Concepts and Words : A Transsystemic Approach to the Study of Law between Law and Language

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De concepts et de mots : approche transsystémique de l'étude du droit entre droit et langue

Conceptos y palabras : un enfoque transistémico para el estudio del derecho entre derecho y lenguaje

Conceitos e Palavras : uma Abordagem Transistêmica ao Estudo do Direito entre Lei e Linguagem

概念与词汇：法律与语言之间法学研究的跨系统进路

Résumé

Le transsystémisme peut être décrit comme une approche juridique centrée sur un dialogue entre des traditions juridiques et ancrée dans une méthodologie pluraliste et interdisciplinaire qui célèbre les différences et les similitudes irréductibles entre diverses traditions juridiques.

Abstract

Transsystemia can be described as a legal approach centered on a dialogue between legal traditions, anchored in a pluralist and interdisciplinary methodology, which celebrates the irreducible differences and similarities between various legal traditions. This paper argues that

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Cet article soutient que la jurilinguistique pourrait être utilisée comme outil pour améliorer le dialogue entre les langues et les traditions, dialogue qui est au cœur du transsystémisme. Au Canada, où le transsystémisme s'est d'abord développé, en plus de l'expression du droit en français et en anglais dans la même tradition juridique, il existe aussi une traduction conceptuelle d'une tradition juridique à l'autre. Un certain nombre de questions se posent lorsqu'on entreprend cette traduction conceptuelle. Les traditions juridiques devraient-elles retenir une terminologie distincte là où le droit civil et la common law ont des conceptions différentes d'une institution juridique ? L'utilisation d'un équivalent fonctionnel est-elle efficace lorsqu'il n'y a pas d'équivalent conceptuel strict ? L'étude du langage juridique est essentielle pour répondre à ce type de questions. De plus, le fait que l'approche transsystémique va au-delà du positivisme juridique affecte la structure linguistique du droit, puisque le langage juridique peut évoluer pour devenir moins technique et donc plus accessible.

jurilinguistics could be used as a tool to enhance the dialogue between languages and traditions that speak to the core of transsystemia. In Canada, where transsystemia has first developed, in addition to the expression of the law in French and English within the same legal tradition, there is also a conceptual translation from one legal tradition to another. A number of questions arise when undertaking this conceptual translation. Should these traditions hold onto distinct terminology where the civil law and common law have different conceptions of a legal institution ? Is the use of a functional equivalent effective where there is no strict conceptual equivalent ? The study of legal terminology is essential to answer those types of questions. Moreover, the transsystemic approach's shift from legal positivism affects the linguistic structure of the law, since legal language may evolve to become less technical and therefore more accessible.

Resumen

El enfoque transistémico puede describirse como la aproximación jurídica centrada en un diálogo entre tradiciones jurídicas y apoyado en una metodología pluralista e interdisciplinaria que celebra las diferencias y similitudes irreductibles entre diversas tradiciones jurídicas. Este artículo sostiene que la jurilingüística podría usarse como una herramienta para mejorar el diálogo entre las lenguas y tradiciones, un diálogo que está en el corazón del enfoque transistémico. En Canadá, donde se desarrolló por primera

Resumo

O transistemismo pode ser descrito como uma abordagem legal centrada no diálogo entre as tradições legais, ancorado em uma metodologia pluralista e interdisciplinar, que celebra as diferenças e semelhanças irredutíveis entres várias tradições jurídicas. Este artigo argumenta que a jurilinguística pode ser usada como uma ferramenta para aumentar o diálogo entre linguagens e tradições, diálogo que está no âmago do transistemismo. No Canadá, onde o transistemismo se desenvolveu primeiramente, ademais da

vez este enfoque, además de la expresión del derecho en francés e inglés en la misma tradición jurídica, existe también una traducción conceptual de una tradición jurídica a otra. Una série de preguntas surgen al emprender esta traducción conceptual. ¿Deberían las tradiciones jurídicas contar con una terminología distinta donde el derecho civil y la common law tienen concepciones diferentes acerca de una institución jurídica? ¿El uso de un equivalente funcional es eficaz cuando no existe un equivalente conceptual estricto? El estudio del lenguaje jurídico es esencial para responder a este tipo de preguntas. Además, el hecho de que el enfoque transistémico vaya más allá del positivismo jurídico afecta la estructura lingüística del derecho, ya que el lenguaje jurídico puede evolucionar para volverse menos técnico y, por lo tanto, más accesible.

expressão do direito em francês e inglês dentro da mesma tradição jurídica, há também uma tradução conceptual de uma tradição jurídica para a outra. Certo número de questões surgem quando se realiza essa tradução conceitual. Essas tradições devem se ater a terminologias distintas quando o direito civil e o *common law* tiverem concepções diferentes de um mesmo instituto jurídico? O uso de um equivalente funcional é efetivo quando não há um conceito estritamente equivalente? O estudo das terminologias jurídicas é essencial para responder a esse tipo de questões. Além disso, o fato que a abordagem transistêmica vai além do positivismo jurídico afeta a estrutura linguística do direito, já que a linguagem jurídica pode evoluir para tornar-se menos técnica e assim, mais acessível.

摘要

所谓跨系统（Transsystemia），是指以法律传统之间的对话为中心、以多元主义和跨学科方法论为基础的法律方法，它支持各种法律传统之间不可化约的不同点和相似点。本文主张，法律语言可作为工具使用，以改善语言与传统之间的对话，而这种对话居于跨系统核心。加拿大作为跨系统最先发展起来的国家，除了同一法律传统中的法语法律表达和英语法律表达以外，还存在一种从法律传统到另一种法律传统的概念翻译。我们在进行这种概念翻译时会产生一些问题。在一个民法和普通法对法律制度有着不同概念的国家，法律传统应坚持不同的术语吗？如果没有严格的概念性对等词，使用功能性对等词有效果吗？研究法律语言对于回答这类问题至关重要。此外，从法律实证主义到跨系统方法的转向，会影响到法律的语言结构，因为法律语言可能演变得不那么晦涩而且更加易懂。

Table of contents

Canada provides a favourable context for the organic development of a transsystemic approach to law. Transsystemia is a way to study and understand law that goes beyond legal traditions. More specifically, transsystemia can be described as a legal approach centered on a dialogue between legal traditions, anchored in a pluralist and non-hierarchical method that celebrates the irreducible differences and similarities between various legal traditions. This approach— which is about ideas neither conceptually nor geographically embedded in one specific legal tradition—is not tied to Quebec or to mixed jurisdictions,[1] but has a larger cultural vocation. Transsystemia transcends the traditional dichotomies between civil law and common law. It also challenges the idea that civil law is better expressed in French in Canada[2], while the common law's natural expression is in English. Finally, it relies on interdisciplinary approaches, thus drawing from other disciplines than law.

This paper will review these features of transsystemia. It argues that jurilinguistics, which can be described as the application of linguistic treatment to legal concepts and texts (in other words, developing the language of the law)[3], could be used as a tool to enhance the dialogue between languages and traditions that speak to the core of transsystemia. The shift in thinking operated by the transsystemic approach to law was initially inspired by the specific needs of the Canadian context.[4] However, this same approach could be used in other contexts, such as Europe, where the interactions between languages and legal traditions create a similar, if not more complex environment. The study of the language of law is relevant

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1 See: Helge Dedek & Armand de Mestral, "*Born to be Wild*: The 'Trans-systemic' Programme at McGill and the De-Nationalization of Legal Education" (2009) 10-7 *German L.J.* 889, 898 [Dedek & de Mestral].

2 In fact, the civil law is already expressed in a variety of languages around the world, namely German, Spanish, Italian, Dutch, among others.

3 See: Jean-Claude Gémar, "Langage du droit et (juri)linguistique. États et fonctions de la jurilinguistique", in Jean-Claude Gémar & Nicholas Kasirer, eds., *Jurilinguistics: Between Law and Language* (Montréal: Les Éditions Thémis, 2005) at 7 [Gémar & Kasirer]: « La "jurilinguistique" – soit l'application d'un traitement linguistique aux textes juridiques sous toutes leurs formes […] ». See also: Jean-Claude Gémar, *Langage du droit et traduction. Essais de jurilinguistique. The Language of the Law and Translation. Essays on Jurilinguistics* (Québec: Conseil de la langue française, Linguatech, Editeur official du Québec, 1982).

