PROBLEMS OF THE TRANSLATION OF LAW IN JAPAN

by

ICHIRO KITAMURA
Professor of Law
University of Tokyo

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FOREWORD

The following paper was first presented by Professor Kitamura, at the 12th International Congress of Comparative Law held in Sydney and Melbourne in 1986, as the Japanese Report on the topic "Problems of Law Translation". The paper has since been published, in the original French, in (1987) 28 Les Cahiers de Droit 747. The author and the Director of Les Cahiers de Droit have both kindly consented to the translation of the paper into English and it is now, in a slightly edited form, presented here for English readers.

The paper has a special interest because it deals not only with the problems of law translation in general but in particular with law translation involving a language in which the Western European concept of law was totally unknown till little over a century ago. The paper highlights the cultural aspect of law translation and gives significant insights into the traditional attitudes of Japanese to law and into the development of Japanese legal thinking. This translation does not reflect all the wit and good humour of the author evident in the original French. It is to be hoped however that the author's erudition still shines clearly through. From the translation point of view the product in English is itself interesting because it has had to pass through two cultural dimensions to reach the present audience. Future generations of New Zealand lawyers will, it is to be hoped, be able to communicate directly with their Japanese colleagues.

A H Angelo
Editor/Translator

Problems of the translation of law in Japan

I INTRODUCTION

"Just like a small boat setting out to sea without a rudder",[1] so began the Japanese history of the translation of European scientific works on 5 March 1771. With an anatomy chart written in Dutch (that had itself been translated from the original in German) in front of them, three Japanese doctors began to struggle with the "hieroglyphics". They had no dictionary nor any sufficient knowledge of the Dutch language but, after three and a half years, they finally published the Japanese translation of the chart. Those had been very difficult years but allowed glimpses of a bright future.

Basically the study of European science had begun at the start of the 17th century on the initiative of interpreters because of their occasional contact with the Dutch.[2] At that time priority was given to the study of practical matters, medicine, botany, geography and the almanach.

After that, attention passed to English, French and German studies about the middle of the 19th century and particularly at the opening up of Japan to the outside world in 1868. Thus Eishun Murakami (1811-1890), who was the first or one of the first to learn French, learnt it by means of the translation of a Dutch-French dictionary and produced the first French-Japanese dictionary in 1864.

Very quickly translators found they were fulfilling a mission of national interest. This was because, the new government had, since the Restoration of 1868, adopted the policy of systematically introducing aspects of European civilisation, and of setting up a Western style legal and economic system. Indeed, because of the colonial appetite of the European powers, to whom China had fallen victim and with whom the Shogunate was obliged to sign a most unfavourable diplomatic treaty, it was very important for the Japanese government, according to the motto of the day, "to make the country rich and

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1 G Sugita *Rangaku Kotohajime (Memoir of the First Years of Our Dutch Studies)* 1815 (1982 ed, Iwanami Bunko Tokyo) 38.

2 The Dutch were, with the Chinese, the only foreigners allowed to come to the port of Nagasaki under the policy of closure of the country which had been adopted by the Tokogawa Shogunate.

to build up the armed forces". The goal was to preserve Japan's independence and to re-establish balanced diplomatic relationships.[3] In this sudden move to open Japan culturally and to westernise systematically, translating was one of the essential ways, if not the way, of learning new techniques or of obtaining the advice of European specialists.

Since then the role of translators has continued to grow in importance, with all political and intellectual activities revolving around foreign ideas which have been translated or are to be translated.

In other words translation made and still makes science and culture, and translators are often considered as an élite: specialists and intellectuals cannot do without access to European or American studies. This also explains why translating constitutes an honourable and often much sought after profession in Japan. Far from being an anonymous technician,[4] the translator is seen as a noble protagonist, almost at the level of the author himself, with foreign lights in the cave of Plato or in that caecum of Eurasia which is Japan. The translator's work must moreover be filled with the translation notes, detailed explanations on the author and on the work without which it would be difficult to satisfy intellectuals or perhaps even the readers of novels.

But, both in respect of law and civilisation generally, the West was not the only focus of Japan's curiosity. Japan's interest had been directed towards China for a very long time.

Long before what happened in the 19th century, the Japanese of the 7th to 9th centuries had systematically introduced elements of Chinese civilisation which had been studied by Imperial envoys sent to the Court of the Sui and the Tang. The natural influence of China goes back even further through the intermediary of the Koreans. For instance the Chinese letters *(kanji)* had been known in Japan from the 3rd century. But the sending of delegations to China began in 607 with the decision of the Dauphin and Regent Shootoku Taishi (572-622), who is famous for the first Japanese Constitution - the Constitution of 17 Articles.[5]

Then the centralised government of the Emperor of Japan *(Tenno)* set up the system of administrative and criminal regulations known as Ritsu-Ryo, which was a fairly faithful imitation of the Chinese legislation. The reception which began in 645 led to a general codification in 701-718, then, having seen its peak in the 9th century, the regime came to an end in the 12th century with the taking of power by the Shoguns (1192-1867).[6]

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3 Y Noda *Introduction to Japanese Law* (Tokyo, 1976) 41.

4 D Aury, Preface to G Mounin *Les Problèmes théoriques de la traduction* (Gallimard, Paris, 1976) vii.

5 T Fukase "Héritage et actualité de l'ancienne culture institutionelle japonaise" - concerning the 17 Article Constitution of Prince Shotoku, R.I.D.C., 1985, 947.

6 Noda, above n 3, 32.

Moreover, the Chinese influence shows itself most strongly at a cultural level where many elements, such as Buddhism, Confucianism and Chinese classical literature, survived the legal-political regime of the Ritsu-Ryo to form an essential and more or less dominant foundation of the moral and intellectual life of Japanese until the arrival of European influences.

It is possible to establish an historical parallel between these two openings to the outside world. The reception of the foreign elements, voluntarily and with far-reaching effect in both cases, was motivated by the concern to build a centralised state, to better organise an efficient bureaucracy, and to guarantee a solid national defence against other powers, be they Asian or European.

This brief historical overview shows the primordial importance that the introduction of foreign ideas has in Japan - translation being the means for the understanding and reception of the ideas. This link by translation has continued to attach Japanese, more or less and with more or less difficulty, to a whole cosmology of the Chinese of former times and of the Europeans today.[7]

Particularly in legal matters, a whole modern system has been built beginning with translations and then adjusted and brought up to date with the help of a great number of foreign or comparative legal studies.[8] Indeed the bulk of the technical terms and ideas, often of an elementary nature, come from the original texts. These are the translated words integrated into the Japanese legal language. It would not be an exaggeration to say that Japanese positive law itself constitutes a whole translated world or is at least a town paved with an underlying multilingual mosaic. So just as the reception of the codes had to be followed by that of theory, the translation of a series of legal terms demands a continuing comparison with the original, either for the purpose of interpretation or for re-examining the relevance of the translations. That is the basic characteristic of Japanese legal science.

And yet research whose purpose is the study and scientific analysis of the intellectual games of translation is extremely rare, and this is so not only in law but even in

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7 Translated books occupy an important place today - more than 10% of all books published each year in Japan - and the percentage is increasing in the fields of philosophy, social science and natural science.

8 It would be useful to do a survey of theses and publications of law faculties to find the number of European terms that are cited in parentheses as original words in the translation.

literature, philosophy and linguistics. With some rare exceptions,[9] even the most demanding people, in terms of social science methodology, seem to maintain an optimistic and complete silence on the problems of translation. All that authors on translation are interested in is a lesson on "secrets" of how to translate well, or the examination of mistakes in translation in other translator's books.[10]

In general, what is seen again here is the tendency to substitute for a theoretical analysis the translation of works on translation such as those by Eugene A. Nida, and George Mounin. This state of affairs is all the more strange and reprehensible because, as has been seen, translation is an integral part of scientific activity in Japan, and because a phenomenon of such broad impact and intellectual consequences ought to constitute one of the primary subjects of study in the disciplines concerned.

Doubtless it is very difficult to undertake a theoretical analysis or even a treatise on translation. The latter has an essentially casuistic nature which in itself discourages or disorients such research. Indeed, in translating, the concern is basically, on the one hand only with the problems of languages, with the comprehension of foreign sentences or their formulation in the target language, and on the other hand only with the scientific or technical matters which are the very substance of the text in question. Furthermore, if the translation is technically impossible that does not, at first sight, prevent the obtaining of an equivalent in substance which, in the normal event, would not basically disturb practical or even scientific communication. There remains therefore the unique problem of the exactitude of the assimilation or of the degree of approximation; or else,

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9 The late Professor Noda was one of the first authors to emphasise the importance of the problem in the legal field. He dealt with it in his Comparative Law course, as one of the major problems concerning the reception of law, and published a number of research articles on the formation and development of translation terminology. See in this regard Y Noda, on the word *Kaisha* (commercial company) *Gendai-shoohoo-gaku no kadai* (Yuuhikaku, Tokyo, 1975) vol 2, pp 689-717 (in Japanese); Y Noda, on the word *kenri* (right) Gakushuuin Daigaku Hoogakubu Kenkyuu Nenpoo, No 14, 1979, pp 1-30 (in Japanese).

In addition, without wishing to make a definitive list of all the articles and writings worthy of attention, the following two important works which are referred to often in this paper are noted here: A Mikazuki "Hoo to gengo no kankei ni kansuru ichi-koosatsu" (A consideration of the relationship between law and language): *Minji-soshoo-hoo-kenkyuu* (Yuhikaku, Tokyo, 1978) vol 7, pp 271-294; A Yanabu *Honyakugo seiritsu jijoo* (The conditions for the creation of words in translation) (Iwanami, Tokyo, 1982).

Yanabu is one of the rare and best Japanese specialists in the study of translation. He has published a number of papers with penetrating theoretical and historical analyses of the intellectual challenge of translation and they were a source of great inspiration for this paper. For a detailed review of one of his books *Honyaku no shisoo* (Reflections on translation with particular reference to the word *nature*), see J Joly "Revue de Hiyoshi: Langue et Littérature françaises", no 1, 1985, pp 70-110 (Keio University).

10 Of course this does not mean that there are no interesting writings. See in particular for jurists, T Yokoi *Goyaku akuyaku no byoori* (Pathology of bad and false translations), (Gendai Journalism Shuppankai, Tokyo, 1971).

quite simply one has to improve ones language skills. The pragmatist theory of communication also seems to feed this optimism (or postponed despair). But it remains somewhat bold, in reality, to cross such a well-used bridge without checking its strength. There are many cases where the adage *traduttore traditore*[11] proves true.

From this comes the interest in studying, even in a succinct manner, the problems of law translation in Japan.

Indeed, since Japanese law engages in a sort of "hidden multilingualism", in as much as its system and its terminology are largely based on those in the West, it is very interesting to compare this situation both with obviously bi- or multi-lingual laws such as Canada,[12] Switzerland, or Belgium, and with the typical monolingualism of, for example, France[13] which has not experienced translation as a major problem affecting its legal system (except perhaps in the context of the passage of time with the problem of adaptation of archaic terms). This is also a way to explain the "selective affinities" that have linked Japanese law and German law for so long, at least at the theoretical level.

This paper will therefore begin by studying how translation was, and today still is, of major importance in cultural phenomena, being not only a simple means of communication but also and above all a way of introducing foreign knowledge and methods.[14]

This then leads quite naturally to a consideration of whether this importance does not produce intellectual difficulties, and whether translation does not operate as some sort of disturbing element in Japanese epistomology, both at a general and a legal level. Given all that, it will still be useful, even admitting the facts, to raise a legal issue and to enquire whether law translation can contribute in a positive way to the development of law.

