

methodology; however, it still attempts to avoid open bias and prejudice. Comparative law tries to get rid of ethnocentrism, though it is probably impossible to completely break loose from the influence of one's own cultural sphere. Neither can a comparatist become fully detached from his/her own conception of the world and his/her own deeply rooted basic ideas.⁴⁷ Notwithstanding, it is still possible to attempt to decrease adverse effects, and the legal theoretic discourse that is known as 'methodology of comparative law' can be of great help here. Nevertheless, heuristic methodology differs from classical scientific exact methodology, which tends to be of a normative nature.⁴⁸

Due to factors that delimit cultural vision, comparatist naturally mostly looks for such explanatory factors as he/she finds possible and sensible on the basis of his/her experience of the world. Therefore, he/she also unconsciously refrains from many such potential explanatory models as another comparatist might perhaps find significant. That is why literature on the history of law and sociology of law, as well as other multidisciplinary literature (offering non-legal contexts for law), is important: because, by means of it, the comparatist can expand the horizon of their understanding. The expansion of the horizon is the key factor, and the methodology being heuristic does not affect that at all, just like heuristics has nothing to do with the idea that comparative methodology should not be taken seriously.⁴⁹ To describe the research designs in comparative law as heuristic methodology is not a belittling epithet; quite the contrary, for it is an outcome of epistemological realism.

⁴⁷ Yet this does not mean that we should choose between ethnocentrism and cultural relativism because these are but extreme ends. See J. Schachereiter, 'Das Verhältnis von Ethnozentrismus und Kulturrelativismus in der Rechtsvergleichung—Ursachen, Ausprägungsformen und Strategien zur Überwindung' (2013) 77 *Rechts Zeitschrift für ausländisches und internationales Privatrecht* 272.

⁴⁸ Typically scientific methodological rules are empirically as follows. 'If one's goal is y, then one ought to do x'; L. Laudan, 'Progress or Rationality? The Prospects of Normative Naturalism' (1987) *American Philosophical Quarterly* 19, 24.

⁴⁹ Cf. G. Samuel, 'Taking Methods Seriously (Part One)' (2007) 2 *Journal of Comparative Law* 94.

Law as Translation

FRANÇOIS OST

IF IT BE relevant and desirable to suggest translation as a paradigm for thinking about the grammar of our plural world—a world which can never again close up on its idiolects, and which strives to escape just as much from oneness of language as from oneness of thought: a post-Babel world, in other words, wise to the inanity of the tall tower of monism and yet eager to transcend its own pluralism of mere juxtaposition—then we may suppose that the domain of law represents a privileged field of application for this paradigm of translation. This is what the present brief study aims to demonstrate. I will content myself with staking out the field of the enquiry!—a field well known to Mark Van Hoecke, that indefatigable mediator of ideas and cultures.

The task is thus to take the measure of the translation phenomena that appear in the juridical field. No doubt the first thought that springs to mind in this regard is the zone of contact where national law encounters foreign law, resulting more often than not in a difficult confrontation between different languages: public international law (see Section I), private international law (Section II) and comparative law (Section III) are the required approaches for this study. But the whole problematic soon broadens and grows singularly complex, bringing into its purview, step by step, the law in its entirety (as a function of that central insight of translation theory according to which translation is by no means limited to interlinguistic exchanges but extends to include the communication occurring within the same linguistic community).² This is because, on the one hand, juridical multilingualism can also be a description of the national legal systems—in countries like Belgium and Canada, for example. On the other hand, it is because the difficulties of terminology translation which we encounter in private international law and in European law are merely the signs of problems in describing institutions that

¹ For more details, cf. F. Ost, *Le droit comme traduction* (Québec, Presses de l'université de Laval, 2009); F. Ost, *Traduire. Défense et illustration du multilinguisme et de la traduction* (Paris, Fayard, 2009).

² P. Ricoeur 'Le paradigme de la traduction' in *Le juste* (Paris, Éditions Esprit, 2001) 125.

are deeply rooted in different traditions of justice—which unfailingly leads the lawyer-translator into the very depths of the respective juridical orders that thus confront each other; and this is something which thereby frequently stimulates him to undertake some very beneficial critical querying of his own categories and taxonomies. Moreover, the emergence of regional European law and of what we call 'globalised law' (Section IV) is a further factor bringing the translation paradigm into the heart of national juridical orders. Sometimes this is a supranational system moulded by comparative law that is imposed upon national systems as a fully fledged component with superior authority, and sometimes, as in the case of globalised law, it is in a variety of forms of borrowing of foreign juridical solutions, with contagion from models of importation which are assumed to be effective, and under more or less spontaneous bombardment by principles that are judged to be legitimate.

One must go further: even assuming that a juridical order could develop in a closed vessel, shielded from foreign traditions and contained within an absolute monolingualism, the phenomena of translation (from *de facto* to *de jure*, from the speech of one branch of law to another's, from one juridical epoch to another, from the speech of an expert to that of a lawyer, etc) would still nonetheless be characteristic of the whole of juridical discourse (see Section V), thus raising not only methodological questions of great interest, but also ethical issues to which we must also pay attention (see Section VI).

But it is not enough to establish the importance of the translation operation for understanding the logic of juridical discourse; one must also show precisely what translation theory contributes to the task of clarifying not only the essential juridical operations of translation in the strict sense (ie translation between languages), but also those of comparison and qualification. Within the limits of the present study, however, it is not possible to develop this analysis. I will content myself, therefore, with recalling briefly, at the end of this study, some of the lessons to be drawn from the very rich general theory of translation (Section VII), leaving the reader to make the necessary transpositions, and especially so in view of the experience of the man whom these lines are intended to honour. In the various domains to which I have alluded, a methodology is needed—something like the grammar of 'networked law'; and, although the general theory of translation is well qualified to do this job, it also has much to learn from being informed about the experience accumulated in the field by juridical practice and doctrine. I will, of course, undertake only 'soundings' of such an immense and turbulent ocean; but in each of these soundings, nonetheless, a structure will clearly emerge—a structure in which I will recognise the characteristic marker of translation—being as far removed from any timid reliance on what is proper to it (its idiolect, its national juridical system) as it is from the dangerous and illusory fascination with the idea of having one single unitary system (a universal language, an imperial model of law). Networked law searches for its grammar, in the space between monolingualism and *esperanto* (to which we must add pidgin

and *sabir* languages, these being made up of unreflective borrowings), ie in the translational model.