4 See Roderick A. Macdonald & Jason MacLean, "No Toilets in Park" (2005) 50: 4 McGill L.J. 721 at 734-735 [Macdonald & MacLean].

for jurists,[5] as it constitutes a "social dialect"[6] or, as Cornu used to say, a "specialized language."[7]

First, this paper explores the constitutional and statutory underpinnings of bilingualism and bijuralism at the federal and provincial levels in Canada, and touches upon the approach taken by courts in interpreting bilingual statutes and the authenticity of bilingual judgments. Using a modified version of the *authenticity rule* and the *shared meaning rule* of the Supreme Court of Canada, I submit that a transsystemic approach to law highlights the idea that the law is expressed through the civil law and common law (or another legal tradition including Aboriginal legal traditions) in English or French (or in another language), and that neither one tradition nor one language is paramount over the other.

Secondly, the paper underlines how a transsystemic approach to the study of law is anchored in both law and language, since bilingualism and bijuralism are part of the transsystemic approach to the study of law. It is suggested that transsystemia, as a kind of *métissage*, creates a new identity between law and language. As well, jurilinguistics, which links law to linguistics, has a key role to play in the creation of law from a transsystemic perspective, notably given that jurilinguistics provides tools to resolve the difficulties of (linguistic) translation, and given the openness of transsystemia to disciplines other than law. Conversely, transsystemia could be useful to jurilinguists, since it involves an experience of translation that is not only linguistic. More precisely, transsystemia offers a model of understanding law through words and concepts that transcends simple translation (from one language to another) or comparison (between legal traditions), creating instead a dialogue between words and concepts in order to capture a new mixed identity.

Thirdly, this paper uses the law of property as an example to examine transsystemia in action. The study of legal terminology is essential to the understanding of law from a transsystemic perspective. Jurilinguistics can

5 Georges Mounin, "La linguistique comme science auxiliaire dans les disciplines juridiques" 24 : 1 Meta : Translators' Journal 9 at 9-17.

6 See Antoine Meillet, *Linguistique historique et linguistique générale* (Paris : Librairie ancienne Honoré Champion, 1926) at 230-271, see especially p. 241, 263 [translated by author].

7 Gérard Cornu, *Linguistique juridique*, Domat : droit privé (Paris : Montchrestien, 2000) at 23 ; in French : *langage de spécialité*.

help jurists to express the law from a single tradition in multiple languages, and to express different conceptions of law in multiple languages. Also, some linguistic difficulties can be transposed in the context of a dialogue between legal traditions. An additional question considers the impact of transsystemia's severance from the positivist idea that law equals State law. Transsystemia's (occasional) divergence from legal positivism may have an impact on legal linguistics, since the language of the law becomes less technical.

I. Institutionalized Bilingualism and Bijuralism in Canada: Drafting Bilingual Legislation and Interpreting Bilingual Judgments

To understand the legal and constitutional foundations of bilingualism and bijuralism in Canada, I will first look at the constitutional and statutory underpinnings of Canadian bilingualism and bijuralism (A). I will then turn to the consequences on the legislative drafting process in the case of federal legislation (B), and on the interpretation of bilingual statutes and the authenticity of bilingual judgments (C).

A. Constitutional and Statutory Underpinnings of Canadian Bilingualism

Canada is often described as a bilingual and bijuridical country, which means that law is expressed in French and English and is grounded both in civil law and common law legal traditions. Bijuralism can be described as the "interaction between two legal traditions."[8] After the British conquest of Canada in 1760 (subsequently confirmed by the Treaty of Paris),[9] the

[8] Robert Leckey, "Harmoniser le droit dans un espace multilingue et pluri-juridique: un point de vue canadien" (2008) 13: 1-2 Unif. L. Rev. 39 at 50 [Leckey]. There are two systems of law that coexist in Canada. Quebec is subject both to civil law in the case of its private law, and to common law in the case of its public law. Elsewhere in the country, common law is applicable both in private law and in public law (see Canada, Department of Justice, "About Bijuralism", online: <justice.gc.ca/eng/csj-sjc/harmonization/bijurilex/aboutb-aproposb.html> [Department of Justice]).

[9] See Michel Morin, "Les débats concernant le droit français et le droit anglais antérieurement à l'adoption de l'*Acte de Québec* de 1774" (2014) 44: 2-3 R.D.U.S. 259 at 269.

Royal Proclamation, 1763[10] instituted the replacement of French law by English law.[11] Shortly thereafter, the *Quebec Act, 1774*[12] provided a return to French law in private law matters.[13] Since then, while the other provinces in Canada follow the common law tradition, Quebec is a civil law jurisdiction in private law matters – which the *Constitution Act*, *1867* confirmed by providing provincial legislatures with control over "property and civil rights."[14]

The Parliament of Canada is required by the Constitution to use both English and French in its publications and proceedings. This requirement comes from section 133 of the *Constitution Act, 1867* and has been later strengthened by section 18 of the *Canadian Charter of Rights and Freedoms*.[15] At a provincial level there are also constitutional instruments that recognize the status of official languages in the provincial legislatures as well as before the courts.[16]

Canada's bilingual nature, at least on the juridical front, was confirmed by section 133 of the *Constitution Act, 1867*, providing that the Parliament and the provincial legislature of Quebec must adopt their laws in both French and English.[17] This section also encourages individuals to argue their cases before Canadian courts in French and English. More specifically, this section provides that :

> Either the English or the French Language may be used by any Person in the Debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec ; and both those Languages shall be used in the respective Records and Journals of those Houses ; and either of those Lan-

10 (U.K.), reprinted in R.S.C. 1985, App. II, No. 1.

11 See Patrick J. Monahan & Byron Shaw, *Constitutional Law*, 4th ed. (Toronto : Irwin Law, 2013) at 35.

12 14 George III, c. 83 (U.K.), reprinted in R.S.C. 1985, App. II, No. 2.

13 See Henri Brun, Guy Tremblay & Eugénie Brouillet, *Droit constitutionnel*, 6th ed. (Cowansville : Éditions Yvon Blais, 2014) at 28.

14 *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 133, reprinted in R.S.C. 1985, Appendix II, No. 5, s 92(13) [*Constitution Act, 1867*].

15 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Canadian Charter*]. See Department of Justice, *supra* note 8.

16 See Leckey, *supra* note 8 at 39.

17 See Michel Bastarache, "Introduction" [Bastarache, "Introduction"] in Michel Bastarache, ed., *Les droits linguistiques au Canada*, translated by Hugues Sirgent, 2nd ed. (Cowansville : Éditions Yvon Blais, 2004) 1 at 23-24 [Bastarache, *Les droits linguistiques*, 2nd ed.].

> guages may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec.
>
> The Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both those Languages.[18]

In addition to section 133 of the *Constitution Act, 1867*, another text did much to bolster the place of the French language in Canada. Section 18 of Canada's *Charter of Rights and Freedoms* in 1982[19] confirmed the status of the French language as it relates to the adoption of statutes in both of Canada's official languages, providing that "[t]he statutes, records and journals of Parliament shall be printed and published in English and French and both language versions are equally authoritative."[20] Moreover, section 19 of the *Canadian Charter* confirmed the use of Canada's official languages before any court established by the Parliament of Canada, stating that "[e]ither English or French may be used by any person in, or in any pleading in or process issuing from any court established by Parliament."[21]

Prior to the adoption of Canada's *Charter*, section 133 of the *Constitution Act, 1867* was "silent with respect to the enactment of statutes and to the authenticity of each language version."[22] While the jurisprudence had previously and implicitly recognized the equal status of both languages,[23] "[g]iven the existence of s. 18 of the *Charter*, the debates about bilingual

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18 *Constitution Act, 1867*, *supra* note 14.

19 *Canadian Charter*, *supra* note 15.

20 *Ibid*, s. 18.

21 *Ibid*, s. 19. This right does not always translate perfectly in practice, as demonstrated by the controversy over the appointment of unilingual (Anglophone) judges, notably to the Supreme Court of Canada. This effectively forces some Francophone litigants to speak English to reduce the risk of conceptual and linguistic distortion through simultaneous interpretation services.

22 Michel Bastarache et al., *The Law of Bilingual Interpretation* (Markham: LexisNexis Canada, 2008) at 17 [Bastarache et al.].