In other words it will be shown first that in Japan the *traduttore* (translator) appeared above all as a *trapiantatore* (transplanter), a transplanter of knowledge and methods, before becoming sometimes a *traditore* (traitor). The final enquiry will be whether a translator might not be a *trovatore* (discoverer).

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11 To translate is to betray.

12 Note the special issue on "Law Translation" that appeared in META, vol 24, no 1, 1979 (Les Presses de l'Université de Montréal).

13 P Malaurie, *Le Droit français et la diversité des langues* (Clunet, 1965) 565. See F Bonn "Les problèmes juridico-linguistiques dans les communautés européennes" RGDIP, 3/1964, 708. G Heraud "Pour un linguistique comparé" R.I.D.C., 2/1971, 309.

14 See R David *The Major Legal Systems of the World Today* (8 ed by C Jauffret-Spinosi, Paris, 1982) 342. The comparison in this paper is limited to French Law and does not deal with the problems, which have become increasingly important, or translation between Japanese law with its Romanic-Germanic base and the Common Law.

II TRADUTTORE/TRAPIANTATORE

Since it is closely linked to the experience of the total reception of law, translation appears in Japan to be less a technical and localised phenomenon within legal and judicial practice and more a phenomenon relating to the total legal system.

This fact leads to a consideration of the situations in Japan where there is a need for law translation on the one hand and, its methods on the other.

A Translation Situations

Whether in the judicial, diplomatic or international commercial sphere, translation of the kind that is normally done usually allows an immediate assimilation, a type of extrinsic qualification whose task is to give meaning to a foreign element by relating it to the national legal system. It is enough to find, where the goal is a more or less practical one, what the text means or what is the meaning of the speech given in a foreign language. The translation does not affect or disturb the national legal system itself, at least in principle even in the case of a diplomatic treaty; it is a consumption task par excellence and provides an alibi of sorts.

Of a quite different nature is the translation which accompanies the total reception of law and which is a creator of institutions and even of an entire legal system. It could be called therefore, in relationship to the global system, legal translation a priori to distinguish it from usual law translation a posteriori.

1 Law translation a priori

In the sudden move to systematic westernisation and legislation that was made in Japan last century, the need for translation was absolute; it was the bane of translators as they had only just begun to study English, French or German.

It is worth recalling one of the legendary episodes of the time. It was the young politician Shinpei Eto (1834-1874), who became Minister of Justice in 1872 and was called the Gambetta of the East, who took the greatest initiative in beginning the policy of "Japanese codification". He was convinced of the uncontestable merit of the Napoleonic Codes and in 1869 ordered Rinsho Mitsukuri (1846-1897), who was not a lawyer but was one of the rare polyglots of the time, to translate all the Napoleonic Codes. His order was: "Do it as quickly as you can; don't worry about mistakes!"

Without any dictionary, any commentary, or any advice, Mitsukuri completed this task in five years, translating the five codes as well as the constitutional laws. "In a veritable fog" according to him, of French legal terminology, which was little known at the time, he had gropingly to create many legal terms such as *dosan* (movable) and *fudosan* (immovable), either by consulting those learned in Japanese and Chinese literature, or by borrowing from the Chinese translation of an American text on public international law. There are, moreover, many explanatory translations which Mitsukuri had to accept in the beginning because he could not find the proper word; for example the definition of *prise à partie* is under the heading "De la prise à partie" of the Code of

Civil Procedure;[14a] and it is more or less the same for other words such as creditor, debtor, usufruct, prescription, res judicata.

On the basis of this translation, Eto had tried to make a Civil Code from as early as 1870. One can today read the fragmentary text which he left and which corresponds to the two first titles of the Code Napoléon (articles 7-101). According to Mitsukuri, "There were discussions in the Cabinet offices as soon as I had completed two or three pages of translation". But the ineffectiveness of these early works led foreign specialists such as Georges Bousquet and Gustave Boissonade de Fontarabie to be invited to Japan.

The codification works were, at least at the first stage in the development of the draft legislation, only the translation of proposals drawn up by these "foreign legislators". [15] This of course did not mean that the codification was a faithful translation. The Boissonade draft for the Civil Code was strongly challenged by those opposed to it, using the slogan "Enactment of the Civil Code, collapse of traditional morality", and was not brought into force until 1898 by which time it had been totally reworked, taking into account the provisions of the first draft of the German Civil Code. But the curious thing is, on the contrary, the subtlety with which Techow, a Prussian jurist, had named his *Projet d'un Code de Procédure civile pour Japon* with the clarification in parentheses which said that it was a translation: *Entwurf einer Civilprozessordnung für Japan (Ubersetzung).* That is, the author first published a "translated edition" of the proposal and then by translating that, "the original had been constituted" in Japanese!

And so it was that the Japanese after about 20 years, when they celebrated in 1890 the coming into force of the Constitution of the Great Empire of Japan, a Prussian inspired document, found themselves in front of a backdrop which gave the perfect appearance of a Rechtsstaat of the Western type.

The same thing happened at the theoretical level where the translations began with authors like Montesquieu, Rousseau, Tocqueville, Henry Sumner Maine, J S Mill, and worked on through the treatises of Laferrière, Demolombe, Faustin Hélie, to the *Trial of Mrs Cailleaux.* Usually the translators were members of the young élite educated in European universities or in the language schools set up with governmental support, and later became first class scholars. Among others Amane Nishi (1829-1897) is worth noting. He was a positivist philosopher who had studied at Leiden from 1862 and who alone invented almost all Japanese philsophical terminology, for example, *tetsugaku* (philosophy), *risei* (reason), *gosei* (understanding), *shukanteki* (subjective), *kyakkanteki* (objective).

14a The term *prise à partie* was used in the title of a section of the Code of Civil Procedure. Since Mitskuri did not have the notion of *prise à partie* in Japanese, he had to put in the translated title a long phrase which was almost the definition of the term: a form of civil process by which the claimant sues a judge because of a serious professional fault committed by the judge in a judgment given in a case involving the claimant.

15 J Carbonnier *Essais sur les lois* (Répertoire du notariat Defrénois, Paris, 1979) 191.

On the legal front, due to the fact that at the beginning foreign professors were invited to deal with the education of lawyers, there were for quite a long time three schools of law: the English, the French and the German. From 1890 to 1945, it was often said that "you are not a lawyer unless you are from the German school". Since 1945, there has been a considerable increase in the study of Common Law following the enactment of a series of statutes inspired by America starting with the present Constitution of 1946 and going through to the commercial legislation.

There is therefore a more or less continuous tradition of foreign and comparative study at least in the university setting. As long as they are involved in it those researching law are in a way translators. Indeed most theses include an examination of foreign legislation, case law and theory; thus translation is a necessary component of legal study. It also often happens that they are literally translators: from the "Twelve Tables" to "How to find American law", according to their taste and with unequal value. It would be possible to draw up a geographical plan of the "spiritual and language home" of professors according to the country to which they went to improve their knowledge and to which they continue to make reference.

At least three sorts of results are expected from this comparative and translation research. First there is intellectual stimulation in general. When confronted with a machine of foreign origin or foreign design, it is obviously desirable to enquire of the practice in its place of origin in order to guarantee its proper functioning. At each point of interpretation reference to foreign authors serves to provide the best inspiration and justifications.

Next it promotes legislative reform. If the French legislator relies on historical or sociological introspection before opting for a solution, the Japanese legislator is on the other hand decidedly extrovert; reform is normally preceded by directed comparative research, either at governmental level or more often in the universities.

Finally, it stimulates foreign studies as such. Leaving aside the courses in Comparative Law and International Law, foreign studies occupy a good proportion of the subjects regularly imposed on or proposed to students (10 out of 43 courses, that is 23% in the Law Faculty at the University of Tokyo).

The specialists in each area organise, as do the specialists in foreign literature, an annual congress and occasional seminars: Anglo-American law, the political history of Europe, etc. They try to get as complete and broad a picture as possible of the legal and political culture of the country they are studying. It could be said that Japanese see the American and European sources, from Domat to Roscoe Pound, as classics, as Greco-Roman culture is for Europeans.

Translation is thus an integral part of Japanese knowledge, as much for law as for other areas of study. It is no longer a question of "imported knowledge", but is still a question of "translated knowledge"; and that said with the mild twinge of conscience.

As far as the material conditions of the translators are concerned, "the era of the heroes" who had to deal with foreign texts without adequate dictionaries has been noted.

It was almost uniquely the commercial interpreters and the privileged students who had the opportunity of studying in Europe, who opened the window to Western culture. In respect of books written in little studied languages, scholars translated those books from a translation in a language that they knew; these retranslations of course left much to be desired.

But, particularly since the Second World War, Japan has made great progress so far as the quality of dictionaries and translators is concerned. This is especially the case with English which has been made a compulsory part of secondary school education, and which has a dominant position almost as the "official foreign language" because of the frequency of contacts with the United States. It is followed at a distance by the other important languages - French, German, Russian, Chinese. The conditions of apprenticeship have also improved, but it is true that these languages are normally taught only in the University or at language schools and have a similar audience and fewer translators. Other languages are in a disadvantaged position and sometimes are not studied at all, at least in the law context.

It is necessary to add a few words on the practice of living languages in Japan. In the first place direct contact with foreigners is usually very limited in Japan and therefore translation is in most cases done in writing and not orally. On the other hand, except in international diplomatic or commercial negotiations, translation is usually done one way only, that is to say from European languages into Japanese and very rarely the other way around.

2 Law translation a posteriori

The development of international exchanges is beginning to stimulate an interest in studying the until now somewhat neglected topic of translation done at a trial, or in the negotiation of contracts or treaties and the like.

Both in civil and criminal procedure, a judge can use an interpreter for a party or a witness who does not speak Japanese, as well as when one of the parties is deaf or dumb. For the procedure, reference is made to that governing the use of experts (article 134, Code of Civil Procedure: article 175 et seq, Code of Criminal Procedure).

There are three main avenues for recruiting interpreters: first there are professional interpreters, either individuals or specialised enterprises; then there are language or topic specialists found somewhat by chance among professors, doctoral students, foreigners resident in Japan and the like; and finally there are court clerks, police officers, customs officers etc.

If professional interpreters are often competent and efficient as generalists, they are not always so in law matters given the technical specificity of legal terms and their lack of familiarity to people in Japan. It is the same for scientific and medical terms.

To resolve a translation problem the judge sometimes invites the interpreter to study the vocabulary to be used in advance; on other occasions, in the presence of the two lawyers, the judge tries to give the interpreter information on the matters at issue in the

case. But there a problem can arise concerning the neutrality of the interpreter. That is why judges call on registrars and court clerks, and even other court officials to take the place of an interpreter, and this happens particularly in cosmopolitan cities such as Tokyo and Okinawa to the extent that the circumstances permit.

English is the language used in most cases, but the good share taken by Chinese and Korean should not be overlooked. European languages are encountered usually less frequently, except curiously enough Portuguese: translation is often necessary for procedural acts drawn up in Portuguese, probably because of relations with Brazil where there are a large number of Japanese immigrants. In exceptional cases, such as Hebrew, help can only be obtained from the rare specialist.

Interpreters (other than court clerks) are paid reasonably - an average of 10,000 yen an hour in recent times.

Since the total number of cases that need translation services is very small (20 or 30 in total in a year according to the official statistics on expert advice in civil matters; and quite rare in criminal cases - in public hearings at least),[15a] there is no proper training of specialist legal interpreters. The accuracy of the translation depends case by case on the skill of the individual translator.