I. PUBLIC INTERNATIONAL LAW AND MULTILINGUAL NATIONAL LAWS

Public international law in its classical form (both public and private) believed it could repress the other, the foreign, the foreign language, and force it out beyond its borders. Based on a philosophy of 'everyone in his own place', expressed in the Westphalian dogmas (arising from the Treaty of Westphalia in 1648) of the internal supremacy of the state and of equality and of external sovereignty, this international law needed to go no further than managing the multilingual diplomatic contacts necessitated by their unavoidable dealings with each other in the context of the family of nations (despite the fact that, as we must remind ourselves, French served until recently as the international language of diplomacy). We find a typical illustration of this in Article 33 of the Vienna Convention on the law of treaties, the aim of which is to rule on the specific question of the interpretation of multilingual treaties. Three rules result from this provision. The first of them establishes a general principle: 'When a treaty has been authenticated in two or more languages, its text is valid and has force of law in each of these languages' (Article 33-1). This principle is then supplemented by paragraph 3 of Article 33: 'The terms of a treaty are presumed to have the same meaning in the various authenticated texts'. In spite of this assumption of the oneness of the treaty and the presumption that accompanies it, Article 33 nevertheless establishes two rules capable of resolving the divergences of meaning which are likely to arise between one version and another. The second part of paragraph 1 sets out a formal rule of preference: '[t]he text of the treaty is valid and has force of law in each of the languages in which it has been authenticated unless the treaty states, or the parties agree, that in case of a divergence of meaning, one definite text will decide the issue' (and, as we know, for a long time it was the French-language version which played the role of this overriding third language). Moreover, paragraph 4 for its part proposes a substantial rule of conciliation:

except where one particular text has force over others in accordance with paragraph 1, when the comparison between authentic texts manifests a difference of meaning which cannot be resolved by applying Articles 31 and 32 [which define the normal rules for interpreting treaties], the meaning to be adopted is the one which, having regard to the object and the aim of the treaty, best reconciles the texts.³

³ On this question, cf AP Papaux, 'Commentaire ad article 33. Interprétation de traités authentifiés en deux ou plusieurs langues' in P Klein and O Carter (eds), *Commentaire des Conventions de Vienne de 1965 et 1986 sur le droit des traités* (Brussels, Bruylant, 2006) 1373–402.

Without developing any further this complex system which simultaneously asserts the uniqueness of meaning of the treaty and acknowledges the possible diversity amongst its versions—requiring that either a choice between them or a ‘best possible’ reconciliation of them be made—let me here note merely that, on a more practical level, since international law remains, like international society, a major contributor to the relations of force, the ‘egalitarian’ translation system put in place by Article 33 is heavily biased by national interests and by the self-interpretation made by states of the treaties which bind them. Let me also note that international commitments are full of intentional ambiguities—these being the only thing that can allow compromises to be worked out; so here the linguistic diversity is only the reflection of a disagreement whose resolution is deferred. In this regard, I recall the radical ambiguity which affects Resolution 242 of the UN Security Council relating to the withdrawal of Israel from ‘the’ Palestinian territories occupied by her: ‘from territories’ according to the English version, ‘from the territories’ according to the French version (but let it be noted that the French delegate stated an explicit reservation in favour of the French version only).

It is clear also that in European law the principle of equal dignity of the different languages of the Community is in force; from the very beginning, a political choice was made in favour of multilingualism, to such an extent that it could be claimed that ‘the language of Europe is translation’. Regulation No 1 of the EEC, dated 15 April 1958, recognised the official nature of each of the national languages of the Community, and the need to write the Community’s directives and regulations in each of these languages. Thus, following the latest enlargements, Europe has no fewer than 23 official languages, giving rise to no fewer than 506 language combinations for translation purposes.⁴

However, the situation of multilingual states shows that it is not enough to externalise the questions of translation. Here again, we encounter at times a rule of preference and at other times a rule of conciliation.⁵ Of preference, see, for example, Article 40 of Quebec’s law on interpreting, which stipulates that ‘in cases where the French text diverges from the English text, the French text shall prevail’. In a comparable sense, we have also the example of Article 8 of Canada’s law on the official languages of the country, which gives ‘preference to the version which assures the best achievement of its objects according to the spirit, the intention, and the true sense of the text’. Of conciliation, as in Article 7 of the Belgian law dated 31 May 1961 concerning the use of languages in matters of legislation: ‘divergences shall be resolved in accordance with the will of the legislator as determined by the normal rules of interpretation giving no pre-eminence to one of the texts over the other’.

The case of Canada turns out to be one of the most interesting ones for the problematic of translation, adding to the bilingualism of terminology the duality of the juridical traditions—the common law and the *droit civil* having mutually cross-fertilised each other in the course of several centuries during which both were applied, while the whole picture was accompanied by various phenomena of reciprocal contamination or, indeed, of retrotransfer of juridical terms. Indeed, it has been noted that, even though certain terms from the common law are today ‘contaminating’ juridical French, a good number of its expressions nonetheless have an origin in . . . French, since in England, up until the eighteenth century, a juridical jargon of Franco-Norman origin was prevalent, having crossed the Channel with William the Conqueror in 1066 (this was the French law which three different measures adopted by the English Parliament, in 1362, 1650 and 1731, struggled hard to repress).⁶

This hybridisation has been pushed so far in Canada that some writers, who have observed the prevailing practices of mixed teaching and research, for example at McGill University Faculty of Law, and also the juridical practices which such teaching and research are based on, have no hesitation in announcing the emergence of a synthetic ‘bijuridism’ which is able to derive the most appropriate solutions ‘beyond’ or ‘between’ the two versions, French and English, of the texts. This is not so much a case of a hegemonic choice of one language to the detriment of the other or of an egalitarian juxtaposition of the two, nor is it even a case of a wise conciliation between the two texts in question; it is more a case of a new thing arising by way of and thanks to the terms provided by the one language and the other.⁷ Thus I have already identified, at the end of this opening discussion, no fewer than four different solutions to the Babelian dilemma.