23 See Claire L'Heureux-Dubé, "Bijuralism: A Supreme Court of Canada Justice's Perspective" (2002) 62: 2 La. L. Rev. 449 [L'Heureux-Dubé] ("Canadian courts have consistently affirmed that the English and French versions of a statute are equally authoritative. Interpretation thus necessitates reading the two texts in light of one another" at 452).

enactment and authenticity are now answered : the Constitution provides that both French and English are equally authoritative."[24]

In Quebec (as well as in New-Brunswick and in Manitoba) there are also constitutional instruments that recognize the status of official languages in the provincial legislatures and before the courts.[25] In *Doré v. Verdun (1997)* the Supreme Court of Canada confirmed, in a case applicable in Quebec, that section 133 requires that "statutes of the legislature of Quebec be enacted in both official languages and that both versions be equally authoritative and have the same status."[26] However, on a provincial level, the situation is not similar in every province in Canada.[27]

Some provinces have no constitutional linguistic obligation related to the adoption of bilingual statutes. The provinces of Saskatchewan and Alberta inherited a provision similar to section 133 of the *Constitution Act, 1867*. Despite being ignored for nearly a century, the Supreme Court confirmed the continued operation of section 110 of *The North-West Territories Act* in *R. v. Mercure*,[28] though the Court also stated that this provision was not anchored in the Constitution.[29] Therefore, those provinces quickly abrogated their linguistic obligations as they pertain to the adoption of bilingual statutes,[30] while maintaining equality between the languages relating to oral proceedings before courts of law.[31]

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24 Bastarache et al., *supra* note 22 at 24.

25 See Leckey, *supra* note 8 at 39.

26 [1997] 2 S.C.R. 862 at para. 24, 150 D.L.R. (4th) 385 [*Doré*]. See also Jean-Maurice Brisson & Nicholas Kasirer, *Civil Code of Québec : A Critical Edition*, 22nd ed. (Cowansville : Éditions Yvon Blais, 2014-2015) at xx [Brisson & Kasirer, 2014-2015].

27 See Leckey, *supra* note 8 at 39-40.

28 [1988] 1 S.C.R. 234, 48 D.L.R. (4th) 1.

29 See *ibid.* at 237. See also the recent Supreme Court decision in *Caron v. Alberta*, 2015 SCC 56 at para 79, [2015] 3 S.C.R. 511, where the Court confirmed its decision in *Mercure* : [T]he provisions of s. 110 of *The North-West Territories Act* continued to be part of the law of Saskatchewan by virtue of s. 16 of the *Saskatchewan Act* … The appellant took the position that s. 110 can only be repealed by virtue of an amendment to the Constitution of Canada made under s. 43 of the Constitution Act, 1982, i.e., by resolutions of the Parliament of Canada and of the legislature of the province to which the amendment applies. I do not think this proposition can stand in the face of the express words of ss. 14 and 16(1) of the Saskatchewan Act, which clearly provide that the laws continued under the Act are subject to being repealed by the appropriate legislature.

30 See Bastarache, "Introduction", *supra* note 17 at 25.

31 See *Languages Act*, R.S.A. 2000, c. L-6, s. 4 ; *The Languages Act*, S.S. 2001, c. 9, s. 11.

At the other end of the spectrum, Manitoba inherited a provision similar to section 133 of the *Constitution Act, 1867* in section 23 of the *Manitoba Act, 1870*.[32] In 1985, section 23 of this Act was used by the Supreme Court of Canada to invalidate all of Manitoba's laws that had not been adopted in the French language.[33] However, the Supreme Court chose to put a stay on that ruling to allow time for Manitoba to adopt its laws in French. Therefore, Manitoba now adopts its laws both in French and English, and individuals are entitled to plead before the courts of Manitoba in either language.

In New Brunswick, sections 18 and 19 of the *Canadian Charter* also constitutionalized protections for the French language. The province must therefore adopt its laws in both languages and litigants may be heard in the language of their choice before provincial courts of law.[34] The *Official Languages Act* of that province also codifies these protections while providing for linguistic equality as it relates to access to courts for all matters concerning procedure, decisions, and services offered to the public and communications with these same individuals.[35]

B. Bijuralism and Federal Legislation

For a long time, the English versions of federal laws were drafted according to common law terminology, while the French versions were drafted according to civil law terminology. This meant that the laws in question did not speak to the linguistic duality of the Canadian State. As Dean Leckey describes it, French speakers living in common law jurisdictions were left void of adequate terminology, and English speakers living in Quebec's civil law jurisdiction were also left "empty handed."[36] In 1995, the federal government put forward a policy on "legislative bijuralism," in which it agreed to provide Canadians with copies of its legislation in French and English, with proper treatment given to both of Canada's legal

32 33 Vict., c. 3, reprinted in R.S.C. 1985, Appendix II, No. 8.

33 See *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721, 19 D.L.R. (4th) 1.

34 *Canadian Charter*, *supra* note 15, ss. 18(2), 19(2).

35 S.N.B. 2002, c. O-0.5.

36 Robert Leckey & André Braën, "Le bilinguisme dans le domaine législatif" [Leckey & Braën] in Bastarache, *Les droits linguistiques,* 2nd ed., *supra* note 17, 41 at 127.

traditions. In doing so, the Department of Justice takes into consideration the particular terminology of both legal systems.[37]

While provincial legislation is enacted in either the common law or the civil law tradition, federal legislation is generally uniform across provinces. Therefore, to ensure coherent application of these federal norms in private law matters, federal legislation must be enacted with four audiences in mind : English common law, English civil law, French common law, and French civil law.[38] Moreover, it is generally assumed that provincial laws will fill in the gaps of federal legislation where necessary. In that sense, as has already been underlined, there is no "federal common law."[39] In the case of property law, provincial private law fills in the gaps of federal legislation. For example, in Quebec, federal legislation would be interpreted according to the property law provisions of the *Civil Code of Québec*, while the other provinces would adopt a methodology consistent with "common law property."

This bijural element of federal legislation is not constitutionally protected under section 133 of the *Constitution Act, 1867*.[40] However, since 1978, the federal government has adopted a co-drafting methodology in which "two lawyers [are] assigned to each government bill, one anglophone common lawyer and one francophone civilian lawyer."[41] Moreover, in 2001, it adopted two important new sections under its *Interpretation Act* according to which :

[37] See Michel Doucet, "Le bilinguisme législatif" in Michel Bastarache & Michel Doucet, eds., *Les droits linguistiques au Canada*, 3rd ed. (Cowansville : Éditions Yvon Blais, 2013) 179 [Doucet]).

[38] See notably on this dialogue : Leckey, *supra* note 8 at 41.

[39] Leckey & Braën, *supra* note 36 at 126. See also *Caisse populaire Desjardins de l'Est de Drummond v. Canada*, 2009 SCC 29 at para. 81, [2009] 2 S.C.R. 94, Deschamps J. (in dissent) : "It should be noted that there is no distinct federal common law … Where the suppletive law must be applied to interpret a concept incorporated into a federal rule, the law of the province is the relevant source" ; L'Heureux-Dubé, *supra* note 23, at 456-457.

[40] See Leckey & Braën, *supra* note 36 at 125.

[41] L'Heureux-Dubé, *supra* note 23 ("In 1978, the Department of Justice made a momentous decision to have two lawyers assigned to each government bill, one anglophone common lawyer and one francophone civilian lawyer. This system, called co-drafting, has survived despite some experimentation with a bilingual single drafter approach" at 459). See also Leckey, *supra* note 8 at 43.

> 8.1 Both the common law and the civil law are equally authoritative and recognized sources of the law of property and civil rights in Canada and, unless otherwise provided by law, if in interpreting an enactment it is necessary to refer to a province's rules, principles or concepts forming part of the law of property and civil rights, reference must be made to the rules, principles and concepts in force in the province at the time the enactment is being applied.
>
> 8.2 Unless otherwise provided by law, when an enactment contains both civil law and common law terminology, or terminology that has a different meaning in the civil law and the common law, the civil law terminology or meaning is to be adopted in the Province of Quebec and the common law terminology or meaning is to be adopted in the other provinces.[42]

Therefore, even though pluralism may be understood in a broader sense, Canada can be seen as a manifestation of legal pluralism. As former Supreme Court Justice Claire L'Heureux-Dubé puts it: "[d]iscovering a premise that unconsciously shaped one's thinking is a dramatic moment intellectually, and the repetition of such discoveries should instill intellectual humility and a reluctance to assume that there is a single right answer."[43] This point of view finds a natural place in a transsystemic approach to law, which is marked by plurality and openness to other(s).