How then are errors avoided? Is it necessary that the opposing party raises the issue immediately at the hearing? Or is it for the registrar to draw up the transcript so that an expert can review the translation later? In practice, the judge often seems to use a tape recording so that he can go through it himself (at least in the case of English) or have a check made if there is a challenge of the accuracy of the translation. So far as written documents are concerned, the challenge of a translation is either decided by an interlocutory judgment (article 184 Code of Civil Procedure) or examined by an expert.

And what is the evidential value of the translated material? For literal proof the general rule is that it is only the original which is evidence. However, as far as contemporaneous oral translation is concerned, it would be natural, by comparison with the general case of expert evidence, to consider as evidence both the deposition in the foreign language and the translation by the interpreter. But these remain only in magnetic tape form and therefore exist in fact but not in law.

There are therefore a number of matters to resolve in the case law. They arise particularly in respect of problems of proof, and in relation mainly to the new methods of handling data such as microfilm and tapes.

Unlike court translations, it seems that business and diplomatic negotiations do not normally give rise to problems about choosing interpreters because each company or

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15a It should be noted that in criminal cases and especially at the stage of police enquiries the need has arisen more and more frequently over the last 10 years or so because of the rapid increase in the number of foreign workers, from Asia or Latin America, in Japan.

ministry has its own personnel responsible officially or by necessity to negotiate in or to translate foreign languages.

As far as international treaties are concerned, they do not escape the linguistically delicate and difficult situation in Japan which arises because Japanese is not on the list of official languages usual in diplomatic circles. It follows that the French or the English can always obtain the official text in their own language but the Japanese cannot, except in the case of bilateral treaties. Multilateral treaties always require a Japanese text in translation. And even in the case of bilateral treaties the negotiations are normally undertaken in English and the internal legislative procedure in Japanese. This means that treaties appear to Japanese, much more so than in the case of countries of an internationally used language, to have a double basis, a double meaning because the translation inevitably includes an interpretation.

A good illustration of this was given in 1969 by the Prime Minister, who was later to obtain the Nobel Peace Prize. He attracted criticism for having given a misleading translation to the nation in respect of a Japan/US security treaty of 1960. In the official interpretation of the treaty agreed between the two countries, Japan could reserve a right of veto vis-à-vis the United States by submitting to a preliminary conference any major modification to the status of the American forces stationed in Japan, as well as in respect of their combat operations undertaken from Japan. While on a visit to the United States the Prime Minister had agreed with the President of the United States that, in the event of such a conference being called as a result of an attack against South Korea by another country, the Japanese Government would study the question "positively and promptly", and he translated the adverb "positively" by an expression which was not a little ambiguous *mae muki ni* (in looking forwards), thus avoiding in the eyes of the Japanese public an indication of prior agreement in principle having been given to the American military authorities.

Given such an artifice (capsule style), it is necessary to be constantly on the alert to see that the translation is made in conformity with the internal legal terminology. But that is sometimes bound up with bureaucratic subtleties. Thus, the English word "arrangement" matches, among others, two words with the same pronunciation *torikime* but which have different ideographs and which are therefore properly employed differently in legal usage: either 取極 (an agreement made between states or between governments), or 取決 (any other international agreement, including that which is made with a foreign entity on the initiative of a single minister). The choice of word therefore necessarily implies an interpretative decision about the extent of the binding nature of the "arrangement" in question.

Confronted by these difficulties interpreter diplomats - and not only them! - sometimes have problems choosing among the Japanese synonyms or do not find an appropriate word, so great is the gap between Japanese and English or French in the conceptual range of each set of words.

From this, it seems, comes a tendency to adopt a neutral position about the meaning of words used in a treaty and to take, almost always, the English text for official interpretation purposes and to translate it with conventional and provisional phrases,

thus leaving internal translation open for a later time. It is no longer possible, however, to use the "capsule" method in the internationalised world of today; that would have encouraged another bolder Prime Minister to provoke another scandal, to make a very faithful translation reflecting his own personal convictions by speaking of an "alliance" with the United States and considering Japan as an "aircraft carrier which will never be sunk" offered to his friend President Reagan.

Finally there is the quote from a young diplomat who rightly said: "the treaty dies with the death of its drafters or translators". This is notably the case when those persons have truly understood the intention of the parties but have not known how to express it properly in writing. If during their life the spirit of that intention continues to put life into inadequate writing, after their death the writing stands alone and opinion changes and interpretations diverge.

B Methods of Translation

Japanese translators quite quickly gained a mastery of Western languages whose grammar and cosmology were however fundamentally different from that of Japanese. They ended up by creating a new type of language which is a little different from current language and which may be called the translation style. However, interestingly enough, it was the earlier experience, the method of reading Chinese texts, which provided the example. It is therefore necessary first to look at that.

1 The Japanese reading of Chinese texts

It is perhaps at the language level that the Chinese influence on Japanese civilisation is the most marked and that influence is evident in two ways. First, the Chinese language at least in its written form had currency for a long time among Japanese élite from the 7th to the 19th century. It was in Chinese that the élite wrote poetry or about science and that the official documents of the government were drawn up.

The most important fact is that the Japanese language itself owes its written form to the Chinese language. Japanese, not having its own system of letters, borrowed letters (*kanji)* from China. At the beginning they were used, from the 3rd to the 10th centuries approximately, directly as ideographs for substantive words and verbs on the one hand, and indirectly, on the other hand, as phonetic signs for auxiliary words which for example indicated grammatical position. From this last use of *kanji*, there was developed by way of simplification two alphabets - *katakana* and *hirigana*. From then on Japanese has been written with a mixture of *kanji* and of *katakana* or *hirigana.*

In the direct use of *kanji*, that was systematically borrowed by a process of japanisation, each letter is in principle read in two ways: one way is by imitating its original sound (*onyomi*, the phonic reading) and the other way is by reading it with the sound of the Japanese word of the same meaning (*kunyomi*, the explanatory reading).[16]

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16 See A Mori *Leçon de Japonais* (Taishuukan, Tokyo, 1972) para 49, p 156.

In this way, according to the philosopher Tetsuroo Watsuji (1889-1906), "Chinese words were made the organs of Japanese thought"[17] to the detriment alas of the capacity for abstract thought within the Japanese language itself, which attribute still exists perhaps in daily life or in novels.

This purely "literal" use of Chinese characters has allowed a curious practice of "the Japanese reading" of the Chinese text to develop.

Following this practice there is no translation; it is a reading. But not in the original way but in the japanised way. For as the Japanese use the *kanji* as their own ideographs with appropriate pronunciations, they understand, or at least can guess, the sense of the classical Chinese text, all of which is comprised of *kanji*. There remains only the problem of understanding the syntax. For this purpose a method was invented according to which the Chinese syntax of European order (S+V+O ...) is artificially transformed into Japanese syntax (S+O ... + V). The sentence is read by changing the order of the words by the use of re-ordering signs (v) or figures (1, 2, 3 ...) placed beside the sentence. The text is then read following the order indicated in order to move on to an interpretation. In a word, this means that the Chinese text is made into a Japanese text of another style which does away with the need, in the true sense, of translating the Chinese; it is rather a process of technical assimilation.

However, it must not be forgotten that the Chinese literature, introduced in Japan between the 7th and 9th centuries, was in most cases that of classical authors such as Confucius (551-479 BC), and that since then cultural exchange with China has either been stopped or been blocked. This means that for twelve centuries Japanese read, but rarely spoke, a very old form of Chinese and it was used as the example for the improvement of their own language. This is somewhat reminiscent of the role of Latin for Europeans.

It is therefore from this method that Japanese translators took inspiration and applied it mutatis mutandis to European texts.

2 *Translation of European texts*

From the beginning of the Dutch or English studies therefore the same method has been followed, benefiting from the similarity of syntax between Chinese and European languages: after having taken cognisance of the meaning of the words, numbers are put beside each of them in order to restructure them as a Japanese language sentence. A simple example is the following:

I	go	to	school	(= watakushi wa gakkoo e iku)
watakushi (wa)	iku	e	gakkoo	
1	4	3	2	

17 T Watsuji *Oeuvres Complètes* (Iwanami, Tokyo, 1962) vol 4, 510.

Given the grammatical differences, the sentence obtained in this way is often only a provisional phrase at base level as far as a Japanese sentence is concerned, so that it is usually necessary to interpret it or to make a readjustment in order to restructure it as a phrase of natural style.

Again we see the explanatory reading in two stages. Today the techniques of translation and of teaching languages have much improved and become more refined, but essentially it is still the same method: on the basis of a knowledge of the vocabulary and of the grammar, the translator follows the invisible numbers. At base this is only a method for deciphering a cryptogram, confirmed by the fact that it is essentially made for reading and not for speaking.[18] A specialist of Chinese philosophy, Sorai Ogyu (1666-1728), criticised the method very roundly and advised that any Chinese text should be taken with its own reading ("the word is the idea itself"!),[19] and yet it is this very method which had to be generalised for use with European texts.

But there are a certain number of peculiarities in the translation of European texts, both from the point of view of syntax and vocabulary, which make the tidying-up of the second step essential.

First, many auxiliary words are necessary if the translated phrase is to reflect its European structure.

Thus it has been necessary to generalise the use of the word *wa* or *ga* to show the subject of the sentence - something which is not necessarily precisely indicated in the Japanese sentence: often it is sufficient that the subject be indicated in the context in different ways such as the inflection of the verbs; which moreover means that a subject which is too long or too heavy will disturb the understanding of the translated phrase. Relative pronouns did not exist in the classical Japanese language; the personal pronouns are organised in a different way, particularly as regards the third person; and it is the same in respect of the demonstrative pronouns. These gaps and differences require

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18 How many Japanese complain of their awkwardness in speaking English after 10 years of study at college or university! In addition to geographical or cultural reasons, and to the relative infrequency of inter-personal daily contact with foreigners etc, there is, it is submitted, a difference in nature between languages. French for example is a language designed mainly to be spoken, the orthography was established only late: in dictation the faults are not very serious provided that the phonemes have been correctly heard. On the other hand Japanese has developed fundamentally as a written language, given its complicated development under Chinese influence. Writing it is itself an art, as in China. And there is not much need to express oneself formally in the family setting of homogeneous people grouped together in the archipelago.

19 Indeed, in this operation of deciphering the cyptogram, it is not necessary to pronounce it correctly; in the extreme case it is possible to say nothing. Therefore why not pronounce it in any way at all, provided that the words are identifiable. From this comes a joke well known to students: "Goethe said: [Gjøɛte], c'est moi?".

a translation to use words and expressions of a conventional kind, thus *kare* for he, *kanojo* for she, *de aru tokoro no* for the relative pronoun, and so on.

But it cannot be denied that the use of these phrases upsets the natural rhythm of the Japanese sentence quite a bit. In order to guarantee a good comprehension of the text by the readers, the translator often has to repeat the noun instead of using a personal pronoun by way of prosthesis. The use of relative pronouns in a long sentence is truly catastrophic: there are often difficulties translating the text of a statute or of a treaty let alone a passage from Kant; a translator-diplomat invented a device which consists in putting the subordinate proposition in parenthesis.[20]

On the other hand, if in principle the Japanese language does not know the differences between masculine and feminine nouns, singular and plural, etc, it is possible to ignore them in the translation, at least if that does not change the meaning of the sentence. It is necessary, however, to enrich the sentence with numerous nuances of honorific terms and with the distinction between words for use by men, by women and by children: for example, the word meal can be rendered as *meshi* (male use), *gohan* (female use), *mamma* (child use), and *shokuji* (neutral). A translator is therefore, particularly in novels, obliged to choose between synonyms according to the view of the personal status of the speaker in question. Even if a scholar can be free of such worries, there is no escape from a delicate implication such as "in my view A could be B but I would accept the contrary opinion if you were to insist" when the meaning is that "A is B", particularly vis-à-vis anyone who is older than the speaker. In other words, the social relationship of speakers is reflected in their use of words, whatever there may be in the words themselves or in the sentence: the factual reality "interposes" according to the view of the late francophone Japanese philosopher Arimasa Mori.[21]

European writers often use noun clauses (for example, "the wide recognition in American procedure of the interest of many groups in suing by means of class actions") which are rare in the Japanese language. If such phrases are translated literally, the translated sentence becomes very heavy. It is therefore necessary to change it into a verbal expression (in the previous example, "one has widely recognised the interest ... and that ...."). But sometimes there is a danger in this approach of disturbing the tone and structure of the original. And this is why translators hesitate.

