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A Space in-Between—Legal Translation as a ‘Third Space’

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A SPACE IN-BETWEEN—LEGAL TRANSLATION AS A 'THIRD SPACE'

Anne Wagner*

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We should remember that it is the “inter”—the cutting edge of translation and negotiation, the in-between, the space of the entre that Derrida has opened up in writing itself—that carries the burden of the meaning of culture... It is in this space that we will find those words with which we can speak of Ourselves and Others. And by exploring this hybridity, this ‘Third Space,’ we may elude the politics of polarity and emerge as the others of our selves.¹

I. INTRODUCTION

Legal translation is a space of possibilities, an autonomous realm of “cross-cultural events”² within which the “system-bound”³ of legal concepts and notions deeply rooted in language, history and societal evolution⁴ of one country are transformed and integrated into the language of another, and as a result, stratified over the course of time⁵:

[A]ll legal systems are mixed—derived from imported structures, concepts and ideas but also emanating from different normative systems which are based on customs, religions and languages, habitat and natural resources, families, geography and climate, conceptions of morality, and other features.⁶

1. Homi Bhabha, *Cultural Diversity and Cultural Differences* in THE POST-COLONIAL STUDIES READER 206, 209 (Bill Ashcroft, Gareth Griffiths & Helen Tiffin eds., Routledge 1995) [hereinafter *Cultural Diversity*].

2. MARY SNELL-HORNBY, TRANSLATION STUDIES: AN INTEGRATED APPROACH 43 (John Benjamins Publishing Company 1988).

3. DEBORAH CAO, TRANSLATING LAW 23 (Multilingual Matters 2007).

4. SUSAN ŠARČEVIĆ, NEW APPROACH TO LEGAL TRANSLATION (Kluwer Law International 2000); Anne Wagner & Jean-Claude G  mar eds., *The Process of Translating: Translating and Transferring Law, its Concepts, Notions and Language*, 26 INT’L J. SEMIOT. L. (2013) [hereinafter *The Process of Translating*]; Anne Wagner & Jean-Claude G  mar eds., *Decision-Making in Legal Translation, Interpretation and Speech Act—Legal Semiotic Cultural Mediation Techniques*, 201 SEMIOTICA (2014) [hereinafter *Decision-Making in Legal Translation*].

5. Barbara Pozzo, *English as a Legal Lingua Franca in the EU Multilingual Context* in THE ROLE OF LEGAL TRANSLATION IN LEGAL HARMONIZATION 186 (C.J.W. Baaij ed., Wolters Kluwer 2012).

6. Nora V. Demleitner, *Combating Legal Ethnocentrism: Comparative Law Sets Boundaries* in 31 ARIZ. ST. L.J. 737, 748-49 (1999).

Accordingly, the main complexity in legal translation is to gather terminology of multiple origins⁷ and to transfer it into another linguistic framework.⁸ This linguistic framework is originally a binary code that comprises two semantic spaces: the source space and the target space. The legal translation process would then constitute the 'Third Space,'⁹ a space in-between, "which enables other positions to emerge . . . [and where] . . . all forms of cultures are continually in a process of hybridity"¹⁰ of evolution. This Third Space is undefined, vague, and fluid. It is a precondition for the negotiation, transformation and translation¹¹ between two cultures. Bhabha posits:

It is that Third Space, though unrepresentable in itself, which constitutes the discursive conditions of enunciation that ensure that the meaning and symbols of culture have no primordial unity or fixity; that even the same signs can be appropriated, translated, rehistoricized, and read anew.¹²

Indeed, this 'Third Space' permits manipulation of the consciousness and unconsciousness of legal discourse when the translation process is underway. It is a "Third Space of enunciation between the poles of cultural identity, a space within which cultural identities themselves are transformed."¹³ 'Third Space' acts as a multistage dynamics,¹⁴ as an absent structure¹⁵ where mechanisms

7. SIMON SHERRY, *GENDER IN TRANSLATION* 134 (Routledge 1996).

8. Wagner & G mar eds., *The Process of Translating*, *supra* note 4.

9. "For me the importance of hybridity is not to be able to trace two original moments from which the third emerges, rather hybridity to me is the 'Third Space,' which enables other positions to emerge." *Infra*, note 10.

10. John Rutherford, *The Third Space: Interview with Homi Bhabha* in *IDENTITY, COMMUNITY, CULTURE, DIFFERENCE* 211 (Lawrence & Wishart 1990).

11. *COMMUNICATING IN THE THIRD SPACE* 120 (Karin Ikas & Gerhard Wagner eds., Routledge 2009) [hereinafter *COMMUNICATING IN THE THIRD SPACE*].

12. Bhabha, *Cultural Diversity*, *supra* note 2, at 208.

13. *COMMUNICATING IN THE THIRD SPACE*, *supra* note 11, at 120.

14. Anne Wagner, *Semiotic Analysis of the Multistage Dynamics at the core of Indeterminacy in Legal Language* in *VAGUENESS IN NORMATIVE TEXTS* 173 (Vijay K. Bhatia., Jan Engberg, Maurizio Gotti & Dorothee Heller eds, Peter Lang 2005).