C. Interpreting Bilingual Statutes and the Authenticity of Bilingual Judgments

Bilingualism and bijuralism have an impact on the interpretation of bilingual laws and statutes, as well as the authority of bilingual judgments.

1. Interpreting Bilingual Laws and Statutes

A modified version of the equal authenticity rule and of the shared meaning rule could provide a framework for application in a transsystemic context. As indicated above, in *Doré v. Verdun*, the Supreme Court of Canada confirmed that section 133 requires that both versions of statutes

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42 *Interpretation Act*, R.S.C. 1985, c. I-21, ss. 8.1-8.2. See also Leckey & Braën, *supra* note 36 at 131-133; Aline Grenon, "Le bijuridisme canadien à la croisée des chemins? Réflexions sur l'incidence de l'article 8.1 de la *Loi d'interprétation*" (2011) 56: 4 McGill L.J. 775 at 778-779.

43 L'Heureux-Dubé, *supra* note 23 at 450.

be equally authoritative.[44] Since then, the Supreme Court of Canada has established a two-step framework to give effect to this principle : [45] 1) the equal authenticity rule, and 2) the shared meaning rule.[46]

On the one hand, the equal authenticity rule establishes that "both the English and French versions of a statute are equally authentic statements of legislative intent, and neither one is supreme or paramount over the other."[47] To give effect to this rule, the rules of procedure of the Supreme Court of Canada provide that "for all laws where bilingual publication is required, lawyers [must] provide the judges with citations in both official languages."[48] On the other hand, the shared meaning rule establishes that "both versions of the statute are expressions of the same legislative intent and that courts interpreting statutes should, as far as possible, attempt to ascertain that intent through a determination of the shared or common meaning of the two versions."[49] In other words, once it is agreed, by using the equal authenticity rule, that both statutes have equal weight in French and English, "the problem becomes what to do about it ; " this is where the shared meaning rule is used to give effect to the intent of the legislature.[50]

In 2008, Justice Marie Deschamps reiterated the Supreme Court of Canada's framework for the shared meaning rule. In *R. v. S.A.C.*, she laid out the two-step process adopted by the Court : "The first step is to determine whether there is discordance between the English and French versions of the provision and, if so, whether a shared meaning can be found," while "[a]t the second step, it must be determined whether the shared

44 *Doré*, *supra* note 26 at para. 24. See also Jean-Maurice Brisson & Nicholas Kasirer, *Civil Code of Québec : A Critical Edition*, 24th ed. (Cowansville : Éditions Yvon Blais, 2016-2017) at xxi, n. 10 : "Whatever the reality of its genesis, the English text cannot be considered as a second-order 'version' of the law by reason of s. 133 of the *Constitution Act, 1867* : see *Doré* v. *Verdun (City of)*, [1997] 2 S.C.R. 862 at par. 24 (per Gonthier, J.). The influence of this judgment on the jurilinguistic reform of the Civil Code was discussed in 'Note to the 2015-2016 edition'."

45 See *Schreiber v. Canada (Attorney General)*, 2002 SCC 62 at paras. 54-56, [2002] 3 S.C.R. 269 ; *R. v. Daoust*, 2004 SCC 6 at paras. 26-30, [2004] 1 S.C.R. 217.

46 See Bastarache et al., *supra* note 22 at 15.

47 *Ibid*. See also Leckey, *supra* note 8 at 43–44.

48 *Ibid* at 44 [translated by author].

49 Bastarache et al., *supra* note 22 at 15.

50 *Ibid* at 32.

meaning is consistent with Parliament's intent."[51] Therefore, as explained in *Doré*, while both statutes are authoritative and have equal value, "[t]he Court can reject that meaning if it seems contrary to the legislature's intention in light of the other principles of interpretation."[52]

In transsystemia, the law can be expressed either in English or in French through both civil law and common law, where neither one tradition nor one language is paramount over the other. A modified version of the equal authenticity rule and of the shared meaning rule could provide a framework for application in a transsystemic context. While there is no need in transsystemia to find the common intent of the legislator, there is nevertheless at least a tendency to find common ideas and shared conceptions between traditions.

2. Authenticity of Bilingual Judgments

When it comes to the authority and use of bilingual jurisprudence there is no constitutional obligation to provide decisions in both languages.[53] The Supreme Court and other federal courts will often use the phrase "French version of the reasons" or "English version of the reasons," thus indicating which version has been translated (the "translated judgments"). At other times, the Supreme Court issues judgments from "The Court" without indicating the translated version (the "bilingual judgments").[54] When dealing with case law, it is impossible to apply the second

[51] 2008 SCC 47 at paras. 15-16, [2008] 2 S.C.R. 675:

> The first step is to determine whether there is discordance between the English and French versions of the provision and, if so, whether a shared meaning can be found. Where a provision may have different meanings, the court has to determine what kind of discrepancy is involved. There are three possibilities. First, the English and French versions may be irreconcilable. In such cases, it will be impossible to find a shared meaning and the ordinary rules of interpretation will accordingly apply … Second, one version may be ambiguous while the other is plain and unequivocal. The shared meaning will then be that of the version that is plain and unambiguous … Third, one version may have a broader meaning than the other. According to LeBel J. in *Schreiber*, at para. 56, "where one of the two versions is broader than the other, the common meaning would favour the more restricted or limited meaning".
>
> At the second step, it must be determined whether the shared meaning is consistent with Parliament's intent.

[52] *Doré, supra* note 27 at para 25.

[53] See Doucet, *supra* note 37 at 286.

[54] See *ibid* at 287.

step of the shared meaning rule – the intention of the legislator – since the courts are not legislative bodies and it becomes difficult to reach outside the text for traces of judicial intent.[55]

While the Supreme Court of Canada has not yet decided any cases on this issue, one could suppose that bilingual judgments in all federal courts are equally authoritative in French and English, and that litigants may therefore rely on either version when they are issued in both languages.[56] These courts have a statutory obligation to produce judgments in both languages in certain cases: for example, subsection 58(4) of the *Federal Courts Act* provides that "[e]ach decision reported in the official reports shall be published therein in both official languages."[57] It becomes more difficult to argue that translated judgments are equally authoritative.[58] However, one could reason that when there is a statutory obligation to provide judgments in both English and French, even translated versions are equally authoritative.

The Supreme Court does not have this obligation in its enabling statute, but the *Official Languages Act* states at subsection 20(1) that:

> Any final decision, order or judgment, including any reasons given therefor, issued by any federal court shall be made available simultaneously in both official languages where
>
> **(a)** the decision, order or judgment determines a question of law of general public interest or importance; or
> **(b)** the proceedings leading to its issuance were conducted in whole or in part in both official languages.[59]

The Supreme Court of Canada has been publishing its decisions in both official languages since 1970,[60] the year after the first *Official Languages Act* was adopted. Where an ambiguity arises, the approach adopted by the Québec Court of Appeal in *Entreprises W.F.H. Ltée c. Québec (P.G.)* is to treat both the English and the French version as equally authoritative by reading both versions and then adopting a contextual approach to

55 See *ibid* at 288.
56 See Bastarache et al., *supra* note 22 at 102.
57 *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 58(4); see Doucet, *supra* note 37 at 286-287.
58 See Bastarache et al., *supra* note 22 at 108-109.
59 R.S.C. 1985, c. 31 (4th Supp.), s. 20(1).
60 See Doucet, *supra* note 37 at 287.

determine the intent of the court when using the words at issue.[61] Some provincial courts also provide bilingual judgments and the same rules would logically apply.[62] However, in provincial courts, except those of New Brunswick, translated judgments should be seen as "mere translations" with no authoritative value.[63]

II. Transsystemic Approach to Law and the Value of Jurilinguistics for Transsystemia

Jurists who adopt a transsystemic position attempt to situate themselves at the encounter between legal traditions, much like legislators or bilingual drafters, who must situate themselves between two legal languages in order to produce norms in both French and English. I will first look at the origins of transsystemia (A), to suggest that transsystemia creates a new identity between law and language (B).