In any case, phraseology fashioned in this way by artificial means creates a language of a type that is quite new, relative to the classical language, in the sense that it is developed solely to transform ideas expressed according to European grammar by sacrificing, to a greater or lesser degree, the natural tone of Japanese thought. It is not only the ideas that are new but also the way of expressing them. This, which is sometimes today called the translation style, has very strongly influenced the language of law, of the sciences and of government as well as having contributed to the creation

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20 See the Japanese language version of the Vienna Convention on the Law of Treaties.

21 Mori, see above n 16, para 50, p 160.

of a new style of literary or current language.[22] Therefore these two styles of language, the idiomatic and the translation language, live side by side interacting with each other in a more or less subtle way.

On the other hand, the vocabulary has been the subject of a more original manipulation. There is possibly even a kingdom of translation words, and it is immediately necessary to note that it is in this that the secret of the strength (according to some, and also of the misery according to me) of Japanese law translation lies.

The Japanese have invented new words which are their own and which are used to identify new foreign concepts by making maximum use of *kanji* (the ideographs of Chinese origin). It is doubtless not very original for a translator to burden traditional words with a new meaning or alternatively to use a very limited meaning. Thus, *kempo* (憲法) was chosen to mean the Constitution, though the word had meant legislative or regulatory documents in general. Mitsukuri did the same when he took the words *kenri* and *gimu* (rights and duties) from an American text of public international law translated into Chinese.

There are many other similar cases where the translators have looked for the term they wanted in a forgotten passage of classical Chinese literature, the holy books of Buddhism included. They could also consult a certain number of dictionaries, Japanese - Portuguese, English - Chinese, Japanese - English, which most frequently had been edited by the former religious missionaries.

But what is truly original is the pure neologism created by means of *kanji*. The latter is an ideograph; it represents a thing or an idea with which it is possible in free combinations with two or three or even more other *kanji* to create a new word (somewhat like the German pattern: *Verfassungsrecht, Bundesgerichtshof, Inderweltsein):*

鉄	(*tetsu*, iron)	+	道	(*doo*, road)	=	鉄道	(*tetsudoo*, railroad)
電	(*den*, electricity)	+	話	(*wa, to speak*)	=	電話	(*denwa*, telephone)
民	(*min*, people)	+	法	(*hoo*, law)	=	民法	(*mimpo*, civil law)
裁	(*sai*, decide)	+	判	(*han*, to judge)	=	裁判	(*saiban*, justice)
裁判	(*saiban*, justice)	+	所	(*sho*, place)	=	裁判所	(*saibansho*, court)
最高	(*saikoo*, supreme)	+	裁判所	(court)	=	最高裁判所	(*saikoo-saibansho*, Supreme Court)

22 This is what is called, in contrast to the classical written language, "the modern spoken language", the language for which A Futabatei (1864-99) is attributed the founder. He wrote a novel noted for this reason: *Ukigumo* (The Floating Cloud) and he was also a translator of the Russian novels of Turgenev. But the expression "spoken language" has already become inaccurate; it is better to say "another written language".

In this way by the use of *kanji* it was possible to create *ex nihilo* innumerable new words to represent new things or ideas from Europe.[23] In other words, by this method these things and ideas were assimilated into the Japanese language without its being colonised by the new arrivals. And that happened even if it was only a quite superficial assimilation and no one, sometimes including the translator himself as he groped along, knew exactly what it was - and from there in truth comes the greatness and also the misery of translation.[24]

That is not all. There is another possible way of receiving foreign words, not by means of translation by *kanji* but by the imitation of their pronunciation either because of their familiarity, their untranslatability or their immediate identification with the thing described. This is a phenomenon similar to *franglais*; and the imitated pronunciation is written in *katakana*.[25]

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23 It is curious but some of these Japanese neologisms have been re-imported into modern China, particularly in the field of science. This fact shows moreover the cosmopolitan nature of the ideographs known as *kanji*, even though their pronunciation has varied from country to country.

24 Pushing this method of neologisms to its limit in the era of the "heros" of the reception of law, one Minister of Justice, T Ooki (in office 1873-1880), thought of having a scholar who had come from China invent ideographs which would represent not only the sense but also the pronunciation of each French legal term. In this way the Minister sought to obtain a perfect artificial agreement between the two sets of terminology. This was a fantastic project which, of course, was not carried through. However, it did leave for posterity a *Law Dictionary* which gathered together those phantom words (*Hooritsu-goi*, Tokyo, Ministry of Justice, 1883).
"For each term which is untranslatable or which it is not possible to understand from the translation," the preface of this dictionary says, "a provisional free translation is given, but the pronunciation has been shown by several *kanji*, and, what is more, by abbreviating those *kanji* they have been reduced to one or two *kanji* in such a way as to make the original word visible by the correspondence of the sound."
For this purpose he invented a series of acronyms by adding to pre-existing ideographs a sort of *katakana:* ㅁ for the words beginning with a, ㅗ for those beginning with e, 亻 for those beginning with i, 丄 for those beginning with u, and 口 for those beginning with other sounds. For example:

	Adoption	Bon père de famille	Indivisibilité
The phonic transcription	亜陀不孫	匍恩 珀児 杜 法弥啦	因地微逝皮重太
Short form	遏噴 (a-puon)	嗞哺 嗞杜 (bon-pu-du)	維誓 (wei-zei)
The invented ideogram	恳 (aon)	嗞釜 (fu)	働 (i)

25 However this difference must not be forgotten: when Chinese characters have been assimilated, they have indeed been reduced to Japanese ideographs with the two imitated and explanatory readings; English words find their place in Japanese as pure onomatopoeia, so to speak, since there is no place given to an explanatory Japanese reading. Furthermore these onomatapoeic terms find themselves cut off in Japan not only from Japanese tradition but also from their own historical implications.

A general tendency to abuse English words (or more rarely French words) can be observed in the case of some intellectuals and in the advertisements for beauty products, etc, but in law matters these "Japlishes" are few. For example, プライバシー *(puraibashi,* privacy); リース *(riisu,* leasing); オンブズマン *(onbuzuman,* ombudsman); アクセス *(akusesu,* access).

From these bases three types of synonyms have been created which can mean almost the same thing in the Japanese, Chinese and English form:[26]

	Japanese	**Chinese**	**English**
Hotel	宿 (yado)	旅館 (ryokan)	ホテル (hoteru)
Cancel	取消 (torikeshi)	解約 (kaiyaku)	キャンセル (kyanseru)
Enquiry	調べ (shirabe)	調査 (choosa)	リサーチ (risaachi)
Idea	思い付き (omoitsuki)	着想 (chakusoo)	アイデア (aidea)

From these three menus, the Japanese sauce generally has the widest acceptance, the Chinese is a little more limited, and English the most restrained. When dealing with concrete things, the commonplace is understood by the first, the more modern and superior in quality by the last. Sometimes, the first evokes something of an everyday nature tinged with sentimentality, while the other two remain more neutral and objective and therefore "scientific"! And this makes those who use the anglicisms think that that implies "the discreet charm of modernisation".

But as soon as the words of English origin are well settled in they begin to be sinologised by breaking them down into a phonetic rhythm specific to Chinese words (with 4 syllables normally):

マス コミュニケーション *(masukomunikeeshon,* mass communication) becomes

マスコミ *(masukomi)*

and then why not re-japanise them by creating derived words by analogy -

ミニコミ *(minikomi,* limited circulation magazines)

口コミ *(kuchikomi,* a communication from the mouth (口: *kuchi)* to the ear).

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26 T Shibata *The Japanese language in the world* (in Japanese) (Iwanami, Tokyo, 1976) vol 1 in the collection *Nihongo,* p 21-22.

Taking it a little further, words of a purely "Japlish" nature are created:

テーブルスピーチ	teeburusupichi	= table + speech,	after dinner speech
バックミラー	bakkumiraa	= back + mirror,	rear-vision mirror
ツートンカラーの	tsuutonkaraano	= two + tone + colour,	two-tone
ナウい	naui	= now, used as an adjective meaning "of a contemporary style"	
アジる	ajiru	= agitation, a verb meaning "to incite students to demonstrate"	
ダブる	daburu	= double, a verb meaning "to repeat" or "to reiterate"	
サボる	saboru	= sabotage, a verb meaning "to skip a course" or "to withdraw from work".	

Thus this considerable flexibility of vocabulary makes a curious contrast with the relatively stable character of the syntactical structure which permits only the production of the translation style. This amounts to saying that even if Japanese thought is open to foreign influences at the level of particular things, its foundation remains quite rigid.[27]

Before moving to the next Part, a glance will be taken at the eternal question of knowing how to choose between a free translation and a faithful literal translation.

In general, and particularly from the literary point of view, the question seems to have been resolved among professional translators thanks to their rather more refined technique and to the development of know-how. Generally free translation is favoured: as an extreme example, a single vague plant name could be used each time that plants which are not known in one's own country are encountered in a foreign novel, so that readers are not distracted by full notes of botanical explanation. In any case, it is certain that substantial equivalence of content is the first condition of translation.

But by searching too hard for quick comprehension through words that are easy to grasp, a step has been taken towards a serious misunderstanding of the difference that there is between elements of the diverse cultures in question. The apparent intelligibility of the translation often results from the sacrifice of the originality of the thing or of the notion translated, and it is precisely in this sense that the importance of

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27 That is the case even if a dedicated anglophone could, with a push, say: "I to school go". It should be noted that the Japanese immigrants in Hawaii do speak in a manner similar to that: "Me *wa* school *ni* go *ne*".

literal translation must be emphasised, particularly at the vocabulary level in the scientific area and a fortiori in that of law where the rigorous use of terminology is critical.

As far as the choice of word is concerned, if there is an aesthetic ideal to affirm, as does the novelist Junichiro Tanizaki (1886-1965), "that there is only a single word to express one thing", it is also certain that there is a great range of choice for expressing something in an approximate manner, from "grosso modo" to "very precisely". The choice depends on the degree of exactitude or precision that is wanted or on which of the elements of the word the translator wishes to prefer.

By virtue of these methods of translation, Japan has succeeded in obtaining a systematic reception of law in its own language, and is perhaps one of the rare examples among countries with non-Indo-European languages.

But it may be doubted whether this narrow and apparently strong bridge guarantees successful communication, particularly when the gulf between one and the other language and cultural bases is great or even huge.

It is therefore always necessary to be alert to the risks of epistemological treachery committed in translation whatever the intention of the translators might be.

III TRADUTTORE TRADITORE

Most times, it seems almost impossible to have an exact coincidence between apparently similar notions across different language systems. This is particularly the case as between languages of different families and in this instance between Japanese and European languages.