15. UMBERTO ECO, *LA STRUCTURE ABSENTE—INTRODUCTION   LA RECHERCHE S MIOTIQUE* (Mercure de France 1972).

of transfer, of importation from one culture to another have to be fairly analysed.¹⁶ However,

1. The passage brought effects of distortions and appropriation . . . , reformulation and renewals demanded of the target language.¹⁷
2. This struggle—between possession and dispossession, or between reinscription and obliteration—is necessary perilous¹⁸
3. Decision-making needs to elaborate multiple and viable solutions . . . and so to have “cultural mediation” in the legal field.¹⁹

‘Cultural mediation’²⁰ is an essential pillar within ‘Third Space’ as it opens up a series of promising ways, alternatives, and compromises to create encounters and crossroads²¹ between disciplines for practical possibilities in the legal translation process: “Put differently, the likelihood of identical concepts possesses both an innate component (our cognitive design) and a cultural one (how culture structures experience and represents it in that culture’s language).”²²

This paper construes presentations of ‘Third Space,’ orientates our vision of ‘legal translation’ and finds acceptable and readable transfers in the legal communicative space—a “protean, moving and complex process.”²³ The aim of this paper is to offer broader perspectives for understanding the roles of ‘translation’ and ‘Third

16. Wagner & G mar eds., *Decision-Making in Legal Translation*, *supra* note 4; SANFORD BUDICK & WOLFGANG ISER, *THE TRANSLATION OF CULTURES—FIGURATIONS OF THE SPACE BETWEEN* (Stanford University Press 1996).

17. SHERRY, *supra* note 7, at 11.

18. BUDICK & ISER, *supra* note 16.

19. Anne Wagner & Jean-Claude G mar, *Communication and Cultural Mediation Techniques in Jurilinguistics* in 201 SEMIOTICA 1 (2014) [hereinafter *Communication and Cultural Mediation Techniques in Jurilinguistics*].

20. *Id.*

21. John Sinclair, *Trust the text* in *ADVANCES IN WRITTEN TEXT 12* (Malcolm Coulthard ed., Routledge 2005).

22. ELINA PAUNIO, *LEGAL CERTAINTY IN MULTILINGUAL EU LAW—LANGUAGE, DISCOURSE AND REASONING AT THE EUROPEAN COURT OF JUSTICE* 143 (Law, Language and Communication Series, Ashgate 2013).

23. Anne Wagner & Jean-Claude G mar, *Jurilinguistique et Juritraductologie—A Collective and Societal Dimension: Multiplicity of Meaning between Sciences and Society*, 27 INT’L J. SEMIOT. L. (2014).

Space' in the debate of legal translation, from both theoretical and practical angles.

II. CONCEPTUAL SPACE OF ELABORATION

A 'space of elaboration,' of interpretation is crucial in the study of law, language and translation in society. It means that the way beliefs and values are socially constructed, and the way they reflect their images and disseminate their views, provides potential and valuable keys for research in the field of legal translation theory. Challenging legal translation theories is an unavoidable aspect of social and legal interaction within the transfer and exchange of communication in the legal sphere.

'Third Space' is not only a space of expansion but also an organised and classified space. It is entwined in the source space and in the target space, and it can lead to several sets of translation, where "they are very diverse map-tracing, rhizomeroom assemblages, with variable coefficients of deterritorialisation."²⁴

A. *Legal Translation as a 'Spatio-Temporal Whole'*

The roles of legal translators, jurilinguists and/or lawyer-linguists are crucial to achieve a comprehensible and readable 'Third Space' in the target language:

. . . of what is immediately presented as a spatio-temporal whole . . . knowing how to orientate oneself in space and time, knowing how to construe presentations or appearance in terms of spatial and temporal 'reality.'²⁵

This 'spatio-temporal whole' leads to considerations of the aspects of 'foreignization' and/or 'domestication' of concepts, terms, notions in the target language²⁶: "The translator can either leave the

24. GILLES DELEUZE & FELIX GUATTARI, *A THOUSAND PLATEAUS* 15 (University of Minnesota Press 1988).

25. JONATHAN HERON, *PHILOSOPHICAL BASIS FOR A NEW PARADIGM* 87 (Seuil 1989).

26. Wenfen Yang, *Brief Study on Domestication and Foreignization in Translation*, 1 *JOURNAL OF LANGUAGE, TEACHING AND RESEARCH* 77 (2010);

writer in peace as much as possible and bring the reader to him, or he can leave the reader in peace as much as possible and bring the writer to him.”²⁷

In the translation process, this ‘whole’ cannot be evaluated in a mechanical way.²⁸ Tomášek²⁹ suggests that translators and/or jurilinguists utilize “a procedure based on both linguistic and legal comparative approaches.” This process needs interpretation of the objective legal reality where translators, jurilinguists and/or lawyer-linguists will be educated and trained to deal with the diverse, multi-layered, socio-legal aspects in translation:

Translation always falls short of its goal of conveying the meaning and the style of a text in a new text that reads like an original composition in the second language. The law is always subject to interpretation; the idea that it is “carved in stone” is only an illusion. Nor is the meaning of words ever fixed: the kind of precision the law demands of language, and formal semantics attempts to represent, is again based on an illusion of human linguistic behaviour, which has evolved very efficiently for a large number of purposes, though pinning down precise meaning is not among them. This has implication for translation as well, for if indeterminacy is already the condition within languages, it holds *a fortiori* between languages.³⁰

Pierre Legrand drew the fact that “texts are intentional and relational. The meaning of the original is assumed not to reside wholly

JEREMY MUNDAY, *INTRODUCING TRANSLATION STUDIES: THEORIES AND APPLICATIONS* (Routledge 2001); LAWRENCE VENUTI, *THE TRANSLATOR'S INVISIBILITY: A HISTORY OF TRANSLATION* (Routledge 1995); EUGENE A. NIDA, *TOWARD A SCIENCE OF TRANSLATION* (E.J. Brill 1964).

27. WOLFRAM WILSS, *THE SCIENCE OF TRANSLATION: PROBLEMS AND METHODS* 33 (Günther Narr 1982).

28. Hans J. Vermeer, *Hermeneutik und Übersetzung (swissenschaft)*, 9 *TEXTCONTEXT* 163 (1994).

29. Michal Tomášek, *On Selected Problems in Translation of the Legal Language* in *TRANSLATOLOGICA PRAGENSIA IV, ACTA UNIVERSITATIS CAROLINAE PHILOLOGICA* 4/1994, 113,113 (Karolinum 1990).