A. The Origins of Transsystemia

Transsystemia is a relatively new approach, which first began as a teaching method. This integrated or transsystemic teaching method follows what began as a sequential teaching model under the National Program at McGill University, in which the civil law and the common law were taught successively, students first integrating the common law or civil law stream and subsequently adding the other legal tradition.[64] In 1994, an ad hoc Curriculum Review Committee was established to study possible reforms to the National Program, and in 1997, the Faculty Council approved the proposal to adopt a new Transsystemic Program. The McGill Transsystemic or Integrated Program was implemented with the first

61 [2001] R.J.Q. 2557 (QC CA), 2001 CanLII 17598.

62 See Bastarache et al., *supra* note 22 at 102.

63 See *ibid*: "[T]ranslations of judgments should be seen as mere translations and reliance on them is not advised."

64 See Daniel Jutras, "Two Arguments for Cross-Cultural Legal Education" in Heinz-Dieter Assmann, Gert Bruggemeier & Rolf Sethe, eds., *Different Legal Cultures – Convergence of Legal Reasoning: Grundlagen und Schwerpunkte des Privatrechts in europäischer Perspektive*, vol. 3 (Baden-Baden: Nomos, 2001) 75 at 80 [Jutras]; Roderick A. Macdonald, "The National Law Programme at McGill: Origins, Establishment, Prospects" (1990) 13: 1 Dalhousie L.J. 211 at 305 [Macdonald].

cohort in 1999. Many of the courses then took an integrated or transsystemic approach that combined both legal traditions in class. This was the case in contractual obligations, torts courses, or secured transactions courses. In 2015-2016, the Faculty implemented a new reform of the curriculum ; among others, courses such as criminal law and property law are taught transsystemically. Aboriginal legal traditions are also more and more integrated in this model of teaching.

Transsystemic education relies on an integrated teaching model of civil law and common law as well as Aboriginal legal traditions. In this educational model, learning is done through the establishment of a dialogue between legal traditions, which are studied together and at the same time, so as to bring out the underlying structure of the different legal systems.[65]

The shift in thinking operated by the transsystemic approach emerged first from the specific needs of the Canadian context, often characterized as bilingual and bijuridical,[66] and is a meeting place of multiple legal, linguistic, cultural and social identities.[67] The transsystemic curriculum aims primarily to encourage students not to adopt one system at the expense of another,[68] but rather to forge a pluralistic legal identity at the interstices of legal traditions. Graduates are encouraged to imagine private law straddling both the Canadian and international "systemic boundaries."[69]

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65 See Macdonald, *supra* note 64 at 305.

66 Macdonald & MacLean, *supra* note 4.

67 See generally Macdonald, *supra* note 64 at 225 for an historical snapshot of how the diversity of McGill's curriculum in the late 19th and early 20th was understood. See also on the importance of Aboriginal legal traditions in this dialogue : John Borrows, "Creating an Indigenous Legal Community", (2005) 50 R.D. McGill 153, 159-160 ; Kirsten Anker, *Declarations of Interdependence : A Legal Pluralist Approach to Indigenous Rights* (Farnham/ Burlington : Ashgate, 2014) ; Michel Morin, "Quelques réflexions sur le rôle de l'histoire dans la détermination des droits ancestraux et issus de traités", (2000) 34 R.J.T. 329, 338.

68 See Roderick A. Macdonald, "Here, There … And Everywhere – Theorizing Legal Pluralism ; Theorizing Jacques Vanderlinden" in Lynne Castonguay & Nicholas Kasirer, eds., *Étudier et enseigner le droit : hier, aujourd'hui et demain : Études offertes à Jacques Vanderlinden* (Cowansville : Éditions Yvon Blais, 2006) at 388 ; Nicholas Kasirer, "Bijuralism in Law's Empire and in Law's Cosmos" (2002) 52 : 1-2 J. Leg. Educ. 29 at 29-30 [Kasirer, "Bijuralism"].

69 See Yves-Marie Morissette, "McGill's Integrated Civil and Common Law Program" (2002) 52 : 1-2 J. Leg. Educ. 12 at 15.

Beyond a "'transsystemic' pedagogy,"[70] there is a broader conception of the transsystemic approach as a project of knowledge,[71] allowing a view of the law focused more on ideas than on geographical boundaries.[72] This conception of the law, which can be seen as a new form of *jus commune* (which underlines similarities between legal traditions beyond their respective particularities) has a natural propensity to inspire other legal contexts and thrive beyond the Canadian experience. This explains why several universities, particularly in Europe, have also adopted this new method of teaching law, including the University of Luxembourg and Tilburg University in the Netherlands.[73]

B. Transsystemia and the Expression of a New Cultural Identity between Law and Language

Jurilinguistics has something to offer jurists who adopt a transsystemic position. Its study could be used as a tool to enhance the dialogue between the languages and traditions that are at the core of transsystemia. As a mode of knowledge, the transsystemic approach aims to transcend systemic and disciplinary division, thus broadening the field of knowledge.

One can identify an intrinsic link between a transsystemic approach to law and a renewal of legal epistemology, while transsystemia releases legal education from the strict confines of legal positivism.[74] As emphasized by

70 Macdonald & MacLean, *supra* note 4 at 736.

71 See Dedek & de Mestral, *supra* note 1 at 897-899; Richard Janda, "Toward Cosmopolitan Law" (2005) 50: 4 McGill L.J. 967 at 969, 976 [Janda].

72 See Nicholas Kasirer, "Bijuralism", *supra* note 68 at 30; Adelle Blackett, "Globalization and its Ambiguities: Implications for Law School Curricular Reform" (1998) 37: 1 Colum. J. Transnat'l L. 57 at 73. For a more in depth look at the transsytemic approach and its origins see also: Yaël Emerich, *Droit commun des biens: perspective transsystémique* (Cowansville: Éditions Yvon Blais, 2017) at 1-18; Yaël Emerich and Marie-Andrée Plante, eds., *Approches transsystémiques du droit* (Cowansville: Éditions Yvon Blais, 2018) (forthcoming).

73 The University of Luxembourg, notably under the influence of Pascal Ancel, launched a transsystemic program. The universities of Maastricht and Tilburg also offer a closely resembling approach in European law. Many faculties developed "global law programs": they are programs generally offered after having studied the local legal tradition during the first year of the program. In Canada, the University of Victoria in Canada has also recently launched a transsystemic program in common law and indigenous legal traditions.

74 See Dedek & de Mestral, *supra* note 1 at 898-899.

Professor H. Patrick Glenn, "doin' the transsystemic" entails reviving the idea that a legal tradition is the necessary foundation of legal systems, and provides means for understanding the normativity of law and the relations between legal systems around the world.[75]

The concept of *métissage* facilitates an accurate understanding of the heart of the transsystemic approach. In his article "Legal Education as *Métissage*," former Dean Kasirer builds on the work of anthropologist François Laplantine and of literary theorist Alexis Nouss to propose the image of métissage as a paradigm of a renewed legal education. Transsystemia as *métissage* represents a "'third way' for cultural practices, including legal ones."[76] The transsystemic approach to law can be seen as a "métis"[77] or "cosmopolitan"[78] way of studying the law, going beyond the study of law as limited to a particular jurisdiction. By creating a solid contact between legal systems and a constant dialogue between cultures through the recognition of difference, *métissage* offers an organizing theme to create, understand, and interpret law in a transcultural way.

Roderick Macdonald has previously emphasized that the transsystemic approach to law is to be pluralistic, polycentric,[79] and "non-positivist."[80] It is around these themes that the recent transsystemic literature is constructed, sometimes with the addition of an interdisciplinary dimension.[81]

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75 H. Patrick Glenn, "Doin' the Transsystemic: Legal Systems and Legal Traditions" (2005) 50: 4 McGill L.J. 863 at 867. See also: Helge Dedek & Shauna Van Praagh, eds., *Stateless Law: Evolving Boundaries of a Discipline* (Burlington: Ashgate, 2015) [Dedek & Van Praagh].

76 Nicholas Kasirer, "Legal Education as *Métissage*", (2003) 78: 2 Tul. L. Rev. 481 at 490 [Kasirer, "Legal Education"].