Even in respect of concrete things such as dog/*chien* /犬*(inu)*, which would at first sight seem universally identical, the translator has only to come back to the starting point as far as the cultural connotation is concerned: what does one think about dogs, how do people act towards them, how do they love them, etc. This is even more the case in legal matters where everything is a creation of the mind, an abstract construction.

The whole situation gets more complicated when on the one side there is only a neologism devoid of cultural and substantive meaning and which exists only to represent a concept from the other side; the correspondence desired by the translator does not in fact exist there, at least at the beginning. Or even when the words for the translation are borrowed from the existing vocabulary there is every reason to fear that there may be slippage between the meaning that the word has had and that which it must now have.

With hypotheses such as these, which are inescapably those of Japanese law translation, the understanding which the translation allows is quite precarious and provisional. It is therefore more useful to comment first on badly translated legal ideas.

Often given as examples from the law of civil procedure are the translation mistakes which have directly affected theoretical discussions: that of *Rechtshängigkeit* (case pending) which was at first translated as "the impeding of rights"; that of *Schuldtitel* (executory title) as "title of obligation". In civil law, *kifukooi* (making of a contribution) is still used to mean *Stiftungsgeschäft* (foundation document), so that a teacher has to draw the attention of students to the fact that what is involved is not the document for giving a gift to a charitable purpose.

Furthermore, a great controversy took place because of two texts concerning direct constraint on the one hand (which is admitted in principle unless the nature of the obligation precludes it: article 414 of the Civil Code) and indirect constraint on the other hand (former article 734 of the Code of Civil Procedure); both provide that it is possible to have forced execution when the nature of the debt permits. There is therefore a doubt about whether in a particular case it is possible to use indirect constraint first. Basically Boissonade, the writer of the text, spoke of direct execution instead of forced execution in the draft of the Civil Code. But an amendment was voted in Parliament with the result that indirect execution meant indirect constraint, there was no reason to distinguish between direct and indirect execution and that it was enough to use "forced execution" instead of "direct execution".

This is of course not a problem of a translation mistake but it is possible nevertheless to see in it a difference of understanding about the word "direct": a frequent occurrence everywhere in the translation context. Anyway the problem was resolved by the recent reform (article 172 of the Code of Civil Execution).[28]

More serious are the mistakes that are not so flagrant but are so tiny that they are not even noticed or are difficult to question; or rather they are not so much mistakes properly so called but more the result of the difference between world views and civilisations[29] in quite ordinary situations where the translator has been happy, for want of something better, to use a quite similar but not very adequate word.

These matters will now be looked at first at the level of words and ideas and then in connection with sentences and expressions.

A The "Words of Translation"

Yanabu refers to the phenomenon where translated words seem to the readers to be something very precious, like a box containing some gems although they do not know (or because they do not know) really what is in the box[30], as the "cassette" effect. That reminds us that Japanese used to believe, and perhaps still do believe, in the existence of

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28 I Kitamura "L'Effectivité des décisions de justice en droit privé japonais" in *Travaux de L'Association Henri Capitant des amis de la culture juridique française* (Economica, Paris, 1985).

29 Mounin, above n 4, 189.

30 Yanabu, above n 9, *Honyakugo seiritsu jijoo*, 36.

a soul in a word or speech. From the words of translation, a fortiori, there would come, in a hypocritical way, a foreign soul with a Japanese face.

At a more analytical level, it seems right to think, following the line of the telling remark by Yanabu,[31] that words of translation are accompanied by mystification effects on the one hand, of valorisation and devalorisation on the other, and finally, in any case, of confusion.

1 The mystification effect

The mystification effect often accompanies neologisms in particular. So, for example, in the translation of the words society *(*社会 *shakai)* and individual *(*個人 *kojin).*

In feudal Japan the individual was not identified as such but as an integral part of the house of his family or of the great house of the suzerain, and this did not allow for the conception of the abstract idea of society. How then did people of this status society understand the terminology of a contract society, of an individualistic society such as that of Europe from the 17th century?

According to the in-depth study of Yanabu, they began by translating the word *genootschap* (society) as a verb *majiwaru* (to have relationship with) or *atsumaru* (to gather together) in 1796 in a first Dutch-Japanese dictionary; in 1814, the word *society* was translated by *ryohan* (companion) in an English-Japanese dictionary. These first endeavours were followed by others: *nakama* (comrade), *majiwari* (relations), *icchi* (communion), *kumi* or *shachuu* (team or troop). A great political writer of the era, Yukichi Fukuzawa (1835-1901), in adopting the word *"ningen koosai"* (gathering of people) and in applying it both to intimate family relationships and to the public relations between a lord and his vassals, tried to obtain an abstract notion comparable to "society" in the Western sense by shock tactics - by the use of this expression in a way which was considered in public opinion as abnormal. Others dared to translate society as *seifu* (government) in order to contrast it with liberty as found in *On Liberty* by J S Mill.

In one way or another it was always groups of friends or very close linked human relationships that the translators first used for the meaning of the word. In the same way, the word *shakai* 社会 very likely taken from an English-Chinese dictionary and used uniformly today as the translation of "society", meant at the time "the assembly *(*会 *kai)* of an association *(*社 *sha).* This was not distinguished from *kaisha* 会社 which today means a commercial company.

As for "society", so for "individual", inspiration was taken from the same dictionary to borrow the word 一個人 *(ichikojin).* This must have been surprising at the time because literally it meant "a piece (or one item) of person", 個 *(ko)* being usually used to count inanimate things.[31a]

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31 Above n 9, 4.

31a It is difficult to convey in English the exact impression that *ichikojin* would have created because the use of counters is not a feature of the English language. Even less common would be the use of a counter for inanimate things for humans. An English phrase of an analogous kind would be "a loaf of bread".

Actually there is a synonym which appears to be closer to the word society: *seken* (世間 : people or things of the world). But since the neologism *shakai* had gained acceptance a curious distinction was quickly established concerning the respective use of these terms. *Seken* was restricted to its concrete and vulgar, and therefore rather pejorative, connotation while *shakai* was seen as a more positive, abstract, and perhaps noble, idea because it reflected Western society.

But at that point mystification becomes involved. The newly created word 社会 indicated, at least at the beginning, only what is called "society" in England. In order to guarantee its proper understanding a wise translator would use it either by adding the original word in parentheses: "社会 (society)", or by printing the katakana indicating the original pronunciation in small print beside the Chinese characters: "ソサエティ 社会".

This way of presenting the translated word shows well how the thing is seen: it has no meaning at the level of current language; the word will create "society" (in the sense of western society) in Japan, but in the meantime this western "society" remains so much an ideal and strange entity for Japanese that they imagine it only beyond the ideogramme:

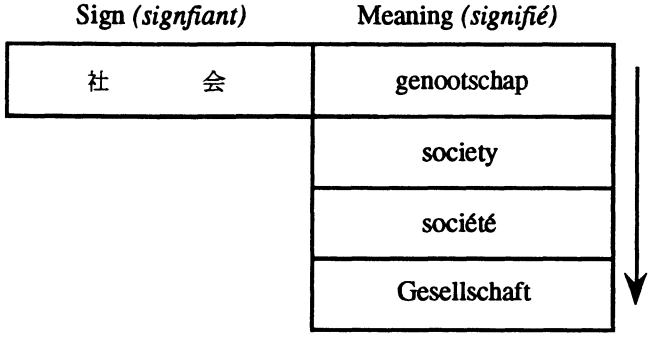
Sign *(signifiant)*	Meaning *(signifié)*
社会	society

In creating a new word and endowing it with a European meaning, the translator is waiting for the newborn to become a Japanese adult, while often the readers continue to see in the word what it could mean in Japanese, unless they wish and can faithfully follow the intention of the translator. The translator lives in the two terms of the external translation, and the readers within the meanings of the internal translation.

	Translator's understanding Sign *(signifiant)*		Meaning *(signifié)*
New word for translation	社 会 *(shakai)*		"society" in English meaning
Original Japanese word with its possible sense	社会 *(shakai)*	assembly of an association	
	Sign	Meaning	
	Normal understanding		

In other words, purely artificial, the word of translation exists in Japanese only by a convention according to which the word must have the original meaning of the translated word. Thus complete nominalism reigns. Putting it another way again, the translator thus condemns the Japanese reality in the name of a foreign concept which, according to him, the reader must understand absolutely; it is, as Yanabu has aptly observed,[32] a type of "deductive translation reasoning".

Then the word of translation is applied to synonyms in other languages:



And this creates another problem. Indeed, it is necessary to watch out for the apparent international equivalence which a common word of translation gives and which can be deceiving. English *society,* French *société,* German *Gesellschaft,* etc, do they all have the same meaning? They certainly do not in a sociological sense. And this is usually also the case when speaking linguistically. And even if the question does not present as enigmatic a difference as between the *chat* of French and the *cat* of English, it does affect the meaning in certain contexts.

Thus, if the word "jurisprudence" means the case law of the courts in France, it means the philosophy of law in England, while in Germany *Jurisprudenze* is nothing other than theoretical interpretations of the law: the very idea of "clarifying the law" varies therefore according to country at least in its principal form. Thus, an historical knowledge is also necessary to explain clearly the relationship between the Parliament of English and the *Parlements* of France of former times and of today. And it is the same for the *divorce* of French and the *divorcio* of Spanish, for the principle of the *autonomie de la volonté* and of the *Prinzip der Privatautonomie* etc.

2 The valorising effect

And so "things" of foreign origin fascinate the mind. Words too: they appear with a cultural halo, with a certain idealistic value; they are given greater value than is required. This is the second effect of the translated word. But the game is sometimes more complicated: it is accompanied by another effect - that of the devalorising of words.

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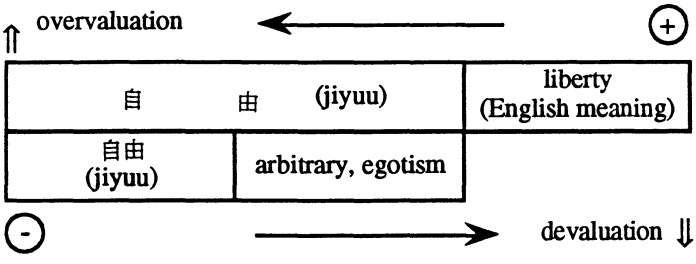
32 Yanabu, above n 9, 40.

Such is the case of the word 自由 *(jiyuu),* the Japanese partner of liberty. It is not a neologism in the proper sense. But when the translator borrowed an existing word it is obvious that readers who did not know foreign languages would understand it in accordance with its traditional Japanese meaning. "Liberty" constitutes one of the principal concepts both in European history and in current life and politics, while *jiyuu* meant rather arbitrariness, egoism, and rarely has a positive value: in Buddhist terminology, where only the initiates of Zen can reach the extreme state of *jiyuu,* it means freed from all anxiety. And it is probably from this notion that the translators took the term. In these conditions, even if the word *jiyuu* is understood intelligently in the European sense, it is also inevitably understood with its meaning linked to tradition:

自 由 (jiyuu)		liberty (English meaning)
自由 (jiyuu)	arbitrary, egotism	

The word has been very much used as a motto in movements demanding a constitution and civil liberties *(jiyu-minken-undo,* 1874-1883) which was at base in most part a manifestation of the discontent of the former samurai with regard to the new Meiji Government. In the name of liberty, according to them, one could legally do what one liked. And by a natural reaction, this caused many citizens to develop a repugnance towards these militants for liberty; or rather towards liberty itself! Even today it is not inconceivable that an argument of the same type might take place in college classes. This sort of half-knowledge often creates a phenomenon of deviance. Thus after World War II there was a significant, even too great an accent on the individualistic conception of the family as a result of the reform of the Civil Code made under the influence of American law. Since a person is now "free" from the family yoke some reasoned, children would no longer have an alimentary obligation to their elderly parents; and that view is held despite the fact that there is clear provision to the contrary in the Civil Code.