30. John E. Joseph, *Indeterminacy, Translation and the Law* in *TRANSLATION AND THE LAW* 13, 19 (Marshall Morris ed., Benjamins 1995).

within the original itself. There are silences to be addressed.”³¹ Causality in the legal translation process is primordial and can lead to multiple explanations.³² As Hermans³³ also points out, there is no real solution to this issue. Experts in legal translation have to “patiently, repeatedly, laboriously negotiate the other’s terrain, while trying to conceptualize our own modes of representation and the commensurability of cultures.”³⁴

B. Legal Translation as a Contact Zone

As already mentioned ‘Third Space’ is entwined in the source space and the target space. ‘Inbetweenness’ is crucial as it acts as a ‘contact zone’ between the source language and the target language. It has a coordinate function between the source culture and the target culture, where sets of interpretation are available for consideration—like in the game theory in mathematics—with high or low connectivity in the legal transfer process. Accordingly, whereas high connectivity leads to a proper transfer without modifying the boundaries of the original meanings, low connectivity results in an increased hybridized discourse with many variants in the target language, leading to intercultural efforts of creations and shifts in meanings. Sacco introduces the concept of “legal formants which may or may not be in harmony with each other.”³⁵ This idea follows the approach proposed by Deleuze & Guattari where they describe the rhizome with three main functions, i.e. heterogeneity, connection and multiplicity:

31. Pierre Legrand, *Issues in the Translatability of Law* in NATION, LANGUAGE AND THE ETHICS OF TRANSLATION 30, 37 (Sandra Bermann & Michael Wood eds., Princeton University Press 2005) [hereinafter *Issues in the Translatability of Law*].

32. See WESLEY SALMON, CAUSALITY AND EXPLANATION 360 (Oxford University Press 1998).

33. Theo Hermans, *Translation as Institution* in TRANSLATION AS INTERCULTURAL COMMUNICATION 3 (Mary Snell-Hornby, Zuzana Jettmarová & Klaus Kaindl eds., Benjamins 1997).

34. *Id.* at 19.

35. Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law* in 39 AM. J. COMP. L. 1, 30 (1991).

A rhizome may be broken, shattered at a given spot, but it will start up again on one of its old lines, or on new lines Every rhizome contains lines of segmentarity according to which it is stratified, territorialised, signified, attributed, etc., as well as lines of deterritorialisation down which it constantly flees.³⁶

Legal translation has a pivotal role in the re-interpretation and/or deterritorialisation³⁷ of identity. It is unavoidable³⁸ to assume new and different meanings from the original matrix of the source language, and to accept that this transfer in the target language is never pure³⁹ between the signified and the signifier.

Alan Watson refers to legal transplant to describe the “moving of a rule or a system from one country to another, or from one people to another,”⁴⁰ and Bhabha completes this notion where he postulates that “the pact of interpretation [could never be] simply an act of communication between the I⁴¹ and the You⁴² The production of meaning requires that these two places be mobilised in the passage through a Third Space.”⁴³

C. The Passage Through Third Space: Between Trauma and Heritage

‘Third Space’ in legal translation entails analyzing the roles of actors involved in the translation process, the actions they take and the final product they built from their practices. Given the power

36. DELEUZE & GUATTARI, *supra* note 24, at 9.

37. *Id.* at 15.

38. See Gayatri Spivak, *Translation as Culture* in TRANSLATION: REFLECTIONS, REFRACTIONS, TRANSFORMATIONS 238, 238 (Paul St-Pierre & Prafull C. Kar eds., Pencraft 2005).

39. See JACQUES DERRIDA, SEMIOLOGY AND GRAMMATOLOGY 26 (Chicago University Press 1981).

40. ALAN WATSON, LEGAL TRANSPLANT: AN APPROACH TO COMPARATIVE LAW 21 (University of Georgia Press 1993).

41. The ‘I’ refers to the source language.

42. The ‘You’ refers to the target language.

43. HOMI BHABHA, THE LOCATION OF CULTURE 36 (Routledge 1994).

legal translation could have, there is a clear need to analyse the discursive *modus operandi* in relation to context, a “cultural turn,”⁴⁴ which is necessary for describing, analysing and interpreting social relations reflected in the text, before delivering the final translation in the target language.⁴⁵ We take ‘cultural turn’ to mean that legal discourse reflects “the organization of society and its institutions and the roles and power structures inherent therein.”⁴⁶

The reconstruction of the meaning of the source language (SL) necessarily involves references to a meta-level parameter, as the SL text cannot be encapsulated within the limits of the source legal system, but has to be ‘colonized’ and/or ‘domesticated’ in the target language.⁴⁷ Talmy states that “language somehow mirrors thought, and thought in turn, some external reality.”⁴⁸ Accordingly, legal language is culturally labelled.⁴⁹ However, Nietzsche moderates the culture-bound system when he expressed his scepticism that “the various languages, juxtaposed, show that words are never concerned with truth, never with adequate expression”⁵⁰

The translation process is the result of legal discourse analyses in which a wide variety of complex linguistic devices may either inherit the same legal usages or abuse (the trauma) the original

44. MARY SNELL-HORNBY, THE TURNS OF TRANSLATION STUDIES: NEW PARADIGMS OR SHIFTING VIEWPOINTS? 50 (Benjamins 2006) [hereinafter THE TURNS OF TRANSLATION STUDIES].