II. PRIVATE INTERNATIONAL LAW

With the science of the conflicts between laws, ‘foreignness’ is no longer camping at the borders: private situations are configured which, on account of certain of their elements, trigger the application of more than one set of national laws simultaneously. The tribunals of the local area are called upon to carry out any desirable connections, with the result that in the end it is inevitable that the foreign law will be taken into consideration (and therefore qualified and translated). Though it is impossible in such cases to apply the national law unilaterally, it is still necessary to know from which juridical system the rule to resolve conflicts of laws comes, on the basis of which the connections, qualifications and translations will function. Rationally, it is

⁶ A. Bulier, ‘De la “commune ley” à la Common Law’ [2006] *Revue de droit international et de droit comparé* 44.

⁷ D. Jutras, ‘Enoncer l’indiscible: le droit entre langues et traditions’ (2000) 4 *Revue internationale de droit comparé* 781.

⁴ J.C. Piris, ‘Union européenne: comment rédiger une législation de qualité dans 20 langues et pour 25 États membres’ (2005) 121–22 *Revue de droit public* 475.

⁵ F. Ost, and M. van de Kerkchove, *Entre la lettre et l’esprit. Les directives d’interprétation en droit* (Brussels, Bruylant, 1989) 72.

tempting to imagine a single unified, universal and integrated system of private international law, but this universalist option has never been successfully imposed, with the result that, if we exclude the hypothesis of international agreements, each juridical order regulates and decides, on its own behalf and according to its own logic, its relations with the whole set of other juridical orders.⁸ Were we, for that matter, going to be locked inside a purely particularist system which would be no more than the extension of internal private law to situations containing an element of foreignness (and this in deliberate ignorance of what's involved in the foreign solutions)? Not at all: the entire effort of the discipline of the conflicts of laws consisted in bringing about a functional articulation of the normative orders in question,⁹ notably on a basis of comparative jurisprudence, and starting out from the categories and methods of the local juridical instance—hence, an operation which in its every aspect is like a translation.

No doubt we will only rarely find the exact equivalent of a national juridical concept in a foreign system, just as the 'word for word' approach is scarcely imaginable or desirable in matters of translation. The result would be that the solution will be holistic and global—resulting from the taking into consideration of the sentence and the text on the one hand, and on the other hand the institution and the economy of the law. François Rigaux, who makes this observation, adds that the comparability thus established rests on a postulate of the 'communicability of juridical systems', which is itself linked to an intuitive view of the 'unity of humanity', that is: as long as we accept to focus on the functional core whose effect is that human beings each in their own way have tried to deal with problems that are fundamentally similar.¹⁰ What remains to be determined, of course, is the syntax of this metalanguage of the conflicts of laws, accepting in advance the limits of the exercise, which arise both from the national (and therefore multiple) origin of this grammar (just as, in matters of language, translation is always carried out on the basis of a definite language and not from a superordinate language presumed to be perfect) and from the often approximate nature of its analogical judgements of equivalence, and sometimes from the recognition of its limits: in other words, the untranslatable cases, represented here by the public-order exception invoked to block a foreign solution even when the latter has been designated by the rule of national conflict, when the content of that solution turns out to be decidedly not assimilable into the host system of law.

III. COMPARATIVE LAW

For a long time, comparative law was practised in the same way as a philatelist collects stamps or an entomologist collects insects: you lined up juridical concepts and solutions by assigning them a place and a rank, statically and without concern for the living relationships which could be established between the entities thus juxtaposed. Comparative law remained a marginal academic specialty and one which was fairly esoteric. Here again, anything foreign was still relegated to the frontiers, frozen in the exoticism of its juridical otherness, or else hastily assimilated into vast universalist systems: these projective and hegemonic comparisons opened out on to the 'great systems' (René David), just like those planispheres which reconstructed the map of the world centred on the continent that the author was from (and this was without even mentioning the notorious distinction between the 'civilised nations' and the others who were relegated to the darkness of the time before there was law).

Admittedly, there were times when the national legislator 'looked over the hedge' when there were parliamentary debates about such-and-such a bill to reform the legislation; there was no incongruity in invoking a foreign legislation that had achieved success, in order to inspire or legitimise an internal reform. Jean Carbonnier himself, the great artisan of the reform of family law in France in the 1970s, makes a malicious reference to this method: 'travellers from afar can lie with impunity'.¹¹

But juridical comparatism did not affect the language and the substance of internal law in any other way. Besides, many held forth eloquently, as Pierre Legrand is still doing today,¹² on the possibility of comparing, exactly as some people proclaim the impossibility of translation as a matter of principle. That the convergences which would arise through this exercise would necessarily be superficial and deceptive was the claim, as long as they failed to carry out the transfer of the meaning inherent in the rules and the concepts—a meaning immersed in a culture and a tradition which, according to this hypothesis, are not exportable. Hence the only legitimate comparatism should take the form of a differential analysis of juridical cultures, insisting on the differences much more than on the pseudo-convergences.

The result was that ultimately the main benefit of juridical comparatism would be for internal use only, as if Janus's gaze directed at the institutions of other countries could do no more than produce by reflex action a new look at our own solutions. Horatia Muir Watt expects from this confrontation with alternative models the benefits of a 'subversive function' comparable to that which is exercised in the US by the multiple currents of critical legal studies. In the absence of any similar perspective in European law, compara-

⁸ F. Rigaux, *La loi des juges* (Paris, Éditions Odile Jacob, 1997) 151.