77 *Ibid.*

78 Janda, *supra* note 71.

79 See notably on polycentrism: Surya Prakash Sinha, "Legal Polycentricity" in Hanne Petersen & Henrik Zahle, eds., *Legal Polycentricity: Consequences of Pluralism in Law* (Brookfield: Darthmouth, 1995) [Petersen & Zahle] 31 and Petersen & Zahle, *ibid.* ("The use of the term 'legal polycentricity' indicates an understanding of 'law' as being engendered in many centres – not only within a hierarchical structure – and consequently also as having many forms" at 8).

80 Macdonald & MacLean, *supra* note 4 at 723, n. 2. See also Jean-Guy Belley, "Le pluralisme juridique de Roderick Macdonald: une analyse séquentielle" in Andrée Lajoie et al., eds., *Théories et émergence du droit: pluralisme, surdétermination et effectivité* (Montreal: Les Éditions Thémis, 1998) 57 at 60.

81 On the necessity of this interdisciplinary dimension, see Harry Arthurs, "Madly Off in One Direction: McGill's New Integrated, Polyjural, Transsystemic Law Programme"

Some have suggested that the transsystemic approach in legal thinking allows coherent coexistence between philosophy and law,[82] or at least, a vision of law as an area of fundamental knowledge that earns its place alongside other social sciences.[83]

The links between comparative law and a transsystemic approach to law are stronger or weaker depending on the chosen conception of comparative law. A narrow perspective on comparative law can be assigned a more practical role : it is then an exercise in comparing the laws of different countries in order to improve the existing law by proposing reforms.[84] In such a conception, there is a tendency to compare in order to contrast, and more emphasis is placed on the differences between legal systems than their similarities.[85] The transsystemic approach, as a project of epistemology, has a broader mandate : it seeks to develop theoretical as well as practical knowledge to identify ideas and concepts that different legal traditions share, as well as the tensions between legal traditions and their modes of expression. Confrontation[86] thus becomes dialogue, with a view to examine different legal traditions at the same time and to translate them in a setting that captures their respective specificities. In that sense, transsystemia brings out the ideas and principles underlying a renewed plural legal identity.

(2005) 50 : 4 McGill L.J. 707 at 715-719. See also : Jacques Derrida, *Du droit à la philosophie*, La philosophie en effet (Paris : Galilée, 1990) at 566. On the similarity between the "Collège de philosophie de Derrida" project and transsystemia, see : Janda, *supra* note 71 at 975-976.

82 See *ibid*. at 979-980.

83 See Kasirer, "Bijuralism", *supra* note 68 at 30-31.

84 See Léontin Jean Constantinesco, *Traité de droit comparé* (Paris : Librairie générale de droit et de jurisprudence, 1972) at 167-168 ; Pierre Arminjon, Baron Boris Nolde & Martin Wolff, *Traité de droit comparé* (Paris : Librairie générale de droit et de jurisprudence, 1950) at 18 [Arminjon, Nolde & Wolff].

85 But see *ibid* at 15.

86 This terminology comes from Arminjon, Nolde & Wolff, *ibid* at 15 : "Quand un juriste est en présence d'une institution étrangère qui ne lui est pas familière et qui offre des particularités, il cherchera d'en saisir le sens, la portée et la raison d'être, en la confrontant avec l'institution nationale analogue la plus rapprochée." See also Antonio Gambaro, Rodolfo Sacco & Louis Vogel, *Le droit de l'Occident et d'ailleurs* (Paris : Librairie générale de droit et de jurisprudence, 2011) at 3 : "Intuitivement, on peut définir la comparaison comme la confrontation de règles juridiques appartenant à des systèmes différents."

III. Transsystemic Approach to Law Between Law and Language : Fluctuations in Property Law

Jurilinguistics can help jurists to express either the law from a single tradition in multiple languages, or different conceptions of law in multiple languages. Some linguistic difficulties can be transposed in the context of a dialogue between legal traditions. In the following pages, I look at the question of linguistic minorities using the example of civil law in English and common law in French (A). I then consider the effect of transsystemia and stateless law on technicality of language (B).

A. "English Civil Law" and "French Common Law" : Giving A Voice to Linguistic Minorities

The civil law as expressed in English and the common law as expressed in French help us to separate concepts from their theoretical embodiment in one language and one tradition.

1. Civil law in English : The *Private Law Dictionary* Experience

Jurilinguistics can be used to study how Canadian bilingualism and bijuralism may influence the way we think about law.

a) Jurilinguistics and Law in One Legal Tradition Expressed in Several Languages

Jurilinguistics can help to express, articulate, and understand the law of one single tradition expressed in more than one language. In Quebec, the Paul-André Crépeau Centre for Private and Comparative Law's work on private law dictionaries regarding terminology of the civil law in both French and English is worth noting. Moreover, since the adoption of the new Civil Code in 1994, a joint committee of the Barreau du Québec and the Chambre des notaires du Québec has been tasked with ensuring the consistency between the English and French versions of the *Civil Code of Québec*.[87]

[87] See Jean-Maurice Brisson & Nicholas Kasirer, 2014-2015, *supra* note 26 at xxv [footnotes omitted] :

"'Updating' includes the power, as section 3, para 2(4) of the Act makes plain, to ensure that the French and English texts of enactments such as the Civil Code say the same

The *Private Law Dictionary* project started in the 1980s at the Research Centre for Private and Comparative law, known today as the Crépeau Centre. Its main objective is to give jurists a tool to understand the specificity of Quebec private law terminology in the form of a bilingual dictionary that illustrates the specific relationship between law and language in Quebec. The project led to the idea of using jurilinguistics to study how bilingualism (and, in some way, bijuralism) influences the thought patterns of the Quebec civilian jurist. Following its initial publication in 1985, a second edition of the Dictionary was published in 1991, which included 4,000 terms. The Centre also published a series of specialized dictionaries on family law, obligations and property law.[88] A second edition of the *Private Law Dictionary of the Family and Bilingual Lexicons* has been published in 2016, and the *Private Law Dictionary and Bilingual Lexicons: Successions* is currently in progress.

The adoption of the *Civil Code of Québec* in 1994 provided an occasion to give greater amplitude to the project, because the language of the law was renewed. In the course of the dictionary project, specific attention is given to definitions that are written in co-redaction, that is to say both in French and in English. One of the main ideas is to identify the essence of each concept between languages, as it is expressed in both languages, complemented by juridical and linguistic observations.[89]

thing. While updating the compilation this spring extended to correcting technical errors in the Labour Code and several other statutes, the principal focus was on the quality of the English text of the Civil Code, which has been a thorn in the side of Quebec private law since its enactment. This was the core of the project announced by the Minister's Information Note, which sought to bring about changes to the text of the Civil Code relating to 'terminological uniformity, quality of language, errors of transcription and minor corrections with a view to reconciling the French and English versions'."

88 *Private Law Dictionary of the Family and Bilingual Lexicons* (1999) and 2nd edition (2016); *Private Law Dictionary and Bilingual Lexicons: Obligations* (2003); *Private Law Dictionary and Bilingual Lexicons: Property* (2012) [*Private Law Dictionary: Property*]. All those dictionaries are available online at: <https://nimbus.mcgill.ca/pld-ddp/dictionary/search>.

89 For example, the Centre's dictionaries will include observations relating to the rules applicable to a concept. Then, a linguistic commentary may note that different terminologies are used. As such, under the entry "usufruct," a note indicated that "An apparent discordance between the English text and the French text of article 1172 C.C.Q. may be noted: the English text characterizes the right of use as a *right to enjoy* the property, whereas the French text characterizes the right as a *droit de se servir* ("right to

For example, one of the questions discussed by Quebec legal scholars is the terminology used to describe ownership in the *Civil Code of Québec*. Previously, the English version of the *Civil Code of Lower Canada* defined ownership at article 406 as "the right of enjoying and of disposing of *things*" [emphasis added]. By contrast, today, article 947 of the *Civil Code of Québec* defines ownership as "the right to use, enjoy and dispose of *property*" [emphasis added]. There has been a controversy surrounding whether this means that ownership in Quebec may have an incorporeal object, since "property" is not associated with materiality in the same manner as the concept of a "thing." It is clear in the Code that property (here, the object of ownership) is either corporeal or incorporeal (art. 899 C.C.Q.). Does this mean that the definition of ownership now has an extended meaning? Here, one can make the argument that altering the words used to express the law holds meaning in relation to the underlying concepts. The language of the legislator being essential in a civilian legal tradition, changing the words might alter the legal concept—here, one of the key concepts in the law of property. This discussion appears in the *Dictionary* as one observation under the definition of ownership, according to which:

> Due to its new definition of ownership, which now bears upon *property*, and no longer upon *things* (art. 947 C.C.Q.), the Civil Code seems to extend ownership to incorporeals, namely rights, leading to a result which would merge the notion of titularity and the notion ownership. This formulation would accordingly have the effect of recasting the "real" character of the right of ownership.[90]

Some linguistic difficulties arise when there is no equivalent – in the same legal tradition – from one language to the other. For example, since there is no equivalent in English to "lost movable," the definition of this term simply indicates "see lost or forgotten thing."[91] Jurists are also sometimes confronted with *calques* or loan translations. As Justice Kasirer underlines, "civil law in English is largely constituted of calques from the French language and from borrowings from the English legal tradition."[92]

make use of")." The English version of this codal article has since been modified to read "right to temporarily use".