45. VIJAY K. BHATIA, WORLDS OF WRITTEN DISCOURSE: A GENRE-BASED VIEW 123 (Continuum 2004).

46. Ruth Wodak, 1968 *The Power of Political Jargon—A “Club-2” Discussion* in LANGUAGE POWER AND IDEOLOGY: STUDIES IN POLITICAL DISCOURSE 137, 155 (Ruth Wodak ed., Benjamins 1989).

47. King-Kui Sin & Derek Roebuck, *Language Engineering for Legal Transplantation: Conceptual Problems in Creating Common Law Chinese*, 16 LANGUAGE & COMMUNICATION 235 (1996).

48. Cited in JOANNA JEMIELNIAK, LEGAL INTERPRETATION IN INTERNATIONAL COMMERCIAL ARBITRATION 41 (Law, Language and Communication Series, Ashgate 2013).

49. GIDEON TOURY, DESCRIPTIVE TRANSLATION STUDIES AND BEYOND 33 (Benjamins 1995).

50. FRIEDRICH NIETZSCHE, ON TRUTH AND LIES IN A NONMORAL SENSE 248 (CreateSpace Independent Publishing Platform 1873).

framework by implementing a distinct legal usage in the target language.

Therefore, the challenge is important for accurate legal translations in practice:

- The translator of a legal text aims at introducing foreign legal worldviews into a different legal life-world. His task is to make the foreign legal text accessible for recipients with a different (legal) background.⁵¹
- In the area of intercultural communication, requiring not only language mediation but heightened cultural expertise, the (human) translator (and interpreter) plays an increasingly important role, whereby he/she will take the full responsibility for the “final product.”⁵²

By revealing the passage through ‘Third Space,’ legal experts are encouraged to better master translation practices to avoid a language/practice duality and lead to:

[an] assumed translation would be regarded as any target-culture text for which there are reasons to tentatively posit the existence of another text, in another culture and language, from which it was presumably derived by transfer operations and to which it is now tied by certain relationships . . . within that culture.⁵³

III. THE ASSEMBLAGE PHASE: FROM MEANING-MAKING TO MEANING-FINDING

“An assemblage is precisely this increase in the dimensions of multiplicity that necessarily changes in nature as it expands its connection . . . There are only lines.”⁵⁴ Law is a social phenomenon having multiple (or comprehensive) philosophical, theoretical and historical roots. Meanings in law have cultural nuances according to

51. E. Pommer Sieglinde, *The Hermeneutic Approach in Legal Translation in UNTERWEGS ZU EINER HERMENEUTISCHEN ÜBERSETZUNGSWISSENSCHAFT: RADEGUNDIS STOLZE ZU IHREM 60. GEBURSTAG* 274, 283 (Larisa Cercel, John Stanley eds., Günther Narr 2012).

52. SNELL-HORNBY, *THE TURNS OF TRANSLATION STUDIES*, *supra* note 44, at 133.

53. TOURY, *supra* note 49, at 35.

54. DELEUZE & GUATTARI, *supra* note 24, at 29.

the systems of lifestyle, values, traditions and the collective memory that are being examined. Law conveys testimony of the past but also demonstrate an ongoing social process that could be adjusted within space and time. Likewise, law reflects human values, practices, and aspirations of changes as its boundaries are flexible and in constant evolution. As expressed by Cao "law and legal language are system-bound, that is, they reflect the history, evolution and culture of a legal system."⁵⁵ The concepts of a particular legal system, however, are not language-dependent. That is to say, they can be transferred from one language to another when carried out within a semiotic framework that facilitates the bridging of conceptual gaps between concepts in the source language and their counterparts in the target language.⁵⁶

It therefore seems logical to make prospective translators "fit" for a wide range of technical producing activities, providing them not only with a solid text-based competence, but also with a solid social knowledge of both the source and target languages.⁵⁷

Concepts are part of the social phenomenon as they are units of meaning that can vary in their finality. Concepts serve as instruments for thinking and communicating, and allowing the expression of human thoughts, conclusions and suppositions in the source language. Consequently, the transfer process is not easy and translators have to distil a reasonable knowledge of the source language in the target language. Sin King Kui points out:

All large-scale cultural transfers begin in the absence of a readily usable language. The first, and most natural, response of the native culture is to make an attempt to naturalize the foreign culture. Where it has a close affinity to the

55. CAO, *supra* note 3, at 23.

56. King-Kui Sin, *foreword to* English-Chinese Glossary of Civil and Commercial Law Terms v-xi (Hong-Kong: Department of Justice 2002).

57. See Jean-Claude G mar, *Traduction et industries de la langue : nouveau d fi pour le traducteur*, 37 META: JOURNAL DES TRADUCTEURS / META: TRANSLATORS' JOURNAL 374 (1992); see also LANGAGE DU DROIT ET TRADUCTION, ESSAIS DE JURILINGUISTIQUE (Jean-Claude G mar ed., Montreal: Linguat ch 1982); Wagner & G mar, *The Process of Translating*, *supra* note 4, at 738-739.

native culture, naturalization or minor adjustment may be adequate. But where it is one of great complexity, or radically different, the native culture will find it necessary at some point to change and adjust its language so as to make it [suitable for effecting such transfer].⁵⁸

Cultural transfer, migration or translatability is a priority, and legal translators will have to fill the conceptual gap in the target language. To find a way from meaning-making to meaning-finding:

Translatability aims at comprehension, whereas encounters between cultures or interactions between levels of culture involve either assimilation or appropriation by making inroads into one another, trying to get out of a different culture or the different intra-cultural levels that seem attractive, useful, or is combated and suppressed for whatever reasons.⁵⁹

In other words, legal translators have to fix the semantic source, adjust it for the target language and—if necessary—build meta-linguistic devices to fill the conceptual gap for the target language: “translators are aware of the decisive part they have always played, without leaving the shadows themselves, to enable others to overcome the barriers of language and culture by way of the translators’ skills as writers.”⁶⁰

The translatability process is never pure and is always subject to a “power takeover in the multiplicity by a corresponding subjectification proceeding Unity always operates in an empty dimension supplementary to that of the system considered.”⁶¹

A. ‘Invariant Concept’ in ‘Third Space’—A Presumably Transparent Meaning

Marriage is an invariant concept when switching from the source language to the target language. Its linguistic unit in the

58. Sin King Kui, *The Common Law in Uncommon Chinese: Linguistic Anomalies and Cultural Shock*, 2 JOURNAL OF TRANSLATION 136-137 (1998).