⁹ H. Batiffol, *Aspects philosophiques du droit international privé* (Paris, Dalloz, 1956) 27.

¹⁰ F. Rigaux, above n 8, 152–56.

¹¹ J. Carbonnier, *Essais sur les lois* (Evreux, Répertoire du notariat defrénois, 1979) 191.

¹² P. Legrand, 'Sur l'analyse différentielle des jurisprudences' (1999) 4 *Revue internationale de droit comparé* 1053.

tive law could at least play some part in dragging our juridical orders out of their dogmatic slumber.¹³

It is clear that, whether it is hegemonic-assimilative or critical-differentiating (a division which is also found, term for term, in the field of translation), comparison was always directed to an object that remained external to it, as if the different juridical orders remained mutually impermeable to one another.

This is the very situation that is changing radically today: the juridical orders are on the move, they are communicating with one another, they are copying each other, they are swapping solutions, they are hybridising themselves in a thousand and one ways (though we must not ignore the phenomena of dominance which inevitably twist and slant such exchanges), with the result that comparative law has ceased to be the study of the platonic relationships between juridical systems viewing each other from the outside and is becoming, to use the expression of H Patrick Glenn, the study of an 'integrated law'.¹⁴—a law which introduces into the heart of the internal juridical mechanisms other, composite matter, hybrid concepts (some would call them bastard concepts), imported solutions that are only 'more or less' under control. Often, on the initiative of legal practice, which is the real motor of this integration, and is a factor which is not constraining but which indeed has real power, cross-border solutions are being elaborated (contract templates, standard models of governance, financing arrangements, etc) which circulate all the more freely because the professional mobility of lawyers is increasing and because information can be stored and communicated universally through the internet. 'Integration' will soon affect all juridical activities: the making of laws, at the crossroads of diverse influences; the dialogue which judges must engage in across frontiers; the teaching of law, which is transnational too (thanks especially to the Erasmus exchange programme), which means that comparatism is being integrated into every branch of legal practice rather than being isolated in a marginal and specialised option.

To these manifestations of 'globalised law' (see below) is added, within the European regional space, the decisive impact of community law: to say that it is riddled with juridical comparatism is a major understatement.¹⁵ Concerning the European Court of Justice, judge Lenaerts wrote that it is 'a laboratory of comparative law', since its constant concern is to ensure the best possible effectiveness (in terms of acceptability and legitimacy) of the solutions which it adopts, by forging them in the crucible of the main national traditions.¹⁶ As

for the 'legislative' process of elaborating directives and regulations, we know how extensively it is informed by comparative law (in the law of the environment especially, but also in the domain of consumer protection or competition law),¹⁷ even if the exercise sometimes remains by implication confined to the preparatory stages or if, in certain cases, comparison is only used as an *ex post facto* alibi intended to legitimise a community decision that has already been adopted.¹⁸

We can see that comparison/translation has once and for all gained permanent and essential currency, no longer merely at the margins of juridical systems, in the limbo of the space between laws, but in the very heart of the national systems—affecting, by that very fact, the canonical distinction between the same and the other. Obviously what remains to be done is to think through the methods of comparative law which has moved into our house at its own invitation: this is the delicate question of the construction of equivalents—likewise a central problem in the methodology of translation.

IV. GLOBALISED LAW

Globalised law must be distinguished from the law of globalisation; the latter is still derived from the classical perspective of the international, given that it proceeds to put in place structures of world governance starting out from states (this is the United Nations perspective); globalised law, on the other hand, results from a much more radical perspective of transnational penetration, the result of a more-or-less spontaneous convergence of national laws seeking to align themselves with standards and models that are dominant or seductive.

We are witnessing, then, an astonishing spread, and at times a very rapid one, of concepts ('universal service'), of values ('transparency', 'good governance'), of models and practices, founded on efficacy and economic rationality or, in other domains, democratic legitimacy, bringing in its wake forms of hybridisation and acculturation of the national systems and their specific vocabulary. This 'soft globalisation' explains, for example, why 'the Swiss legislator, without being obliged to, is transforming into national law the norms of the WTO or the *soft law* of the OECD'.¹⁹ This 'modelling' of juridical instruments, which tends to select the most powerful instruments

¹³ H Muir Watt, 'La fonction subversive du droit comparé' (2000) 3 *Revue internationale de droit comparé* 503; in the same sense, cf G Monateri, 'Critique et différence: le droit comparé en Italie' (1999) 4 *Revue internationale de droit comparé* 989.

¹⁴ H-P Glenn, 'Vers un droit comparé intégré' (1999) 4 *Revue internationale de droit comparé* 84.

¹⁵ F van der Mensbrugghe (ed), *L'utilisation de la méthode comparative en droit européen* (Namur, Presses Universitaires de Namur, 2003).

¹⁶ K Lenaerts, 'Le droit comparé dans le travail du juge communautaire' in Van der Mensbrugghe, *ibid.*, 123. The author talks about a principle of 'loyal cooperation' (126), which leads

judges to 'seek resources' in a permanent way in the common juridical conceptions of the Member States in order to arrive at 'the best solution in the middle line' (167).

¹⁷ P Lannoye, 'L'approche comparatiste au Parlement européen' in Van der Mensbrugghe, *ibid.*, 27ff.

¹⁸ F van der Mensbrugghe, 'Comparative Methodology as a Means of Dissipating Tension' in Van der Mensbrugghe, *ibid.*, 41ff.

