into a strictly computational language, with a view to identifying the 'better law'. This thesis provides support for – and perhaps derives inspiration from – conventional comparative legal scholarship (of the kind, it must be said, that is being increasingly discredited). In their established treatise, Konrad Zweigert and Hein Kötz, two of the twentieth century's most prominent comparatists, thus argue that '[o]ne of the aims of comparative law is to discover which solution of a problem is the best' (1996, 8). For Zweigert and Kötz, '[s]ometimes one of the solutions will appear "better" or "worse" [...]. Often, however, [the comparatist] will find that the different solutions are equally valid

[...]. Often, he will find that one solution is clearly superior. Finally, he may be able to fashion a new solution, superior to all others' (46–47). Zweigert and Kötz's logic of 'ranking' seems hard to escape.

Thus far, comparatists have largely failed to address the 'legal origins' thesis, no doubt because, given their predominantly silo-like view of disciplinary configurations, they consider it to pertain to economics (but see Siems 2007, 2014; Michaels 2009; Legrand 2014). Some of the reactions that have made themselves heard have gone so far as to worry that this new permutation of law-in-translation might be calling into question the very future of comparative law. Indeed, one comparatist asks whether comparative law is now likely to be replaced by economics or statistics, or if, on the contrary, there is something specific to comparative law that cannot be supplanted (Michaels 2009). Other critics focus on the way in which economic comparisons of legal systems involve abstracting from legal specificity and reducing all law to a common quantitative measure. Here, the argument is that mathematisation of law simply cannot account for its complexity, nor can it convey any sense of its cultural fabric. The effort to reduce laws to diagrams and statistics is thus regarded as ill-informed. In a recent paper, Legrand (2014) claims that in such a case translation ought not to obtain, and that what should take place is a 'withholding' of law-in-translation.

The examples I have developed, whether concerning the transfer of the US 'plea bargain' to France or the transposition of law into economic language, reveal how law-in-translation exists as an assemblage also featuring the metaphorical in addition to the literal sense in which the expression has traditionally been used. If it is the case that metaphors take words 'in an unexpected direction' (Donoghue 2014, 1), it can fairly be expected that an expression like law-in-translation will prove relevant in many more situations that have yet to materialise.

Law-in-translation is thus an assemblage in motion, and it is so in a number of different respects. Yet, among lawyers in particular it remains plagued with an 'invisibility' that is reminiscent of the effacement that a leading translation theorist has deplored with reference to translation generally (Venuti 2008). As I write these observations, the most recent textbook in comparative law (a work numbering over 400 pages) has precisely two half-pages to devote to the translation of law. Moreover, these few lines purport to address one question only: 'To translate or not to translate?' (Siems 2014, 17–18). Perhaps such marginalisation, compounded by a brief array of references showing an obvious lack of familiarity with (and interest for) the topic on the part of the author, can be seen as one indicator of the long way that law-in-translation has yet to travel before it can boast genuine scholarly acceptance by lawyers. But law-in-translation is an assemblage: when it comes to recognition, it therefore brings together both law and translation studies' vindications. One hopes that, if only by way of counterpoint, this issue of *The Translator* will succeed in enhancing law-in-translation's profile within the field of translation studies.

Notes

1. The references to the two US Supreme Court decisions are *Lawrence v. Texas*, 539 US 558 (2003) and *Roper v. Simmons*, 543 US 551 (2005).
2. Researchers have found that 'the Hittite version was originally written in Akkadian, from a first Hittite draft, inscribed on a silver tablet, and then sent to Egypt, where it was translated

- into Egyptian. Correspondingly, the Egyptian version of the treaty was first composed in Egyptian, and then translated into Akkadian on a silver tablet before being sent to the court of Hattusili' (Bryce 2006, 1).
3. Roman Emperor Justinian I's rule concerned the text of the *Digest*, perhaps the most influential part of the *Corpus*, which features the writings of several eminent Roman jurists. According to the Emperor, transpositions from the Latin into the Greek language 'in the same order and sequence' (*'sub eodem ordine eaque consequential'*) would be authorised; all other re-formulations, however, would be qualified as 'perversions' (*'persiones'*) (Justinian 533, lx–lxi).
 4. *Klippert v. R.*, [1967] SCR 822.
 5. Article 111 of the UN Charter states that 'the Chinese, French, Russian, English, and Spanish texts are equally authentic'. Available at: <http://www.un.org/en/documents/charter/chapter19.shtml> (accessed 15 June 2014).
 6. According to the Resolution adopted by the General Assembly in its first session in 1946, '[i]n all the organs of the United Nations, other than the International Court of Justice, Chinese, French, English, Russian and Spanish shall be the official languages, and English and French the working languages'. General Assembly of the UN, Resolution 2 (I), 1 February 1946. Available at: http://www.un.org/en/ga/search/view_doc.asp?symbol=A/res/2%28I%29&Lang=E&Area=resolution (accessed 15 June 2014). Another Resolution, adopted by the General Assembly in 1973, includes Chinese among the working languages of the General Assembly, its committees and its subcommittees and adds Arabic to the official and working languages of the General Assembly and its main committees. General Assembly of the UN, Resolution 3191 (XXVIII), 18 December 1973. Available at: <http://daccess-dds-ny.un.org/doc/resolution/gen/nr0/282/63/img/nr028263.pdf?OpenElement> (accessed 15 June 2014).
 7. See Article 39 of the Statute of the International Court of Justice annexed to the UN Charter, of which it forms an integral part. Available at: <http://www.un.org/fr/documents/charter/> (accessed 15 June 2014).
 8. See *Loi no. 2004–204 du 9 mars 2004 portant sur l'adaptation de la justice aux évolutions de la criminalité*, published in *Journal Officiel*, 10 March 2004, p. 4637.
 9. See *Loi no. 2011–1862 du 13 décembre 2011 relative à la répartition des contentieux et à l'allègement de certaines procédures juridictionnelles*, published in *Journal Officiel*, 14 December 2011, p. 21105.
 10. The *Doing Business Reports* have been addressing 10 types of business activities: starting a business, dealing with construction permits, getting electricity, registering property, getting credit, protecting investors, paying taxes, trading across borders, enforcing contracts, resolving insolvency. Available at: <http://www.doingbusiness.org/> (accessed 15 June 2014).

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