59. Wolfgang Iser, *On Translatability*, 4 SURFACES 5, 6 (1994).

60. Renato Correia, *Translation of EU Legal Texts* in CROSSING BARRIERS AND BRIDGING CULTURES: THE CHALLENGES OF MULTILINGUAL TRANSLATION FOR THE EUROPEAN UNION 38, 40 (Arturo Tosi ed., Multilingual Matters Ltd. 2003)

61. DELEUZE & GUATTARI, *supra* note 24, at 29.

meaning-finding is fixed in both languages. Only the variables (societal and legal factors) within this concept may differ. However, *Marriage* does not create confusion in the translatability process, as the linguistic unit is transparent. The 'invariant concept' under translation leads to the conservation of its original unit, though there is no absolute cultural equivalence. A process of meaning-finding will then be implemented to adjust the target language:

Transplanting frequently, perhaps always, involves legal transformation. Even when the transplanted rule remains unchanged, its impact in a new social setting may be different The whole context of the rule or concept has to be studied to understand the extent of the transformation.⁶²

Marriage is one of the most anchored concepts related to culture, society and religion. It is considered as a Christian heritage. It is part of the cultural heritage, highlighting a distinction of the criterion for the composition of a couple. The assessment of the novelty 'marriage' requires the identification of the concept, a sequential analysis of its development, and the cultural experience this word has in civil law and common law systems.

Marriage comes from the verb *marry*, which meant in the XII century "to bind women to men, and thus guarantee that a man's children were truly his biological heirs. Through marriage, a woman became a man's property." 'Marry' derives from the Latin *maritus*, which means husband. From a traditional etymology, *maritus* meant "male," but Alain Rey (Editor of the dictionary *Petit Robert*) traces this word back to an Indo-European root, in Sanskrit *Marya* (young man in love) and from the Greek *Meirax*. Additionally, Benoit De Boysson indicated that the term *marriage* comes not only etymologically from *maritare* (which means "male") but also from *matrimonium*, which means "marriage" and from *mater*, the mother.⁶³ Etymologically, De Boysson concludes that "marriage is a legal form

62. WATSON, *supra* note 40, at 116.

63. BENOIT DE BOYSSON, *MARIAGE ET CONJUGALITÉ—ESSAI SUR LA SINGULARITÉ MATRIMONIALE* (Thèse—Université Jean Moulin Lyon 3, LGDJ 2012).

by which a woman is preparing herself to become a mother by marrying a man.”⁶⁴

Religion became involved in the institution of marriage when the sacramental nature of marriage was written into canon law at the Council of Trent in 1563. However, same-sex couple marriage in history is rare, but known. The Roman emperor Nero, who ruled from AD 54 to 68, twice married men in formal wedding ceremonies, and forced the Imperial Court to treat them as his wives. In the second and third century in Rome, homosexual weddings became common.⁶⁵ Romans outlawed formal homosexual unions in the year 342. But John Boswell in his research found evidence of homosexual unions after that period, including some that were recognized by Catholic and Greek Orthodox churches.⁶⁶

The history of the development of French national law in the area of conceptualisation of family and marriage has significantly evolved. Modern cultural evolutions introduced the concept of “Civil Partnership” both for heterosexual and same-sex couples in the mid-20th century. With the introduction of civil partnerships, boundaries were reconsidered in terms of the concept of family, where significant developments were expected to comply with Human Rights’ frameworks encompassing the notion of family. They mostly focused on the individual rights of man to participate, to create his own cultural identity, and to have a family irrespective of his sexual orientation insofar as it did not infringe upon human rights of other individuals; however, men could not enjoy the same rights as heterosexual couples in terms of parentage and inheritance.

The most recent evolution of the concept of marriage dates back from November 2012 where the French government decided to vote a bill “*mariage pour tous*,” marriage for everybody irrespective of their sex. This text relies on the principle of equality before the law and permits same-sex couples to marry and enjoy the same rights

64. *Id.*

65. MARILYN YALOM, *A HISTORY OF THE WIFE* (Harper Collins 2002).

66. JOHN BOSWELL, *SAME-SEX UNIONS IN PREMODERN EUROPE 199-217* (Vintage 1995).

and duties as heterosexual couples.⁶⁷ The bill was passed and changes were made in the French Civil Code to replace the words “husband and wife” with “spouses,” and “father and mother” with “parents” (respectively in Art. 75 of the French Civil Code, and in Art. 34, Art. 371–1).⁶⁸

An evolution of the concept of marriage also occurred in Hong Kong, a common law jurisdiction, when the Court of Final Appeal decided in 2013 (FACV No. 4 of 2012 on appeal from CACV No. 266 of 2010) that a post-operative male-to-female transsexual person who had undergone sex reassignment surgery (“SRS”) at a hospital is allowed to marry her male partner. Previously, she had been denied the possibility to do so by the Registrar of Marriages on the ground that she did not qualify as a “woman” under Hong Kong’s marriage law, which solely adopted the biological criteria for assessing the sex of a person for the purposes of marriage as “procreative intercourse was an essential constituent of a marriage at common law” (*Corbett v Corbett*).