¹⁹ C-A Morand, 'Le droit saisi par la mondialisation. En guise de prélude' in C-A Morand (ed), *Le droit saisi par la mondialisation* (Brussels, Bruylant, 2001) 10.

imposed by practice, is related to a form of 'natural selection'²⁰ and leads to a specialisation in the language of the law and a series of differentiated languages, conferring upon each sector of economic life its transnational regulation: thus, in the margins of the *lex mercatoria* (which is already very old), we have witnessed the development of a *lex petrolae*, a *lex bursarum*, a *lex informatica*, a *lex bioethica*, etc.²¹

This phenomenon, which has been called 'de facto internormativity'²² (insofar as it proceeds from voluntary adjustments and not from a legal obligation), presents multiple facets: sometimes it proceeds from economic constraint (think, for example, of the nations of the former Soviet bloc or the emerging countries rising up out of underdevelopment and obliged to align themselves promptly with the standards of the globalised liberal economy) and sometimes from intellectual fascination (such as the phenomena of borrowing, sometimes unconscious, of practices, arguments and forms of motivation studied by Monateri in the case of Italy),²³ but in all cases it leads to forms of hybridisation, if these borrowings are selective and partial (it is rare for a juridical system to be adopted in its entirety), which certainly increases the debate about the legitimacy of these 'legal transplants'.²⁴ It is ultimately a matter of a unique language, of translation that respects differences, or is it rather a case of a heteroclitite *sabir* language, of the poorly mastered pidgin of an over-hasty globalisation?

In order to inject a bit of order into this normative proliferation, Mireille Delmas-Marty introduced, some years ago, a welcome distinction between two forms of globalisation: globalisation proper, which arises out of market forces, and universalisation, which takes its inspiration from the ethical ideals of fundamental rights.²⁵ Thus we are apparently witnessing the joint action, at times convergent and at times conflictual, of these two sorts of globalised law: the former tends to impose everywhere the dogmas of free competition and to dissolve those national policies which cannot be subsumed under a liberal perspective; and the latter speaks the language of human rights and tends to universalise the principle of the irreducible dignity of the human being, in the name of which it is legitimate for collectivities to organise themselves to preserve their rights, sometimes against the demands of free competition. However opposed to each other these two forms of globalised law may be in

their ideological goals, they nonetheless present astonishing formal similarities as regards their 'subversive' action upon the coherence of national juridical systems. In both cases, what is at stake is a language of principles, largely liberated from state juridical sources, something like a new natural law creeping in to the tissue of internal orders and profoundly modifying their economy. Consider in this regard the example of the irresistible penetration of the language of human rights into all of the branches of law, spilling over from their branch of origin, constitutional law, to take the form today of a transnational benchmark of legitimacy for all juridical mechanisms.

What is at stake in the planetary game that is being played out today consists of the balancing out of these two forces of globalisation. Will it be possible to harmonise their respective powers and to ensure something like a translation from one language into the other? This is the perilous and often disappointing exercise to which, for example, the Disputes Settlement Body, which is the body within the WTO that has jurisdiction in the resolution of trade disputes is devoted when it deals with questions related to the protection of the environment, for example, whilst its dominant logic is obviously the promotion of free competition. It is the same exercise, but with more felicitous outcomes, when fundamental human rights are today invoked before the Court of Justice of the European Union, since this latter body is not yet a party to the European Convention on Human Rights, yet has nevertheless decided to recognise the main ones among these fundamental rights as 'general principles of community law'.

Let us acknowledge, however, that the universalist method—the one which aims to universalise human rights by means of major planetwide agreements—is often still stuck in the mud and marking time, for want of a body having jurisdiction over these fundamental rights on a worldwide scale, and also on account of the 'imperial' policy of the US, since it is now the only global superpower. With the 'Americanisation of law',²⁶ we are witnessing an alternative strategy of an entirely Babelian kind: the imposition of a single language and a single juridical model on the scale of the one power which is capable of dictating its law everywhere. It must be noted that the US has not ratified the major universal treaties (the Kyoto Protocol, the Rome Convention on the International Court of Justice, and so on), or has ratified them only belatedly and with many reservations (as in the case of the UN Pacts on civil and political rights), so it is clear that the US really intends to universalise its own law. Indeed, in numerous domains (the fight against corruption, money laundering and drug trafficking, the fight against terrorism using the Patriot Act of 2001, rules of accounting for companies quoted on the US stock markets, regulating the internet, etc.) the US has almost completely succeeded in imposing its model on the entire world, just as, in the case of the trial of Saddam Hussein, the option of Americanising the tribunal was preferred

²⁰ A. Martin-Serf, 'La modélisation des instruments juridiques' in E. Loquin and C. Kessedjian (eds), *La mondialisation du droit* (Dijon, Litec, 2000) 180.

²¹ E. Loquin and L. Ravillon, 'La volonté des opérateurs, vecteurs d'un droit mondialisé' in Loquin and Kessedjian, *ibid.*, 123.

²² M. Delmas-Marty, *Les forces imaginantes du droit. II. Le pluralisme ordonné* (Paris, Seuil, 2006) 41ff.

²³ Monateri, above n 13, 97.

²⁴ On this question, cf. A. Watson, *Legal Transplants* (Edinburgh, Edinburgh University Press, 1974); see also the criticisms of R. Sacco, *La comparaison juridique au service de la connaissance du droit* (Paris, Economica, 1991) 115ff; W. Ewald, 'Comparative Jurisprudence: the Logic of legal Transplants' (1995) 43 *American Journal of Comparative Law* 489.

²⁵ M. Delmas-Marty, *Trois défis pour un droit mondial* (Paris, Seuil, 1998).