90 *Private Law Dictionary: Property*, *supra* note 89, *sub verbo* "ownership".

91 *Ibid.*, *sub verbo* "lost or forgotten movable".

92 Nicholas Kasirer, "Le *real estate* existe-t-il en droit civil" (1998) 29: 4 R.G.D. 465 at 477 [Kasirer, "Le *real estate*"] [translated by author].

For example, the term "inopposability" is a calque for the French term "inopposabilité".

There are also examples of *asymmetrical equivalents*, where, for example, the French version of the *Civil Code of Québec* adopts the expression "action en inopposabilité" while the English version of the text uses the traditional terminology "Paulian action." In linguistics, this means that a new term is created in one legal tradition's language of origin, but in the other language, a term from another legal tradition is integrated -creating a translation where the two terms are very different.

Another question addresses the *normalization* of legal terminology. The question here is whether jurilinguists should always use the same expression as the legislator even in situations where the legal terminology is foreign to the ear of an Anglophone. In some cases, it seems better, as the *Dictionaries* recommend, to use another expression as a principal term, even if the expression is not the legal terminology used in the Civil Code.

b) Jurilinguistics and Law in More Than One Legal Tradition, Expressed in More Than One Language

Some of these linguistic difficulties can be transposed in a context of dialogue between legal traditions. A bijuridical context raises similar questions where there is no conceptual equivalent, not from one language to the other, but from one *tradition* to the other. For example, the term "estoppel" appears to be impossible to translate from English to another language. But a conceptual translation of this term could also be considered impossible. As Heeney underlined : "The fact that the effects of certain provisions of the civil law represent what would be termed estoppel by an English lawyer, is no more a proof of the existence of the doctrine than an excuse for using the expression."[93] As a consequence of its legal and linguistic context, the vocabulary of Quebec civil law in English is often created either through the translation of French civilian terms or through the integration of terms from Canadian common law into the civilian vocabulary.

The idea of *asymmetrical equivalence* would mean, conceptually, that for the same institution, some terms are created in the legal tradition – by a

[93] Arnold Danford Patrick Heeney, "Estoppel in the Law of Quebec" (1930) 7 Can. Bar Rev. 500 at 509.

translation from its language of origin – and others are calques of terms from another legal system. One could think, in the context of a trust, of the term "fiduciaire" which, rather than being translated as "fiduciary," is instead translated as "trustee," from the term "trust" in common law.

The idea of *calques* could also be transposed from linguistic to legal concepts. The calque would then have, as a source, another legal tradition rather than another language, the concept being used in the same language but in a different legal context. The best example of this operation is the use of the term "real property" in English civil law.

The question of normalization of the law, when an expression is not familiar to the ear of a jurist from another legal tradition, is also interesting from a conceptual perspective. For example, if one uses "bien réel" in French as an equivalent for "real property," the civilian will not understand what the concept refers to ; while if we use "biens immobiliers", the civilian will understand the concept, but the language used will fail to flag the conceptual difference between "biens immobiliers" and "real property." Civil law in French uses the word "immeuble" to refer to "land, and any constructions and works of a permanent nature located thereon."[94] As a means of comparison, this resembles the common law concept of "real property." However, translating *immeuble* to "real property" or "real estate" in the civil law can be perceived as dangerous. Instead, the English word used to describe land is "immovable."[95] Conceptually, "immovable" and "real estate" do not mean the same thing since in common law, "real property" or "real estate" is an "interest in land."[96]

2. Common Law in French

There has similarly been an effort made by the University of Moncton with its *Dictionnaire canadien de la common law* to establish adequate French terminology in the Canadian common law.[97] Much like the *Private Law Dictionary* in Québec, it has attempted to create conceptual equiva-

94 Art. 900 C.C.Q.

95 Art. 899 C.C.Q. ; Kasirer, "Le *real estate*", *supra* note 92 at 471-472.

96 *Ibid* at 468-469.

97 Canada, National Program for the Integration of the Two Official Languages in the Administration of Justice, *Dictionnaire canadien de la common law : droit des biens et droit successoral : terminologie française normalisée* (Cowansville : Éditions Yvon Blais, 1997) at x :

lents to the English terminology. In that sense, those dictionaries aim to establish that civil law does not need to be expressed solely in French and that the common law does not need to be expressed only in English. Both languages are capable of providing a terminology that conveys specific concepts in both legal traditions.[98]

The Supreme Court of Canada has largely adopted this methodology. An analysis of decisions of the Court, in English and French, in relation to Quebec property law demonstrates the conceptual accuracy with which decisions are rendered. For example, in *Lefebvre (Trustee of) v. Tremblay (Trustee of)*,[99] the Court addresses a question relating to a "droit de propriété" in French, which is translated as a "right of ownership" in the English version of the judgment. In that sense, it acknowledges and considers the distinct concepts in each legal system. A direct translation of "droit de propriété" might have been "right of property." However, such a translation could be seen as an inadequate representation of the civil law conception of "propriété".

In the civil law, "propriété" is traditionally considered a full and absolute right. Thus, by translating "propriété" as "ownership" rather than using the broader and more ambiguous term "property," the civilian notion of a so called "absolute and direct right" makes its way to the forefront in English civil law.[100] In the common law, the notion of "property" is usually seen as conceptually less absolute. For instance, there is arguably no private right of ownership over real property in Canadian common law as all land is ultimately owned by the Crown. Moreover, property is

Le vocabulaire normalisé s'efforce de concilier légitimité juridique et légitimité linguistique. De fait, il procède d'un choix respectueux des exigences linguistiques de la langue française et aboutit à une terminologie qui surprendra sans doute parfois le juriste civiliste de langue française, mais qui sera logique et compréhensible pour un juriste formé à la common law.

La légitimité juridique est l'élément fondamental de la démarche terminologique de normalisation et reflète le principe fondamental en droit interne selon lequel il faut amener la langue au droit et non l'inverse.

98 See Nicholas Kasirer, "Dire ou définir le droit ? " (1994) 28 : 1 R.J.T. 143 at 155 [Kasirer, "Dire ou définir le droit ? "].

99 2004 SCC 63, [2004] 3 S.C.R. 326.

100 In the civil law tradition, *la propriété* (ownership) is defined as a "[r]eal right which confers upon its titulary, the *owner*, the exclusive prerogative to use, enjoy and dispose of his or her property within the limits set by law" (*Private Law Dictionary : Property*, *supra* note 88, *sub verbo* "ownership" [emphasis in original]).

generally described in the common law as a "bundle of rights" as opposed to a single absolute and unitary right over a thing or asset. Property in this tradition is often characterized by the value of the right and the ability to exclude others.[101] Accordingly, the terms "property right" or "right of property" are appropriate English-language terms for a variety of rights over things in common law jurisdictions. Thus, the distinction between common law and civil law concepts should be "translated" or made apparent in unambiguous terms.