Three points are worth noting in the decision of the Court of Final Appeal. First, as the right to marry is protected by the *Basic Law* of Hong Kong and the *Hong Kong Bill of Rights*, it must not be taken away by any marriage law. Second, the nature of marriage has undergone drastic changes in Hong Kong, so much that procreation is no longer regarded as an essential constituent of marriage. Third, the biological status of a person’s sex should not be fixed at birth and be regarded as immutable. To put it in a nutshell, the decision has given new meaning to the common law concept of marriage and modified the conventional concept of sex as something inborn and immutable. Yet, unlike the latest French concept, marriage under

67. Act No. 2013-404 of May 17, 2013, art. 13, allowing marriage to same-sex couples. The preliminary title is completed by article 6-1 as follows: “Art. 6-1.—Le mariage et la filiation adoptive emportent les mêmes effets, droits et obligations reconnus par les lois, à l’exclusion de ceux prévus au titre VII du livre Ier du présent code, que les époux ou les parents soient de sexe différent ou de même sexe.”

68. *Id.*

Hong Kong laws remains marriage of opposite sexes. The two concepts, though close, are not equivalent.

Legal language is bound to culture. In terms of translation, that of the concept ‘marriage,’ and for that matter, the concepts of sex (male, female, man, woman), might seem straightforward, but in terms of cultural transfer and in reference to Christianity or to common law history, “there cannot be equivalence of meaning between the law-in-translation and the original law.”⁶⁹ Translators will not be in the capacity of *translatabilizing*, transplanting the full load of the concept into the target language, which can only be achieved through meta-translational devices.⁷⁰ Multiplicities in meaning are flat and defined by the outside.⁷¹

B. Multivariable Translational Analyses in ‘Third Space’

The choice of equivalence is not merely a linguistic and translational decision but a cultural mediation,⁷² corresponding to the ‘passage through Third Space’ and to “the silences to be addressed.”⁷³ These silences correspond to the background in meaning, making in the source language where they derive from prior experiences of law. ‘Third Space’ creates a living notion⁷⁴ where:

[C]oncepts are more like chess pieces. They can be manoeuvred to produce certain results but the players have a choice as to the move. Similarly, lawyers and judges often have a choice as to how they will move the concepts.⁷⁵

Multivariable translational analyses⁷⁶ provide both descriptive and inferential meanings. They presuppose that (1) we examine

69. Legrand, *Issues in the Translatability of Law*, *supra* note 31, at 30.

70. King-Kui Sin, *Out of the Fly-Bottle: Conceptual Confusions in Multilingual Legislation*, 26 INT’L J. SEMIOT. L. 927 (2013).

71. DELEUZE & GUATTARI, *supra* note 24.

72. Wagner & Gémar eds., *The Process of Translating*, *supra* note 4.

73. Legrand, *Issues in the Translatability of Law*, *supra* note 31, at 37.

74. FRANÇOIS GÉNY, 1 SCIENCES ET TECHNIQUE EN DROIT PRIVÉ POSITIF, (Recueil Sirey 1922).

75. JOHN HYNES FARRAR & ANTHONY M. DUGDALE, INTRODUCTION TO LEGAL METHOD 78 (Sweet & Maxwell 1990).

76. Only a few samples from our multivariable translation analyses are shown in this paper.

some concepts, (2) process their variables and (3) search for the inter-correlations that the variables may possess in both the source and target spaces. Eventually, from this deciphering process provided by the inter-correlated variables, we could envisage the most appropriate translation.

The objective of multivariable translational analyses is to gain thorough understanding and knowledge of concepts, their purposes, their assumptions, and their limitations in the source space. From these extractions, we can then emphasize the similarities and/or differences in both the source and target spaces, and so think of the 'passage through Third Space.' The essential objective of these analyses is to be meaningful in the target space. As expressed by Legrand, "to penetrate the 'legal' one must appreciate the 'social' that underpins it, otherwise the 'legal' literally does not make sense."⁷⁷

Our analyses rely on two matrices. Each of them has extensions, located in space and time, and leads to the analyses of some extractions so as to decipher their meanings in the source and target spaces, and to see how the translation was operated. The two matrices with the units to be investigated (in bold) are as follows:

- Matrix 1:
 - a. Extracts from *Les codes des codes ou les Vingt-un Codes* in 1839 (Text 1)
 Extracts from *The Code Napoleon or, The French Civil Code*—literal translation 1827 (Transl. 1)
- Matrix 2:
 - b. Extracts from the most recent version of the Civil Code of March 14, 2014 (Text 2)
 - c. Extracts from the official and current translation available on *Legifrance Portal* (Transl. 2)