²⁶ 'L'américanisation du droit', 45 *Archives de philosophie du droit*, 2001.

over the setting up of a supranational jurisdiction. The conclusion, drawn by Mireille Delmas-Marty, is that:

this attitude, accompanied by a tendency to favour private-sector players, encourages the promotion of the market as the only model capable of universal application, whereas the majority of real instruments having universal significance (human rights, crimes against humanity, the common good) derive very much from the sweet will of the US.²⁷

Faced with this Babelian ambition, how will the universalism of human rights be able to make its voice heard, a plural voice which, since it is well able to manage differences, especially thanks to the technique of the domestic margin of appreciation, is related to the procedures of translation? This is what must be studied in the coming years. However, let me note here again that the 'dialogue of the judges', which is so much talked about today—this informal judicial forum which reaches beyond borders and orders of jurisdiction—(according to Julie Allard and Antoine Garapon)—manifests the same tension between the market and fundamental rights that we have just alluded to. Consequently, these authors are using the term 'judges' business' in a very opportune way to express the ambivalence of this dialogue which can be interpreted sometimes as a form of diplomacy that is more or less aiming to conquer and impose, quietly, a given juridical model (the common law versus Roman/Germanic law, adversarial model versus investigative model, etc) and sometimes, on the contrary, as the construction of a supranational juridical argumentation in the context of a globalised public space which thereafter concretises the 'universal hearing' which Chaim Perelman talks about.²⁸ Between collaboration and competition, 'judges' benevolence²⁹ or continuation of (economic or political) war by judicial means, cooperative dialogue or language of force, the judges too are mobilised in the great Babelian game of globalised law.

V. LAW IN DAY-TO-DAY PRACTICE

The foregoing brief survey of the domains reserved for international law (public and private), for comparative law and for globalised law should already have convinced the reader (at least, I hope so) of the pertinence and importance of the problematic of translation for an understanding of law today, even to the point where the notion of 'domain reserved' for these branches, supposedly distinct from 'law in day-to-day practice', loses most of its legitimacy. What I have tried to suggest is precisely the penetration of

the external by the internal or of the other into the same. Nonetheless—and this justifies the present continuation of this study—if it were possible to radically isolate a juridical order of world trade and to study it therefore in the 'purity' of its tradition, the coherence of its internal ordering and the uniqueness of its language, it would still be a question, decisively, of the logic of translation.

Every time a jurist puts a norm or an institution or a procedure into a historical perspective, it is already a question of translation: by doing so, he is bringing two historical periods closer to each other, sometimes going beyond the linguistic obstacles inherent in temporal distance—this diachronic depth (which was practised systematically by a civil law specialist like De Page) being often of a nature to shed light on the nature and function of the institution in question.

It is also a question of translation when one situation (concubinage, for example) is successively viewed from the angle of the different branches—civil law, social law, tax law—which is what leads Xavier Thunis to write that 'in the broad sense, all jurists are comparatists without knowing it'.³⁰ Whether it concerns the needs of teaching (what could be more pedagogical than a comparison?), of law practice (the obligations of the attorney are not the same as those of the business manager, those of the tenant are different from those of the usufructuary) or the commentary in jurisprudence (we know the delights of bringing out the divergences in jurisprudence between this or that chamber of a high jurisdiction), comparison is inherent to the profession of jurist, and hence so also is translation between the respective spheres of meaning both close and distant.

Translation yet again: when it comes to 'translating' the technical language of the court-appointed expert, when the legal adviser transposes into a juridical convention the arrangements desired by his clients, or when the parliamentary draftsman transposes into an acceptable juridical form the political will of a party or a government.

Another example of translation: when fact and law are brought together—and here we are at the heart of the juridical procedure—at the end of the double operation of checking/qualifying the fact and applying/interpreting the law.

Far from being reserved to only the specialists in private international law, the qualification or orientation of the litigious situation towards this or that juridical institution (and, more precisely, the choice of the qualifying concept inscribed in the hypothesis of such-and-such a norm) is the most normal and common operation carried out by jurists—to be convinced of this, one need only look at the qualification checking exercised by the Appeals Court. But if the complex of the facts requires to be configured around the rule, the rule, in turn, must be remodelled towards its own satisfactory application to the

²⁷ M Delmas-Marty, *Les forces imaginantes du droit. I. Le relatif et l'universel* (Paris, Seuil, 2004) 404.

²⁸ J Allard and A Garapon, *Les juges dans la mondialisation* (Paris, Seuil, 2005).

²⁹ G Canivet, 'Les influences croisées entre juridictions nationales et internationales. Éloge de la bénévolence des juges' (2005) 4 *Revue des sciences criminelles* 799.

³⁰ X Thunis, 'L'empire de la comparaison' in Van der Mensbrugghe, above n 15, 11.

dossier. Who would still maintain that this step is like a simple syllogism, as if it were enough to deduce in an *a priori* way and *ne varietur* the solution of which legal category applies? Here again, it is a matter of weighing it up, negotiating, adjusting it by means of trial and error, which is exactly what happens in the work of the translator: these are two worlds, both close to and distant from each other, foreign and yet familiar, which must be brought together and brought into dialogue with each other. In this operation, the judge 'translates' the discourse of the author (who is sometimes at a distance of several centuries, as in the case of the Code Napoléon) into that of the contemporary reader; he translates the letter of the text into the language of the spirit which must be given to it in view of the legitimacy and efficacy which we have a right to expect from a juridical text; he brings the part (this or that clause of a contract, this or that article of law) together with the whole (the juridical system seen in its entirety).

The Italian constitutional judge Gustavo Zagrebelsky is right to emphasise that the judge must serve two masters (exactly as the translator must): he seeks the norm which fits the special case just as well as it fits the juridical order. In so doing, he 'is in the service of neither the one nor the other, but of the one and the other'.³¹

It may perhaps be contended that today the classical method of interpretation of texts is a step backwards, since the judge is often required, due to the complexity and novelty of the questions before him, to work without or almost without a safety-net, using only a simple toolkit of very general principles, which obliges him to undertake a weighing up of the interests which confront him more directly with the weight of the forces and interests in conflict—think, for example, of the delicate question of the acceptability of aircraft noise in the vicinity of airports. But these forces, these interests, these values in conflict, have to be weighed up, ie have to be brought down to a common measure in spite of their heterogeneity. Despite their apparent incommensurability (here one may think of the American Supreme Court judge Scalia, who mocked this method by saying that it consisted of wondering whether 'this stone is heavier than that line is long'³²), the judge must shoulder the task of 'constructing equivalents': he must translate a moral harm into a financial compensation, he must translate the language of health or of safety or of quality of life into the language of employment, of economic prosperity, of national imperatives—and the other way around, with the same feeling of approximation and sometimes of failure that every translator feels when his task is completed.