The translated word, whose meaning is not always obvious to everybody, thus stimulates the mind less than the emotions. In such a situation there is good reason to fear that the notion of liberty will become the object of a double epistemological error. On the one hand, if one proceeds solely and unconsciously from the Japanese notion of *jiyuu,* liberty in the European sense risks being devalued; on the other hand and inversely, starting with the notion of liberty 自由 can be overvalued.



The real fear is this latter aspect. Indeed Japanese, and particularly "scholars", are accustomed to using this notion as "自由 (liberty)", that is to say by using the word 自由 they are in reality thinking of "liberty". The more they are accustomed to seeing things through European eyes, the more they are exposed to the risk of falling into an unconscious error of artificially reading the presence of liberty into the Japanese context without effectively seeing the real aspects of 自由.

Now, a scholar trying to avoid just this risk may be content to give an onomatopaeic version of the notion in *katakana* instead of putting it in ideographs in *kanji*.

リバティー *(ribatii)*	liberty

As such, *ribatii* means nothing in current Japanese and yet it is given the responsibility of being a password destined for use in scientific argument. Can one imagine how much greater are its effects of fascination and mystification.

Another example is the word 私法 *shihoo* which means quite literally "private law". It must not, however, be forgotten that formerly the Shogunate forbade the practices of *shihoo* which meant the arbitrary regulation of matters that one undertook secretly within a determined group. And a quarter of a century after the promulgation of the Japanese Civil Code an eminent journalist misunderstood why it was called private law since according to him the law was entirely imposed by the government.

To generalise a little, nothing would be more quixotic than discussions through assimilation such as "Japan is a country of democracy and liberalism" (yes but ...) or "Japanese law can be considered as belonging to the Romano-Germanic family" (rather, no). It is possible to see here the sometimes fatal danger of a free cultural or scientific translation.

3 The effect of limiting (découpage) and mixing

The last effect of translation words is that of the limiting and the confusing of their notional field of application.

The French or German notion of *droit* or *Recht*, which means both law and right, is one of the best (or worst) examples of division: the Japanese, just like the English, cannot represent exactly these continental fundamental concepts, and in translation use different words for *droit* in the objective sense (法 *hoo*, law) and *droit* in the subjective sense (権利 *kenri*, right). As was seen in passing, when Japanese speak about *hoo*, they have in mind a somewhat mandarin idea of law which consists in thinking pre-eminently of aspects of criminal and administrative law: for them, law is essentially state or governmental, whether it is written or not. This conception led Japanese to retain, with the term *droit*, only its objective aspects and this has made it impossible to comprehend the integral notion of European *droit* or *Recht*.

Concerning its subjective aspects, the early translators created a word 権理 ***kenri*** combining characters signifying "power" and "reason", because the notion of right (or people's right) itself did not exist in Japanese. Since the pronunciation is the same, "reason" (理) was quickly replaced by "interest" (利). A right is thus reduced to the interest that individuals get from law, at least in a literal sense. And apparently, the immanent relation between law and right is lost for Japanese because of translation. This situation leads some careful scholars to translate the word *droit* or *Recht*, for want of a better choice, by the two words joined by the equals sign 法=権利.

The same conception of *hoo* (law) has had the effect, on the other hand, of becoming confused with *hooritsu* (法律 statute). Of course textbooks give the same respective definitions of "law" and "statute" as in Europe. But in fact, Japanese do not distinguish much between them, neither in the general public, nor among jurists. Indeed, they speak of a *hooritsu-mondai* (法律問題 question of "statute") instead of a "question of law"; they speak also of a *hooritsu-kooi* (法律行為 which would, in French, be *acte légal*, "statutory act") instead of an *acte juridique* (legal action) which is the generic term used to designate "legal actions consisting in a manifestation of the will which have the object and effect of producing a legal consequence, as in the case for example of contracts".

In the same way, when a new piece of legislation is explained the commentary will say:

"This new "law" has as its object the regulation of such-and-such field of activity"
"The present "law" has such-and-such characteristics, unlike the former "law""
"Article 1 of the "law" provides that ... ".

Whether the word used is *hooritsu* (statute) or *hoo* (law) is in the end only a matter of euphony, so that a translator who tries to be too exacting about the European concept runs the risk of being accused of cacophony!

This situation lends itself well to a discussion about the very concept of law in Japan.[33] Here it will suffice to note that before any legal or philosophical analysis there is a etymological complication which results directly from successive translations of the word *hoo*. This is a state of affairs which could be called an accumulation of different meanings of quite heterogeneous origin.

The ideograph 法 (originally 灋) which was developed in China, expresses the image of a curious animal which is favoured by the Emperor, being locked up on a small island surrounded by a lake in order to prevent it from escaping, while at the same time leaving it free to graze. From this comes the meaning of penalty or of regulation

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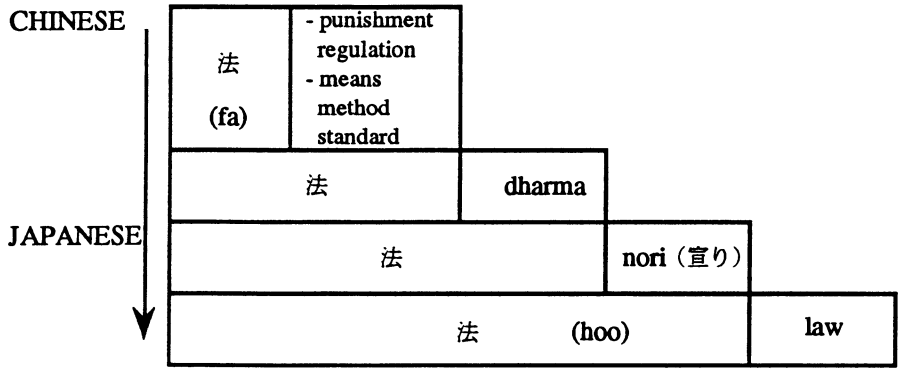
33 Kitamura "Une esquisse psychanalytique de l'homme juridique au Japon", *Revue internationale de droit comparé*, 1987, no 4; and in *Etudes de droit japonais*, Paris, Société de legislation comparé, 1989, pp 25-61. The French word here translated is *droit* which means both *law* and *right* (eg *je fais mon droit*, I study law; *droit commercial*, commercial law; *le droit de vote*, the right to vote). The example is therefore not suitable for translation.

as well as that of method, example or standard: the law is essentially destined in China to serve as a standard for government officers in their application of Imperial orders.

But Chinese translators quickly assimilated this word to the Sanskrit notion of *dharma*, the supreme law of the cosmos and of nature, when they were translating the Buddhist sutras.

And then the word came to Japan with Buddhism: it is therefore with the meaning of the extreme Buddhist laws that the Japanese learnt the notion of 法. But by way of the Japanese reading of the word, they assimilated it to the Japanese notion of *nori*, a rule "proclaimed" by a divine lord and hence by the Tenno or by the government, which is in turn, the double of the Chinese notion of law. And it is at that point that Western "law" was added. Leaving aside matters of detail, this evolution can be set out in the following way.



Today lawyers think only in the latter sense, law, but all the other meanings remain alive; or rather, it is the latter meaning which strikes the least strong chord among the public at large; for them it has a very vague reference. There is no shortage of examples. There was the journalist who saw law only as regulations imposed by the government. Additionally, the word 商法 *(shoohoo)* which translates in law as commercial law, means also with a different accent "method of sale" (for example *akutoku-shoohoo*, a dishonest or deceptive sales practice).

It is truly a question of the syncretism of meanings, as it is in the case of the notion of ***kami*** (神) a violent being who menaces humans + wild beasts or frightening natural phenomena + an animistic being who causes fear by dominating a fixed place (mountain, river, sea, path, etc) + the gods (notably Japanese ones) + the *Tenno* or the ancestors as religious objects + the "God" of Christians (by translation)! And so it is that one word can include within it two opposed or antagonistic concepts in a manner quite beyond Aristotelian logic.

This is triply inconvenient. On the one hand, the co-existence of the most contradictory of concepts in the same word leads, in the extreme case, to depriving it of any substantive meaning without succeeding in evoking any clear or unequivocal image,

and finally to reducing it to a notion of indeterminate content. It becomes literally, as was cleverly pointed out by Yanabu, a cassette whose content is unknown. In this sense also Roland Barthes was quite right in saying that "the Japanese sign is empty: what it represents escapes, there is no god, no truth, no morality 'at the base' of these meanings which rule 'without any counterpart'"[34].

On the other hand, those who use these words in translation do not do so without a vague concern about the uncertainty of the concepts. A specialist of Chinese literature, Suzuki,[35] has remarked on this delicate psychology that the Japanese have about Chinese words: "I express myself in *kanji*. But I wonder whether it is truly in accordance with the correct usage .... Isn't there some misunderstanding there, let's see?" He adds to this scruple the fact that Japanese is full of euphemistic expressions. Typical of them is the suffix which forms an adjective, 的 *(teki)*, meaning approximately "of a ... sort." In current idiomatic language there are so many other words or similar expressions used to express approximation or to avoid a clear affirmation: *kusai, too-yuu-tei-no, ge, soo, rashii, yooda, yoo-na-mono-da,* and even *chikku* (a suffix borrowed from English: eg roman-tic)!

Further the splitting of the same original idea through the interplay of translation continues to be encouraged by the autonomy and isolation of each specialised discipline. Thus the word "article" is translated as *joo* or *jookoo* in law, *kanshi* in grammar, *fushi* in botany, *kansetsu* in anatomy, *shinamono* or *hinmoku* in commerce, *koomoku* in a report or annotation, *kiji* in newspapers, *ronsetsu* in reviews .... Within law itself, the word "action"[36] means *kabushiki* for commercial lawyers but *soken* for proceduralists and *uttae* for civil lawyers; the word "author" becomes *zenshu* in matters relating to transfer of property, *kyoodooshiso* in family law matters, *chosakusha* in copyright, *kagaisha* in respect of tort liability, and *kooisha* or *hannin* in criminal law; in the same way, it is necessary to distinguish between publicity of title *kooji*, misleading publicity *kookoku*, and the principle of public trial *kookai*; quite different are appeals *kyuushoo* in the case of non-payment, appeals to a court *jooso* and appeals *fufuku-mooshitate* to an administrative authority.

By breaking up the internal economy of a notion by translation in this way, there is great difficulty in reconstituting the common basic idea of it, and this is one of the reasons for the difficulty the Japanese have in mastering European languages. The famous joke on this matter is about the Japanese professor of the Kantian school who was surprised to find on the door of a building in Berlin a notice which said "Raüme zu

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34 R Barthes 1987 *L'Empire des signes* (Skira, Geneva, 1970).

35 S Suzuki *Kango to Nihonjin* (Chinese words and the Japanese) (Misuzu, Tokyo, 1978), 1-25 (in Japanese).

36 French *action* includes the meaning of a company share.

vermieten" (Rooms to let); he reflected in admiration: "Ah, Germany is truly the land of philosophy. Even a concierge knows the concept of "*Raum*" (space).[37]

Finally there is another phenomenon - the opposite, that of confusion. This occurs where various synonyms are represented by a single word. The words of translation are thus vulgarised and homogenised; they are the object of a convergence of meaning.