77. Pierre Legrand, *European Legal Systems are Not Converging* in 45 INT'L & COMP. L.Q. 52, 58 (1996).

Matrix 1.	Text 1.	Transl. 1
Art. 53 Civil Code	<i>Le procureur du roi au tribunal de première instance sera tenu de vérifier l'état des registres lors du dépôt qui en sera fait au greffe; il dressera un procès-verbal sommaire de la vérification, dénoncera les contraventions ou délit commis par les officiers de l'état civil, et requerra contre eux la condamnation aux amendes.</i>	The commissioner of government at the court of first instance shall be bound to verify the state of the registers at the time of their being deposited among the rolls of the court; he shall draw up a concise statement of such verification, he shall certify all offences and crimes committed by the officers of the civil courts, and shall demand sentence against them.
Matrix 2.	Text 2.	Transl. 2.
Art. 53 Civil Code	<i>Le procureur de la République au tribunal de grande instance sera tenu de vérifier l'état des registres lors du dépôt qui en sera fait au greffe ; il dressera un procès-verbal sommaire de la vérification, dénoncera les contraventions ou délits commis par les officiers de l'état civil, et requerra contre eux la condamnation aux amendes.</i>	The Government procurator at the tribunal de grande instance shall verify the state of the registers when they are deposited at the court registrar's office; he shall draw up a memorandum of verification, denounce minor and ordinary offences committed by officers of civil status and call for their being sentenced to fines.
Matrix 1.	Text 1.	Transl. 1
Art. 11	<i>L'étranger jouira en France des mêmes droits civils que ceux qui sont ou seront accordés aux Français par les traités de la nation à laquelle cet étranger appartiendra.</i>	A foreigner shall enjoy in France the same civil rights as are or shall be accorded to Frenchmen by the treaties of that nation to which such foreigner shall belong.
Matrix 2.	Text 2.	Transl. 2.
Art. 11	<i>L'étranger jouira en France des mêmes droits civils que ceux qui sont ou seront accordés aux Français par les traités de la nation à laquelle cet étranger appartiendra.</i>	An alien enjoys in France the same civil rights as those that are or will be granted to French persons by the treaties of the nation to which that alien belongs.

Matrix 1.	Text 1.	Transl. 1
Art. 144	<i>L'<u>homme</u> avant dix-huit ans révolus, la <u>femme</u> avant quinze ans révolus, ne peuvent contracter mariage.</i>	A <u>man</u> before the age of 18, and a <u>woman</u> before 15 complete, are incapable of contracting marriage.
Matrix 2.	Text 2.	Transl. 2.
Art. 144	<i>Le mariage ne peut être contracté avant dix-huit ans révolus.</i>	<u>A male and a female</u> may not contract marriage before they have completed their eighteenth year.

From completeness, we investigate their meanings in context, search for the variable factors available for them, and eventually see if their original significances were preserved (heritage) or radically modified (trauma).

1. The Latin Heritage: Article 53 of the Civil Code

Under article 53, Latin was privileged in Matrix 2 over an English word translated literally in Matrix 1. Latin is transparent in both the source language and target language without any loss of authenticity and meaning. Translators seek the etymological root of “*procurateur du roi*,” “*procurateur de la République*,” and select the Latin concept for that legal purpose. The ‘passage through Third Space’ is then much easily facilitated. As rightly pointed out by Rodolfo Sacco:

*La plus grande partie de l’immense bagage lexical dont bénéficie le continent européen est traduisible en raison de ses origines liées, d’abord à la traduction du latin au français, du latin à l’allemand, du latin à l’italien, puis à la traduction du français et de l’allemand à l’italien, au russe, au hongrois, à l’espagnol, au polonais, etc.*⁷⁸

Indeed, if we look at the meaning of *procurator*, several convergent definitions arise from dictionaries of the source and target spaces in Matrix 2:

78. Cited in HEIKKI E.S. MATTILA, JURILINGUISTIQUE COMPARÉE—LANGAGES DU DROIT, LATIN ET LANGUES MODERNES 209 (Jean-Claude Gémart trans., Yvon Blais 2012).

- *Ce mot vient du latin procurator (qui prend soin des intérêts d'un autre). On appela procureurs, des officiers publics, dont la fonction était de comparaître en jugement pour les parties, d'instruire leurs causes et servir leurs intérêts.*⁷⁹
- The term *procurator* is used in those countries whose codes are based on the Roman civil law for certain officials, having a representative character, in the courts of law. Thus under the *ancien régime* in France, the *procureurs du roi* were the representatives of the Crown in all causes.⁸⁰

If we now investigate Matrix 1 and its translation as “Commissioner,” the meaning is as follows:

- This word is applied to members of a permanently constituted department of the administration, as civil service commissioners.⁸¹

In Matrix 1, the author added “of government.” Even though it may fit with the original meaning, there is a need to investigate the source meaning in the source space (French) at the approximate equivalent time period with the French word “*commissaire*.”

*Commissaires—Nom donné à tous ceux qui recevaient une mission du roi ou d'une assemblée pour inspecter les provinces, administrer la justice, soutenir une loi devant les assemblées politiques, etc.*⁸²

From this reading, the concept is not adequate and has no equivalence to the context in which it was originally attributed in the Civil Code drafting of 1839. However, if we follow the “Thousand-Plateaus” principle of Deleuze & Guattari, translators tried to “operate in an empty dimension supplementary to that of the system considered.”⁸³ The root (also named ‘line’) of the rhizome is not cut and its exteriority is then expanded as a “line of deterritorialization”⁸⁴

79. Dictionnaire Historique des Institutions, Mœurs et Coutumes de la France (1874).

80. The Encyclopaedia Britannica (1911).

81. *Id.*

82. Dictionnaire Historique des Institutions, Mœurs et Coutumes de la France (1874).

83. Deleuze & Guattari, *supra* note 24, at 48.

84. *Id.* at 30.

and permits to re-stratify its meaning into another sign-system, even though its conceptual load is not fully transferred.

2. *From Trauma to Repair: Article 11 of the Civil Code*

In the light of Art. 11, one key concept that arises is “*étranger*.” Even though its translation seems unequivocal, two proposals were given: “Foreigner” in Matrix 1 and “Alien” in Matrix 2.