VI. A QUESTION OF ETHICS LIKEWISE

Thomas Kuhn, the author of the theory of paradigms, had the merit of emphasising that a paradigm was not only the bearer of a hypothesis and of a method (resting upon a world-view and translated into 'well-chosen examples'), but that it was also accompanied by a set of values.³³ This applies especially well to the question of the translational paradigm with which this chapter concerned, and which, no doubt more explicitly than is the case for other intellectual operations, turns out to carry an ethical exigency. Translation is straight away accompanied by a recognition of the difference of the other and of the wish to undertake with that other an interaction on the basis of the reciprocal admission of the limits of each other's own language: in the activity of translation, what Antoine Berman nicely termed 'the test of the foreign' is being tried out.³⁴

Seen from this angle, the bringing together of the fact and the law can be analysed also and above all as the coming into contact (often a traumatising contact, at least in its premises) of the discourse of the individual with that of the man of laws. Here we are, of course, not limited to envisaging the translator to whom every accused person who does not speak the language of the court has a right; generally speaking, every citizen subject to law requires the intervention of a lawyer or juridical counsel, or some other person initiated into the language of the law, for the purpose of bringing about the coming together of two language-universes (which are also 'forms of life', as Wittgenstein reminds us) which are *a priori* very far from each other.

The exigency of 'accessibility' to the tribunal (Article 6 of the European Convention on Human Rights) here takes on an ethical profundity which passes via the medium of language; in order that justice should be done, what is at stake is to give a hearing to the parties first of all, without reducing the content of their discourse to what is *a priori* 'encodable', assimilable into the legal hypothesis. Beyond the traditional calling into question of juridical jargon, this is an ethical exigency of humanity that makes its voice heard here: to do justice to the words of the individual subject to the law, in its specificity and sometimes in its strangeness, before dispensing justice. This is a question of recognition, of listening, of equality in principle of all those who are subject to the law, and it is a question of a cooperative dialogue.

As is emphasised by James Boyd White, what is asked of the judge is this rare quality of being able to place himself successively in the place of each of the parties, which implies that he must recognise both the pertinence and the legitimacy of the discourses that confront each other at the same time as he perceives their respective limits—including perceiving the pertinence and limits of the juridical language.³⁵ Only on this condition will the judgment be

³¹ G. Zagrebelsky (M. Leroy trans), *Le droit en douceur* (Paris, Economica, 2000) 131.

³² Dissenting opinion of Judge Scalia in *Bendix Autolite v. Mitsubco Enters.*, 486 US 888, 897 (1988).

³³ T. Kuhn, *La structure des révolutions scientifiques* (Paris, Flammarion, 1972) 216ff.

³⁴ A. Berman, *L'épreuve de l'étranger* (Paris, Gallimard, 1984).

³⁵ J.B. White, *Justice as Translation* (Chicago, University of Chicago Press, 1990) 262.

audible to both parties. In the best case, he will do more and go further than merely 'deciding between' the appellants by allotting to each his share (to do only that, all you need is a sword); instead, he will bring the protagonists to the beginnings of a reciprocal recognition, an indispensable prerequisite for each of them to resume their participation in the social bond that had been compromised.³⁶

On the ethical terrain likewise, it turns out that law is a privileged laboratory for the translational paradigm.

VII. SOME GAINS FROM TRANSLATION THEORY

The foregoing elaborations have permitted me, at the end of my rapid staking-out of the juridical field, to take the measure of numerous important applications of the translational paradigm in the field of law. But then, you will ask, what use can this approach be in terms of translation? Rather than go back now over the various questions raised in the preceding paragraphs, in order to shine upon them the light of the translational paradigm, I propose in conclusion to run through some of the essential gains arising from this problematic of translation.

The first point consists in recalling that translation is not limited to the mere transfer of a verbal message from one language to another (translation in the strict sense); it is also understood in the broader sense, of the interpretation of any signifying ensemble within one and the same linguistic community. This is because difference passes through the heart of every natural language and not just along its frontiers: difference, and hence strangeness, opacity, the non-coinciding of the self with itself—this is the post-Babel dispersion and confusion. How could it be otherwise, since there does not exist anywhere a lexis which would coincide, term for term, without loss and without excess, in a perfect transparency, with the things that its words aim to name? Rather than dictionaries with univocal definitions, we have encyclopedias which are a summation of usage, of conventions, of traditions relative to these words and which express our more or less successful efforts at naming these things. But this weakness of natural languages is also their strength: their semantic plasticity and their floating usages reveal astonishing possibilities of meaning, and permit us precisely to carry out translational adjustments and creativity in language. Because they are at the same time both less and more than a lexis, these languages are condemned to be constantly (re)translated, condemned to be susceptible to infinite signifying virtualities.

The second of the chief gains acquired from translation theory consists in the identification of translation's two limit points, which are like its Scylla

and Charybdis. On the one hand, there is the hasty and often arrogant statement of omnitranslatability, according to which translation comes down to a simple decoding of a more-or-less encrypted message, whose code one only needs to master in order to solve its difficulties. On the other hand, there is the denial of translation, anchored in the conviction that the deep structures of languages and cultures are incommensurable with one another and therefore in reality no transposition between them is possible. In the first case, we think we can get to the common basis of all the languages, which would make translation between them possible, so we make great efforts to detect, beneath the apparent buzzing confusion of languages, these hidden structures which would either take us back to an originary matrix whose traces have been lost in the darkness of time or forward to an absolutely rational language which remains to be constructed, but whose lines of force we are already in a position to discern. Placed in the service of political/cultural ambitions, these postulates increase, as one might suspect, the danger of a hegemonic translation policy, one that enslaves, a policy of the sort that imperial Rome practised towards the Greek heritage which she appropriated. In the other case, the postulate of untranslatability—despite the existence of massive and ancient translations which are not all 'unfaithful beauties', and although it can claim its authority from a certain degree of incommensurability of natural languages—could also feed into some regrettable political/cultural attitudes inspired by the fear or the rejection of the other, the refusal of all forms of cross-breeding, and the timid falling back onto one's own idiolect. Since its beginnings, the history and theory of translation has never ceased to oscillate between these two extremes, succumbing at times to its traps, and at times succeeding in coming up with a third way, which makes translation into an exercise which is just as necessary as it is approximate, and which must therefore always be started anew.