For instance, in a Japanese translation of the new Code of Civil Procedure of France:

the word 訴訟 *soshoo* chosen to cover at the same time - procedure, litigation, appeal, hearing and matter
申立 *mooshitate*: claim, pleadings, appeal
召喚 *shookan*: summons, citation, serving process
提出 *teishutsu*: to present, to produce, to depone, to deliver, to propose, to administer.

Sometimes there are several words that have the same meaning depending on the context and, particularly in French, there is an attempt to avoid repetition of the same word. On the other hand, it is a good idea as a general rule to translate in as clear and accessible manner as possible for everyone, at least, as Eugene Nida emphasises along the lines of the method used for the translation of the Bible, in cases where the translation is to be used by the general public.

But such a practice sometimes leads to a misundertanding of the technical difference that exists between synonyms. And there is also cause to enquire whether this is not a matter of the failure to differentiate between ideas, as ethnologists have observed in connection with the naming of members of the family. Indeed, Japanese have little inclination for procedure, they have only a single traditional idea of appeal to the court of justice which was covered by white pebbles (*oshirasu*), and this constitutes a passe-partout for translators.

Whatever the situation may be, wherever, as in our case, lawyers and legal terms are a little bit isolated from other sectors of society as a whole, there is reason to fear that

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37 Furthermore as we have already seen, the same word is translated differently as an onomatapoeic term and as an ideograph. Here is what can happen. You will have heard people speak of *sekitsui kariesu* (vertebral decay or Pott's disease). Yes, you say, that is some kind of sickness which affects the bones in the vertebrae; but *kariesu*? "Oh, I don't know what that is, you'd have to ask a doctor". And this from a person who does not know what caries are, though they are troubled by them often: *mushiba* (dental caries)! And so for a Japanese, one thing is *kariesu* (phonic imitation of the German medical term *karies*) and *mushiba* (an original Japanese word) is another thing. What a diversion of thought and what epistemological damage!

The world seems so divided and complicated when language does not guarantee a sufficient basis for intellectual activity. It could be said that we live in a duplex apartment in which the living room and the office are separated by a staircase which is translation.

words in translation usage, because they have little contact with words in general use, show symptoms of autism and a tendency towards hereditary recessiveness.

Unlike words which conceal conceptual gaps, translated sentences first strike the mind with their difficulty.

B Translation Style

It has already been seen how translation has given birth in the Japanese language to a particular type of phraseology which reflects the grammatical structure of European languages.

And this style of translation occupies a position which is almost official, since it has been institutionalised particularly in legal matters. No more will be said of the alienation that Japanese citizens experience vis-à-vis their state law and administrative style of public offices, but its influence remains indeed quite marked in the fields of legislation, of case law, and of legal theory.

1 Legislation

The texts of the Meiji era, which are only a century old, already constitute a very nice puzzle for many people, including lawyers. This is in part because the style and the grammar have evolved very quickly (no comparison can be made with the almost constant character of the French phrases), but also, because there is in them many expressions which are no longer found except in the very old Chinese classics. Furthermore, there are items of jargon or expressions peculiar to legal and judicial circles. This means that it sometimes happens that it is necessary to read or write the same words in a manner other than in accordance with current usage. For example, 意思 (*ishi*) instead of 意志, free will; *igon* (遺言) instead of *yuigon*, a will.

The most recent texts are no less embarrassing when they are statutes drawn up under the influence of American law after the Second World War. The latter are the more or less direct products of translation: for example, the present Constitution of 1946, the Code of Criminal Procedure 1948, the Law on Trade Unions of 1949. This last statute was prepared, it is said, at the time when the Supreme Command of the Allied Forces imposed its text on the Japanese Government, saying "Translate it as a legislative proposal, but be sure not to change it, not even one word".

The text of the law in force presents the authentic characteristics of the translation style with errors that resulted from its hasty preparation: the sentences are sometimes too long or too complicated to be intelligible at a first reading; there are some words which are translated differently from article to article; and one conditional sentence preceded by "however" has no principle in the preceding passage.

The product of translation is not, for all that, easy to retranslate into European languages if the ideas have been well thought out in Japanese.

In spite of the drafting flaws and difficulties of comprehension, it is not easy to remedy the situation because the procedure for making or amending a law is a very burdensome one. Since Japanese do not like laws, how can they like changing them? In these conditions the question of an internal translation does not really arise.

2 The case law

Reading judgments is no less difficult. The common complaint is that each sentence is unusually long, particularly in the part dealing with the facts, the arguments of the parties, and the evidence that they have adduced.

Imagine a whole series of "Whereas"s which resemble in some small way the pattern of a French judgment or preamble to an English statute, but which follow each other without the "whereas", without punctuation, and that in the series the judges state the facts in such detailed fashion that there is risk of losing sight of the contextual setting. It is probable, though it has not yet been proved, that traces of French influence can be found in this as in some other judicial practices.

There have been several attempts to simplify the writing of judgments, as a result of which the pattern has been a little improved. The tendency is to break the judgments down part by part, but experience shows that almost nothing is changed in the essential style of the judgment and the reader continues to suffer from the weightiness of the sentences.

3 Legal theory

It is the area of legal theory that suffers most from being very close to the translation style, and naturally this is loathed to a greater or lesser degree.

Written therefore in an artificial language, academic literature is not very readable and is sometimes inaccessible to the public at large. Imagine a translation of Kant, of Hegel or of Heidegger which is embroidered with very long and heavy sentences and with all sorts of translation techniques which link normal philosophical words with words expressly created to provide the terminology peculiar to these authors. This is one of the most difficult puzzles to decipher. The specialists will be freed from the burden of reading by going directly to the original text, but they will impose on their readers a new burden by writing their reflections or thoughts on the texts in the translation style.

And it is the same with law language: there are few students who have not complained about the difficulty of reading the textbooks. It is even not unusual to find practitioners who let their distaste for law in general, *Brotwissenshaft* (knowledge for bread), be known, and sometimes for the "translated knowledge" of the university proceduralists which is well developed in Japan with a subtlety inherited from their German masters.

A quite curious phenomenon is that there is often published in legal journals a reconstituted record (and moreover one very carefully corrected by the participants) of the

dialogues, trilogues and quadrilogues ... of specialists on the legal problems of the moment, or even by way of commentary on a reform: they recount rather than expound. And this is so because, in respect of a piece of academic writing, one has the feeling of the "bent shoulders" not only in the reading of it but also in its writing: authors sometimes say so expressly. This search for a lost natural style speaks volumes about the inconvenience created by legal writings and the indigestible style of their writing.

Contrary to this current of ideas there is one author, Takeyoshi Kawashima, a leading civil lawyer and sociologist, who advises scholars to develop their sentences "in a manner which will permit their immediate translation into a European language", that is to say according to a grammatical structure which is as close as possible to European grammar.[38] This amounts to saying basically, go as far as possible with the translation style.

It is true that in this way he is seeking a maximum of scientific rigour. And indeed there are many reasons for believing that the Japanese language is not made for the law, but rather for literature with its extreme subtleties and its sentimental nuances.

Nevertheless one cannot totally accept this approach. Even if the intention is good, there are very many problems presented by the principle itself without referring to the writings of the author, the concrete applications of his thesis which are brim-full of brilliant ideas but alas sometimes also with difficult turns of phrase.

Indeed, though a successful translation can stimulate readers in their desire to create a new style or language by presenting them with various foreign examples, more often than not it renders a text that is more commonplace, one that is more standardised and one that lacks any personal or original character, because the artificial and conventional character of the phraseology of translation does not leave much room for free adaptation nor for literary exploration. In this sense the translation style tends to the same autism that was seen in respect of the vocabulary, thus weakening stylistic consciousness itself and further impoverishing the possibilities of the Japanese language.

It follows that in trying to ensure a certain scientific rigour one cannot allow oneself to be unclear even if this means imposing on readers many intellectual feats; particularly not in legal matters where one is deemed to know the law, which is already difficult enough even if it is written in quite ordinary language which itself is outside the spoken language. Therefore though it is good to seek exactitude in statements, it is necessary to take many precautions which are typical of the translation style such as using relative pronouns which do not exist in Japanese.

But behind the thesis of Kawashima there exists a greater temptation, vague though more invasive.

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38 T Kawashima *Aru hoogakusha no kiseki* (Yuhikaku, Tokyo, 1978).

Today many scientists make no secret of their desire to express themselves, to teach, and to have discussions directly in English, not only in international fora but even in their classes. One writer, Naoya Shiga (1883-1971) called the "saint of prose", went so far as to propose that the national language be replaced by French! This was not a joke but perhaps delirium born of despair. And this dream/despair might not have lacked national dimension because Amane Nishi, the father of philosophical translations, formulated the same view a century ago.

This means that there is a flight towards the original, combined with a "cult of the universal". Instead of dancing on the bridge of translation the preference is to cross to the other side. Indeed, Japanese researchers have a tendency to begin and end by working on a Euro-American plane, entering into dialogues principally with the works of their overseas colleagues all the while expressing themselves through the translation style.

But this attitude can imply dangerous deviation. It is appropriate to heed the alarm which is given by an eminent economist, Yoshihiko Uchida.[39]

He admits that Japanese science, and not only the natural sciences but also the social sciences, which began by being imported sciences have reached the point of becoming in certain sectors sciences for export. Indeed, one can list a number of Nobel prizes in physics and other areas and, to give but one example in the social science area, there has been the case of an author publishing the original reconstituted text of *German Ideology* by Marx.

But Uchida notes, quite properly, that the very fact that Japanese sciences may become those for export is evidence of their character as imported sciences, that is to say sciences which rely almost exclusively on the base of translation. If they have advanced now, he says "they have done it outside of daily reality" and "have left the Japanese language behind".

The fact that the translation style, which has become the academic language, affects the normal tone of the Japanese language quite a lot need not be restated. It is a bit like a new city becoming the capital alongside the old deserted city.

This criticism calls to mind a story told by a sociologist. In a village the peasants were growing a mushroom called *Ipponshimeji*. One day they were surprised to hear on the radio that this mushroom was poisonous, and that the consumers in the city were no longer going to buy it. In all likelihood, the sociologist said, the information had its origin in a botanical text whose author seemed to have imitated a foreign text. Then the villagers got an idea: sell the mushrooms under another name picked at random: *Hotei-shimeji*. And there you are, it was on sale again; they are eaten often and without any worry or accident.[40]

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39 Y Uchida *Shakai ninshiki no ayumi* (Iwanami, Tokyo, 1971).

40 M Kida *Nippon buraku* (Iwanami, Tokyo, 1967).

In looking too far for international equivalence and scientific acceptability, there is a risk of succumbing to the perverse illusion that knowledge is found only in foreign books, and this causes one to forget the continued efforts of reflection and careful observation of daily life which absorb researchers. This is what Uchida was emphasising when he stated that "it could be said that Japan's social sciences are as developed as they are, precisely because each researcher has directed attention from the very beginning to ready-made 'social sciences', by preceding through the basic but tiring tasks of learning to think in 'the social science way'"[41].

Up to this point this paper has perhaps been too critical of translators as *traditore*. But while slightly betraying both sides of the bridge, can this guide between the two worlds also take pride in finding something instructive, or constructive? Can the *traduttore* also be a *trovatore*?

IV TRADUTTORE TROVATORE?

This question can be asked as much in the context of Japanese law as in the context of law in general or of comparative law.

Indeed, if modern Japanese law, which is the product of translation, has made mistakes even in respect of the most elementary of notions, what has it assimilated from the law which it has taken as its model? Or if it has not taken over the original ideas, what has it found as a result of these very misunderstandings or at least through the translation exercise? In a word, in what way has Japanese law profited from translation, or even more precisely from the conceptual difference which unavoidably exists between two systems.