In Matrix 1, we first notice that the word “foreigner” is not an entry in the Encyclopaedia Britannica, which comprises 21 volumes. Only the word “Alien” is found and is referred as follows:

The technical term applied by British constitutional law to anyone who does not enjoy the character of a British subject; in general, a foreigner who for the purposes of any state comes into certain domestic relations with it, other than those applying to native-born or naturalized citizens, but owns allegiance to a foreign sovereign.⁸⁵

Now, if we compare the target language version to the source language version, we can see many similarities indeed:

*Étrangers—La législation moderne distingue deux classes d'étrangers, l'étranger domicilié et l'étranger passager. Le premier, lorsqu'il a obtenu l'autorisation de résider en France, y jouit de tous les droits civils. Le second n'a que les droits garantis par les traités à sa nation. Tous peuvent recevoir des legs et des successions, droit que la loi du 17 juillet 1819 leur a reconnu dans toute sa plénitude. Quant aux droits politiques, tels que le droit d'être électeur, de siéger comme juré dans les tribunaux, d'exercer des fonctions publiques, et de représenter la nation dans les assemblées politiques, les étrangers ne peuvent en jouir que s'ils ont obtenu des lettres de naturalisation.*⁸⁶

So, the proposed translation seems not valid, though the translator uses “foreigner” to avoid the culturally-labelled meaning of “British subject” inherent to him with the use of the concept “Alien.”

85. THE ENCYCLOPAEDIA BRITANNICA (1911).

86. DICTIONNAIRE HISTORIQUE DES INSTITUTIONS, MŒURS ET COUTUMES DE LA FRANCE (1874).

In Matrix 2, “*étrangers*” are translated as “aliens.” In *Jowitt’s Dictionary of English law*, “aliens” are said to be: “At common law an alien is a subject of a foreign State who was not born within the allegiance of the Crown.”

Therefore, this definition validates the translation choice of “aliens” in Matrix 2 and could have also originally been implemented in Matrix 1.

3. Societal Evolution of Marriage: Article 144 of the Civil Code

Our last example concerns Art. 144 of the Civil Code about the qualities and conditions required to contract marriage under the Civil Code of 1839 (Matrix 1), and the current Civil Code (Matrix 2). If we consider Matrix 1, the translation of the words “*homme*” and “*femme*” is easy and transparent, and does not lead to any difficulties in terms of contracting marriage between people of opposite sexes.

If we now turn to Matrix 2, Text 2 uses a gender-neutralized sentence. No mention to man or woman is made at this level. However, the translation operates the opposite direction and again mentions “male” and “female,” which are adjectives if we refer to the Oxford or Cambridge Dictionaries. “Male” and “female” appear when you have to fill in a customs declaration for passengers flying to foreign countries, and check the relevant box corresponding to their respective sex. The drafter’s original intent to remain neutral is no longer respected and does not correspond to the current legal reality of “marriage” in France, which can be contracted not only by heterosexual couples but also by homosexual couples.

IV. JURILINGUISTICS AS AN EVOLUTIONARY DISCIPLINE

Legal translation issues have been extensively addressed over the last two decades,⁸⁷ and transferring concepts and terms into other

87. See Wagner & G  mar eds., *Decision-Making in Legal Translation*, *supra* note 4; Wagner & G  mar, *Communication and Cultural Mediation Techniques in*

linguist/legal systems has been a salient characteristic. The paper shows how language is powerful and active, conveying social experiences and shaping the reality of legal translation both in theory and in practice. It is noteworthy that practitioners and experts in this field are sensitive to an “assumed translation.”⁸⁸ Theories and practices are structured to understand this ‘Third Space,’ where legal translation could accommodate both the source and target languages.

For this reason, translators, lawyer-linguists, and jurilinguists make decisions and choices that reflect common knowledge,⁸⁹ but they still operate within the constraints set by the principle of cultural reality in the target language:

Semiotically speaking, it will be clear that it is the target or recipient culture, or certain section of it, which serves as the initiator of the decision to translate and of the translating process Translators operate first and foremost in the interest of the culture into which they are translating, and not in the interest of the source text, let alone the source culture.⁹⁰

Finally, ‘Third Space’ in the translation process leads to mitigating solutions, to a map in action with multiple entryways, passage-ways, strata in meanings. Various strategies in both matrices were employed, invoking both tradition and ‘emancipation’ from legal translation theories and practices:

Translation thus is not simply an act of faithful reproduction but, rather, a deliberate and conscious act of selection, assemblage, structuration, and fabrication In these ways

Jurilinguistics supra note 19; Wagner & G mar, *Jurilinguistique et Juritraductologie—A Collective and Societal Dimension: Multiplicity of Meaning between Sciences and Society*, 27 INT’L J. SEMIOT. L. (2014); Wagner & G mar eds., *The Process of Translating*, *supra* note 4; MATTILA, *supra* note 78; JURILINGUISTICS: BETWEEN LAW AND LANGUAGE (Jean-Claude G mar & Nicholas Kasirer eds., Th mis 2005); JEAN-CLAUDE G MAR, *TRADUIRE OU L’ART D’INTERPR TER* (Presses Universitaires du Qu bec 2000); *LANGAGE DU DROIT ET TRADUCTION, ESSAIS DE JURILINGUISTIQUE* (Jean-Claude G mar ed., Linguat ch 1982); Rodolfo Sacco, *La traduzione giuridica* in *IL LINGUAGGIO DEL DIRITTO* (Uberto Scarpelli ed., LED 1992); ŠARČEVIĆ, *supra* note 4; CAO, *supra* note 3.

88. TOURY, *supra* note 49, at 35.

89. See ŠARČEVIĆ, *supra* note 4.

90. Gideon Toury *cited* in SNELL-HORNBY, *THE TURNS OF TRANSLATION STUDIES*, *supra* note 44, at 49.

translators, as much as creative writers and politicians, participate in the powerful acts that create knowledge and shape culture.⁹¹

91. TRANSLATION AND POWER xxi (Edwin Gentzler & Maria Tymoczko eds., University of Massachusetts Press 2002).