The methodological version of the dilemma, which is of more direct interest to us here and which constitutes the third gain of translation theory, consists in emphasising the eternal tension between the vow of fidelity and the suspicion of betrayal which runs through this whole problematic. The translator, as has been written, is that servant forced to serve two masters at the same time and who cannot but betray both the one and the other. But this excess of unworthiness (*traduttore, traditore*), just like this over-rigorous insistence (fidelity to what—to the word, to the letter, to the spirit, to the source language, to the target language?) proceeds from a common misconception: the belief, even now, that it is possible to say the same thing in different words, as if there existed some universal super-lexis—a supranatural and immutable language—which could guarantee the change, without loss or distortion, from one language to another, because it would be able to tell the truth of things 'as they are in themselves'. However, we must get away from this illusory belief (which reproduces at the inter-linguistic level the fantasy of a pure lexis which we have already denounced at the intra-linguistic level); we must mourn the sad passing of the idea of a perfect language and come to terms

³⁶ On this double intention of judgment, cf P Ricoeur, 'L'acte de juger' in *Le Juste 1* (Paris, Éditions Esprit) 185ff.

with the fact that there does not exist any criterion of good translation. Thus, we will make do with 'an equivalence that is not identical' (Paul Ricoeur) and, when we translate, we will content ourselves with saying 'practically the same thing' (Umberto Eco). Along this path, a very rich set of methodologies has developed, seeking to bring the (national) reader closer to the (foreign) author. A study of these methodologies reveals an astounding degree of convergence with our analysis of the work of the judge: Valéry Larbaud refers to the 'weighing of words' practised by the translator;³⁷ Umberto Eco, for his part, speaks of the quest for the most advantageous compromise, but remains conscious of the sacrifices that you must know how to make; as for Paul Ricoeur, he alludes to the 'construction of comparables' with a view to establishing this 'equivalence without being identical', which is, as regards translation, the sole form of higher 'justness' (justice?) that one can lay claim to.³⁸ In the best case, the balance that is negotiated between the other and the same, the old and the current, the letter and the spirit, can take the form—beyond the problematic of the more-or-less great 'fidelity'—of what Jacques Derrida calls *une traduction relevante*, a 'relevant translation';³⁹ that is to say, a translation which is not only pertinent or well adapted, but which 'raises' the translated work, in the triple meaning of what, first of all, 'raises' a culinary preparation and gives it taste; secondly, of what elevates the translated work, hoisting it up to the heights and making it equal to the strongest of its potentials; and thirdly, in the Hegelian sense of sublation, that which transcends and preserves at the same time. A translation, indeed, brings about the putting-to-death of the translated text and yet at the same guarantees it a form of survival. In this way we will have accomplished the essential function of what Walter Benjamin called 'the task of the translator': to take responsibility for and germinate in one's own language the seed of meaning which dwells in the source language without truly coming to be heard therein.⁴⁰

³⁷ V Larbaud, *Sous l'invocation de Saint Jérôme* (Paris, Gallimard, 1997) 76.

³⁸ P Ricoeur, 'Un "passage": traduire l'intraduisible' in P Ricoeur, *Sur la traduction* (Paris, Bayard, 2004) 62ff.

³⁹ J Derrida, *Qu'est-ce qu'une traduction relevante?* (Paris, L'Hermès (carnets), 2005).

⁴⁰ W Benjamin, *La tâche du traducteur* (1923) in M de Gandillac, R Roehlitz and P Rusch (eds), *Œuvres*, vol 1 (Paris, Gallimard (Folio), 2000) 244ff.

6

Controlled Comparison and Language of Description

MAURICE ADAMS¹

VERY NOW AND then, I enjoy watching nature documentaries, and in particular those by Jacques Cousteau, the famous French oceanologist. There is an episode where—if I remember correctly—part of the coast of Somalia is explored. Cousteau's divers are at the beach, fully equipped and ready to explore the waters. This to the great amusement of the local population; to the locals, the creatures on the beach must be an unfamiliar species of dolphins: they have the same smooth skin and general appearance, despite the fact that they have limbs and are able to walk. Nonetheless, dolphins they must be!

We all experience the desire to characterise unfamiliar phenomena in terms or categories we think we understand or recognise; this makes the unexpected manageable. As the example above shows, this desire can be so seductive that it can lead to deception. As far as comparative law is concerned, this can be quite a problem. Is there a way to overcome this seduction? This is a question I want to deal with in this chapter, and I will build on a debate that took place in the 1960s in order to do so. But to be able to do this, I will first need to start with a discussion on the specific characteristics of comparative law.

I

What is it that justifies comparative law as an independent discipline?² This question is relevant, since comparison is inseparably connected with doing research in the humanities and social sciences—either of which the legal

¹ A previous version of this chapter was published in Dutch as 'Eenvoud en verdelijkheid: Rechtsvergelijkende analyse en taal van descriptie' (2011) 60 *Ars Aequi Maandblad* 796.

² See also M Adams, 'Doing What Doesn't Come Naturally: On the Distinctiveness of Comparative Law' in M Van Hoecke (ed), *Methodologies of Legal Research* (Oxford, Hart Publishing, 2011) 229–40.