B. Transsystemia, Stateless Law, and the Technicality of Language

Does transsystemia have an effect on the linguistic expression of the law? The Private Law Dictionaries create a vocabulary and terminology for both the civil law and common law. These dictionaries draw largely from the wording used in legislation to create terms that express legal concepts common to both traditions. In so doing, the dictionaries sometimes—but not always—ignore "the usages, practices, values and objectives that underlie a living legal vocabulary."[102]

The transsystemic approach goes one step further, as it tends to demonstrate that multiple legal traditions can co-exist and contribute to the development of legal norms. As Helge Dedek and Armand de Mestral explain, the transsystemic approach "liberates [legal education] from its ties to a positivistic training in the law in force in a certain jurisdiction."[103] In fact:

> Globalization and internationalization are challenging the boundaries of the 'discipline'; with the nation-state waning in importance as the ultimate refer-

[101] See France Allard, "Entre le droit civil et la common law: la propriété en quête de sens" in Gémar & Kasirer, *supra* note 3 at 198-199. In the common law tradition, "property" is defined as "[a]nything over which the rights of possession, use and enjoyment are exercised" (Ontario, Ministry of the Attorney General, *Glossary of Terms*, online: <attorneygeneral.jus.gov.on.ca/english/glossary/?id=338#results>).

[102] Kasirer, "Dire ou définir le droit?", *supra* note 98 at 175 [translated by author]. See also: Rosalie Jukier, "The Impact of 'Stateless Law' on Legal Pedagogy" in Helge Dedek & Shauna Van Praagh, *supra* note 75, 201 at 205 [Jukier].

[103] Dedek & de Mestral, *supra* note 1 at 898.

> ence point for jurisdictional demarcation lines, it is also being called into question as an intellectual paradigm of legal scholarship and legal education.[104]

In that sense, transsystemism "has a potential for sharpening, deepening and expanding the lenses through which one perceives law."[105] Instead of completely rejecting or completely embracing State law, transsystemia evaluates each legal tradition in relation to the other and allows a flexibility with the law that is conducive to this shift from legal positivism. In this sense, the transsystemic approach to law is open to multiple norm-generating communities – rejecting an approach that is overly formalistic and closed to non-traditional sources of law. If the transsystemic approach can serve as a means to recognize non-positivist sources of law, could it also lead to integrating and recognizing sources of legal vocabulary outside the positivist framework of a single legal system?

In Montreal, some of the biggest law firms avoid making conceptual legal translations, preferring instead to use the English common law and the French civil law terminology. For example, the concept of "immovable" (or "immeuble" in French), to which I previously referred, is translated as "real estate" (or "real estate law").[106] Of course, in Quebec, there is no such thing as "real estate law," but these firms still use this terminology, perhaps out of ignorance of the difficulty of translation, or perhaps also to present their international customers with familiar terminology.

It is also common for large firms to use English common law terminology and French civil law terminology side-by-side in private legal documents, such as commercial contracts and wills.[107] In these situations, the technical civil law terminology co-exists with common law terminology.[108]

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104 Helge Dedek, "Stating Boundaries: The Law, Disciplined" in Helge Dedek & Shauna Van Praagh, *supra* note 75, 9 at 9.

105 Dedek & de Mestral, *supra* note 1 at 906.

106 See notably Norton Rose Fulbright, "Real estate", online: <nortonrosefulbright.com/ca/en/our-services/corporate-and-commercial/realestate>; Gowling WLG, "Real Estate", online: <gowlingwlg.com/en/canada/sectors-services/services/real-estate>; Osler Hoskin & Harcourt, "Real Estate", online: <osler.com/en/expertise/services/real-estate>; McCarthy Tétrault, "Real Estate", online: <mccarthy.ca/expertise_detail.aspx?id=150>; Lavery, de Billy, "Real Estate Law", online: <lavery.ca/en/legal-services-expertise/295-1-real-estate-law>; BCF, "Entertainment, Sports and Media: Real Estate", online: <bcf.ca/en/expertise/real-estate>.

107 See Kasirer, "Le *real estate*", *supra* note 92 at 473.

108 See *ibid* at 474.

This might have an effect of hybridization of the law, creating a new legal vocabulary, and rendering the language less technical.

In many situations, the transsystemic approach to law could help jurists describe it by using words independent from the concepts embodied in a particular legal tradition. When civil law and common law use different terms for a legal concept, trying to find a word that encompasses both is an exercise that can lead to the development of simpler terms. For example, instead of using terms attributed to one legal tradition such as "hypothec" or "mortgage," we might use "security/sûreté" or "guarantee/garantie", which are generic terms not related to one specific legal tradition[109] to which they owe their existence. In doing so, the terminology of the law becomes less technical[110] and therefore more accessible.

By proving that a legal norm or concept does not only exist in its manifestation in one language or one legal tradition, transsystemia thus allows for the identification or creation of terms less influenced by the technical frameworks of one specific legal system.

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In Canada the words and intentions of legislators may bring about a multilingual legal conversation, where debates in the legislative assemblies can occur in French, English or a variety of Indigenous languages.[111] While laws are drafted and authoritative in both French and English,[112] a major question could arise when courts are faced with a multilingual legislative record at the shared meaning rule stage of their analysis : do

[109] See e.g. : *Personal Property Security Act*, RSO 1990, c. P.10 ; *Personal Property Security Act*, SNB 1993, c. P-7.1… While these legislative titles may seem clear, there is still much work that jurilinguistics could do to in relation to these acts.

[110] See Jukier, *supra* note 102 at 205.

[111] See *Official Languages Act*, R.S.N.W.T. 1988, c. O-1, s. 6 [*Official Languages Act*, R.S.N.W.T.] ; *Official Languages Act*, S.Nu. 2008, c. 10, s. 4 [*Official Languages Act*, S.Nu.] ; *Languages Act*, R.S.Y. 2002, c. 133, s. 3 [*Languages Act*, R.S.Y.].

[112] *Official Languages Act, R.S.N.W.T., supra note 111,* s. 7 ; *Official Languages Act*, S.Nu., *supra note 111*, s. 5 ; *Languages Act*, R.S.Y., supra note 111, s. 4. Of note, Nunavut's official language statute provides a mechanism by which statutes may be equally authoritative in Inuktikut : "The Legislative Assembly, on the recommendation of the Executive Council, may, by resolution, designate an Inuit Language version of an Act to be authoritative" (*Official Languages Act*, S.Nu., *supra note 111, ss. 5(4)).*

other languages also reflect legislative intent even if they are not reflected in the enacted law? And if so, to what extent? This, it seems, remains an open question in Canada – one the Supreme Court may have to decide at some point.

Beyond the mere translation of a text into multiple languages, multilingualism as known in Europe implies that different language versions of a single document do coexist without one substituting for another,[113] and without removing cultural influence in the drafting of legislation. Thus, legal documents drafted in the European Union are the product of hybridization between several cultures and languages.[114] In addition, some level of approximation might exist between different words and concepts that do not necessarily have the same meaning in each language because of differences between legal systems.[115]

Within the European Union, Spain has for example proven innovative with regards to the management of the relationship between Spanish and the various languages and dialects found within its autonomous communities.[116] Paragraph 2 of Article 3 of the Spanish Constitution recognizes a system of co-officiality in the bilingual regions,[117] where the local language (such as Castilian, Catalan, Galician, or Basque) and Spanish are equal within these regions.[118] This provision, however, does not provide for individual linguistic rights of citizens in "multilingual communities."[119] Fuelled by this constitutional provision, autonomous communities were nevertheless prompted to adopt Statutes of Autonomy to make their local language official and to produce policies of linguistic normalization.[120]

113 See Agnieszka Doczekalska, "Drafting or Translation: Production of Multilingual Legal Texts" in Frances Olsen, Alexander Lorz & Dieter Stein, eds., *Translation Issues in Language and Law* (New York: Palgrave Macmillan, 2009) [Olsen, Lorz & Stein] 116 at 119.

114 See *ibid* at 130.

115 See Karen McAuliffe, "Translation at the Court of Justice of the European Communities" in Olsen, Lorz & Stein, *supra* note 113, 99 at 105.

116 The four main ones are Castilian, Catalan, Galician, and Basque.

117 See Noémi Nagy, "Linguistic Diversity and Language Rights in Spain" (2012) 150 Studia Iuridica Auctoritate Universitatis Pecs 183 at 190 [Nagy].

118 See Anabel Borja Albi, "Legal Language and Linguistic Rights in Twenty-First Century Spain" [Borja Albi] in Gémar & Kasirer, *supra* note 3, 225 at 232.

119 Nagy, *supra* note 117 at 191.

120 See Borja Albi, *supra* note 118 at 232.

The common difficulties of translation between languages and traditions create a shared experience among jurists of different jurisdictions, for instance between Canadian and European legal practitioners and scholars. Such common ground provides an opportunity for dialogue between them, allowing for an exchange of diverse approaches to similar translation issues.