It is also interesting to ask such a question at the more general level of comparative law. Can translation contribute to the finding of something original across different systems of law? This is the problem of the universal principles of law.

It is obviously difficult to answer these questions, framed as they are in a somewhat general way. It would be necessary to wait for the results which may be obtained from the works of going through each branch of the law with these questions in mind. But here it is useful to make a few observations.

A The Discoveries of Japanese Translation

In this part it is appropriate to focus on the ideas of filtering and crystallisation.

1 Filtering

First of all translation involves a filtering. It almost goes without saying that one can understand that part of the meaning of a word to translate which is covered by the

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41 Uchida, above n 39.

word of translation, but not that which is not. This is obvious but at the same time it is rich and serious in its consequences.

Translation does not directly transmit the historical, philosophical or sociological ideas which are the basis of the ideas of a word which is to be translated. Only what is explicit is translated. What is tacit and implicit is quite purely and simply neglected, unless those elements are understood in the same way in the corresponding translation word, and this is quite rare. Thus filtered they have hardly any persuasive value for those who receive the translated word.

And this is exactly the case of the idea of law as was seen earlier. The notions of *droit objectif* (which means "law" in French but Japanese receive only in the sense of "commands of the state") and *droit subjectif* ("right" in French but rather "legal power allowing pursuit of interests" in Japanese) are comprehended separately and they are never found together in a single basic configuration of what is just. Thus there is great difficulty in understanding the theoretical and historical ideas behind the word *droit* or *Recht*.

The French notion of *faute* (fault), which is one of the most fundamental ideas of French law, is also impossible to translate as such in Japanese law which only has words which correspond to intentional fault (*koi*) and to negligence or imprudence (*kashitsu*). In order to get greater precision, sometimes an effort is made to translate by way of phonetic imitation (*footo*), but that in no way serves to transmit the moral and ordinary connotations of fault.

Though there is a risk of lack of comprehension or of inadequate comprehension of the metaphysical aspect of foreign ideas, it seems on the other hand that the Japanese end up by understanding them in their most legal of ideas and in their purest of technical senses.

Looking again at the case of fault. Freed from the European moral yoke, Japanese jurists do not feel much embarrassment about affirming the idea of liability without fault; this is encouraged by the word *sekinin*, the apparent equivalent of liability, which includes another meaning of charge or burden, which one must assume in relation to the resultant damage.

In the same way, the French principle of *autonomie de la volonté* (autonomy of the will) has not found a receptive audience in Japan where only the less philosophical rules of contractual freedom count and where it is less the will of the parties than the modalities of their relationship which bind them. And so in general a greater role is given to teleological, legal and economic considerations. The case law is not opposed in principle to the review of contractual clauses for reasons of frustration. Doubtless the number of applications in practice are rare but the clause which is the equivalent of rebus sic stantibus appears in fact to be implicit in every contract.

More generally, by the effects of filtering, translated law and translated legal knowledge end up looking like a truly closed and autonomous system, ready-made, and sufficiently defined and presenting perfection at a more or less high level. And this

makes thoughts and reasoning appear more emphasised in their mechanical aspect or at least to be very operationally oriented. If, at a later stage there arises the question of interpretation or of application of knowing how to reconcile the conflicts between systems of traditional and moral values, it is possible in turn, from the beginning to develop discussions within the legal system, in a manner isolated from other considerations of an ethical or religious nature. This explains the situation of Japanese legal science where subtle dogmatism becomes more and more accentuated, while at the same time the sociological considerations, which have already been taken into account in broad measure in the setting of the rules by the interpreters are left to develop by themselves.

Of course, this phenomenon also gives warning of the danger of losing moral flexibility in theoretical analyses, in particular where the subject-matter lends itself to discussion only between specialists, and therefore where there is no control by public opinion or any taking into consideration of sociological data. This is particularly the case with the rules of civil procedure. For example, the controversies surrounding the cumulation of *Ansprüche*, originally taken from the theory of Windscheid, seem today to have reached the height of their subtleties, and this cannot but be a puzzle for those civil lawyers who are not specialists.

It is true that all this has not arisen solely from translation or translation style but it is nevertheless certain that in large part translation has complicated or aggravated the theoretical situation. In a word, translation tends to abbreviate, condense and develop technical ideas of a legal nature and leaves aside other cultural, religious or socio-economic ideas which formed an integral part of the ideas and which, whether they restrain or sharpen the meaning, are of an intrinsic nature.

And it is not only ideas of foreign provenance which are condensed; it also happens to local ideas.

2 *Crystallisation*

The concern here is with the crystallisation of Japanese legal ideas which previously were diffuse and unclear and which came to benefit from the existence of a new word, the product of translation, so that they could gain precision and definition. This is one of the most interesting problems for comparative lawyers and warrants further study. Two typical examples are given here.

One is the case, in civil law, of the notions of good faith (*shingisoku*) and of abuse of right (*kenri-ranyoo*). Indeed, one must exercise one's rights and fulfil one's duties in good faith and with loyalty and it is forbidden to abuse one's rights. These formulae touch the heart of Japanese ethics to such effect that they seem to represent certain natural law values. As a result they have not only been the subject of an extensive caselaw in various matters but have also been expressly confirmed since 1947 by the provisions of the very first article of the Civil Code.

The other example appears in criminal law in respect of the institution of the *ministère public* (*Kensatsu*).[42] This institution did not exist in the former Japanese system, except for administrative matters and then under a different name. But, after contact with French law it was suddenly adopted in 1872, five years after the fall of the Shogunate, at the time when modern Japan was at the "trial" translation stage and in the history of its reception of Western law. And since then the Japanese *parquet* has taken root amazingly well in the judicial structure, though only in the criminal law field. Basically it is the penal and administrative climate of Japanese law which is thought to have defined the functions, because the *ministère public* of Japan hardly ever appears in civil cases and in particular never performs the tasks which are fulfilled by the Advocates-General at the Court of Cassation in Paris. The concern is that this remarkable but partial assimilation runs the risk of providing false information on the comparative plane both in regard to the parent legislation and with regard to what is properly Japanese.

B Multinational Translation

Finally there is the question as to the nature of the gains of comparative and multinational legal translation. More precisely, will translators, in their eternal search for a cultural assimilation between different systems, eventually succeed in discovering the universals of law?

Today, it would seem a little absurd to answer affirmatively solely from the metaphysical point of view as was tried by the Realists of the Middle Ages. It remains, however, true that in certain areas it is possible to find some elements which are common to different systems of civilisation. For example, a French linguist André Martinet, said it was possible to find the opposition of noun and verb everywhere.[43]

And there is no need to recall the importance of the research of ethnologists on the universal character of fire, of levers, of the spear and of the taboo against incest, etc.

In legal matters just as in any other, the possibility at least should not be excluded of accumulating discoveries of the common essential link which will be made clear by translation. The development in the near future of a translating machine is particularly interesting in this respect. One need but wait until such a machine, endowed with an analytical linguistic capacity, is used for research on the legal base common to all people. With these universals of law known, the very operation of translation would in its turn and to that extent be founded on the practical certainty of principle.

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42 In the criminal law context this refers to the role of the public prosecutor. See Noda *Introduction to Japanese Law* (University of Tokyo Press, Tokyo, 1976).

43 A Martinet "Réflexions sur le problème de l'opposition verbo-nominale" Journal de psychologie normale et pathologique, 1950, 103.

In this regard the hypothesis of "proto-law" (*protodroit, Urrecht*),[44] which was advanced by the late Professor Noda, a great Japanese comparatist, seems in particular to suggest the hypothesis of universal principles of law. These could find their basis in proto-law.

By relying on the results of the research of ethnologists and psychologists such as Jung, and by assuming that all humans have developed from a common origin, Noda thought that at the first stage in human history, particularly at the time of Australopithecus, all people lived for a very long time with the same style of life and therefore with the same legal mentality. This original mentality must, according to Noda, have been inherited successively to build up in the subconsciousness of each human being and to constitute the base of what Jung called the archetype of the collective subconscious. And it is through this original identity of the condition of the legal soul, which he called proto-law, that Noda tried to establish a theoretical foundation for comparative law.

This theory is worthy of closer consideration by reference to ethnological and archeological research and, what is particularly important to the present discussion is that it can also establish the existence of the universals of law.

Doubtless it will then be extremely difficult to say what those universals are. They would probably be very abstract, diffuse or succinct, like the rules of the Ten Commandments. It is nevertheless believed that it is possible, through a series of semiological analyses, to pick out a certain number of law types which belong to several families of law and for some of the most basic of subject matters.

Experience confirms the usefulness of such research by often showing that there are many basic concepts common to people who come from different civilisations.

It remains to appeal to the translators of the world to unite to this end.

V CONCLUSION

This paper has spoken much about the bad effects of law translation. Nevertheless the author totally agrees with Mounin when he said that translation is "one of the finest of victories over the difficulty of communication between people".[45]

At the same time, optimism must be tempered particularly when the singular position of hidden multilingualism, which is the lot of Japanese law and Japanese lawyers, is taken into account. For, to generalise a little, the legal system which is the work of a translator, can at the end of the day only with difficulty be reconciled with the

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44 Y Noda "Quelques réflexions sur le fondement du droit comparé: Essai d'une recherche anthropologique du fondement du droit comparé" in *Aspects nouveaux de la pensée juridique: Receuil d'études en hommage à Marc Ancel* (Pedone, Paris, 1975) 23 et seq.

45 G Mounin *Encyclopaedia Universalis* (French Edition), vol 18, 1984, see "Traduction".

traditional normative conscience and the legal sensibility of the nation. This law-exoticism lends itself very readily to a law-esotericism, the preserve of the government and its leaders who will continually refine it technically and further add to the mystification and the disaffection of those who are subject to the law.[46]

And legal thought, developed on the basis of translation, is obviously exposed to the risk of an intellectual uprooting which will take it to the limit between xenomania and chauvinism; between being a legal puppet or a scientific marionette when too much attention is paid to a foreign version and international equivalence, and a traditionalism or a mystic ethnocentricity when, by way of reaction, there is too much reliance on local meaning.

That being so, the reality must be accepted. We have before us a law which the heroes of the reception succeeded in drawing up after a very great deal of trial and error with translation. And that is only 100 years ago. The picture of the three doctors of the Dutch school who had before them an enigmatic book of the "truth" is, for Japanese, still very vivid. It is the very symbol of young scholars at the threshold of their careers.

Since it is our law, we cannot but interpret it properly "in the same spirit as a text in the domestic language is interpreted".[47] Where translation is necessary it is no longer a question of saying "don't worry about mistakes", and one must know not to be timid either about possible misunderstandings which can have a creative function.

However, that is conditional on the interpreters being also sociologists and comparatists who are very careful about the difference between civilisations, whether they be Japanese or European, and being philosophers who are vigilant in respect of the difference between world views, whether they be historical or ideological. These are methods of which a reasonably representative body, particularly of civil lawyers, is beginning to take notice.[48]

In such conditions, could law not wait for the miracle of a legal Pinnochio, the birth of an original and autonomous law from this mix of the most heterogeneous of elements marked by the complicated tasks of translation, and for a Flying Dutchman, through whose image Japanese science began to study Western civilisation, to cast its anchor in the haven of the mind.

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46 H Mitteis *Deutsches Privatrecht* (7 ed, Beck, Munich, 1976) chapter 3, VI, p 14.

47 Malaurie, above n 13, 588.

48 See Hoshino *Course in Civil Law: Introduction* (in Japanese) (Yuhikaku, Tokyo, 1983) 23.