Comparative Law — Engaging Translation

Edited by
Simone Glanert

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Comparative Law — Engaging Translation

In an era marked by processes of economic, political and legal integration that are arguably unprecedented in their range and impact, the translation of law has assumed a significance which it would be hard to overstate. The following situations are typical. A French law school is teaching French law in the English language to foreign exchange students. Some US legal scholars are exploring the possibility of developing a generic or transnational constitutional law. German judges are referring to foreign law in a criminal case involving an honour killing committed in Germany with a view to ascertaining the relevance of religious prescriptions. European lawyers are actively working on the creation of a common private law to be translated into the 24 official languages of the European Union. Since 2004, the World Bank has been issuing reports ranking the attractiveness of different legal cultures for doing business. All these examples raise in one way or the other the matter of translation from a comparative legal perspective. However, in today's globalised world where the need to communicate beyond borders arises constantly in different guises, many comparatists continue not to address the issue of translation. This edited collection of essays brings together leading scholars from various cultural and disciplinary backgrounds who draw on fields such as translation studies, linguistics, literary theory, history, philosophy or sociology with a view to promoting a heightened understanding of the complex translational implications pertaining to comparative law, understood both in its literal and metaphorical senses.

Dr Simone Glanert is a Senior Lecturer at Kent Law School where she teaches comparative law, French public law and legal interpretation.

Notes on Contributors

C.J.W. (Jaap) Baaij, who holds degrees in law and philosophy, is an Assistant Professor at the Faculty of Law, University of Amsterdam. He teaches contract law and dispute resolution, in both national and transnational contexts. His scholarship concentrates on the intersection of law and language, specifically the role of legal translation in comparative legal research and the multilingual process of legal integration. He teaches seminars on these topics throughout the European Union and in the United States, and frequently provides professional training for translators and lawyer-linguists of the European Commission and the European Council. He is the founder of the 'Amsterdam Circle for Law and Language' (lawandlanguage.eu) and the editor of a multidisciplinary volume on *The Role of Legal Translation in Legal Harmonization*, The Hague: Kluwer, 2012.

Raluca Bercea, a qualified lawyer with an academic background in linguistics and law, is an Associate Professor at the Faculty of Law, University of Timişoara. She has appeared before the European Court of Human Rights and has acted as visiting professor in France, Italy and Hungary. She is the co-founder of the *Romanian Journal of Comparative Law* and the author of 'La leçon de Picasso: quand les tableaux évoquent la fabrication de la comparaison des droits' (2011) 1 *Romanian Journal of Comparative Law* 213 and 'Toute comparaison des droits est une fiction', in P. Legrand (ed.) *Comparer les droits, résolument*, Paris: Presses Universitaires de France, 2009.

Shawn Marie Boyne is a Professor at Indiana University School of Law. Her research interests span the intersection of criminal law, politics and culture. In her recent scholarship, she examines the meaning of prosecutorial 'objectivity' in Germany's civil law system. In her new book, *The German Prosecution Service: Guardians of the Law?*, Berlin: Springer, 2014, she uses ethnographic research to explore how German prosecutors interpret and enact their mandate to view evidence from a neutral standpoint. She argues that, despite the fact that statutes prescribe a form of 'ritualized objectivity', the working meaning of 'objectivity' can be found in collegial decision-making practices rather than in the law. In 2011, the American Society of Comparative Law selected

the working draft of her article entitled 'The Many Faces of Objectivity: A Look at German Sexual Assault Cases' (2010) 67 *Washington and Lee Law Review* 1287 as one of six papers to be discussed at its annual work-in-progress workshop held at Yale Law School. She is currently researching the role of defence counsel in civil law systems.

Michael Cronin, a member of the Royal Irish Academy and co-editor of *The Irish Review*, holds a Personal Chair in the Faculty of Humanities and Social Sciences, Dublin City University. His research interests include Irish translation history and translation with specific reference to globalisation. He is the author of *Translation in the Digital Age*, London: Routledge, 2013; *Translation Goes to the Movies*, London: Routledge, 2009; *Translation and Identity*, London: Routledge, 2006; *Translation and Globalization*, London: Routledge, 2003; *Across the Lines: Travel, Language and Translation*, Cork: Cork University Press, 2000 and the co-editor of *Transforming Ireland: Challenges, Critiques, Resources*, Manchester: Manchester University Press, 2010, with D. Ging and P. Kirby; *The Languages of Ireland*, Dublin: Four Courts Press, 2003, with C. Ó Cuilleanáin; and *Unity in Diversity? Current Trends in Translation Studies*, Manchester: St. Jerome Publishing, 1998, with L. Bowker, D. Kenny and J. Pearson.

Luca Follis is a Lecturer at Lancaster University Law School. He works at the interface of socio-legal studies and political and social theory exploring how democratic orders rationalise, legitimate and explicate punitive choices. His current project focuses on the centrality of penal exclusion to the United States' political imaginary and on the historical relationship between criminal dispossession, citizenship and the emergence of the local state. Recent publications include 'Resisting the Camp: Civil Death and the Practice of Sovereignty in New York State' (2013) 9 *Law, Culture and the Humanities* 91 and 'Discipline Unbound: Patuxent, Treatment and the Colonization of Law' (2014) *Law, Culture and the Humanities* (forthcoming).

Pascale Fournier is an Associate Professor at the Faculty of Law, University of Ottawa where she holds the Research Chair in Legal Pluralism and Comparative Law. She previously served as Law Clerk to Justice Claire L'Heureux-Dubé at the Supreme Court of Canada and graduated from Harvard Law School (SJD) as a Fulbright and Trudeau scholar. She has lectured at the State University of Haiti, McGill University, the University for Peace in Costa Rica and the Institute for Women's Studies and Research in Iran. Her major research project investigates the migration of the Jewish *get* and the Islamic *talaq* to Canada, France, Britain, Germany and Israel, and explores through field interviews the effects of such migration on Jewish and Muslim women. Her book, *Muslim Marriage in Western Courts: Lost in Transplantation*, was published by Ashgate in 2010. A French version has now appeared as *Mariages musulmans, tribunaux d'Occident*, Paris: Presses de Sciences Po, 2013.

Jean-Claude Gémar is Emeritus Professor at the Université de Montréal and the Université de Genève. He is the author of *Traduire ou l'art d'interpréter*, 2 vols, Montreal: Presses de l'Université du Québec, 1995 and the co-editor of *Jurilinguistics: Between Law and Language*, Brussels: Bruylant, 2005, with N. Kasirer. A former member of the editorial board of the *Quebec Private Law Dictionary*, he sits on the editorial board of *Meta: Translators' Journal*, a leading Canadian journal in translation studies. Professor Gémar founded the GREJUT (*Groupe de recherche en jurilinguistique et traduction*) at the Université de Genève. Since 1992, he has been responsible for the French Judgment Writing Seminar offered to Superior Court judges by the Canadian Institute for the Administration of Justice. He has also worked as a freelance translator for Canada's Translation Bureau.

Simone Glanert is a Senior Lecturer at Kent Law School. She has repeatedly acted as visiting professor at various European universities and regularly lectures in the United States and Canada. She has also visited at the Université de Montréal. Her research focuses on theoretical issues arising from the practice of comparison in the context of globalisation and Europeanisation. She is the author of 'Foreign Law in Translation: If Truth Be Told …', in M. Freeman and F. Smith (eds) *Law and Language*, Oxford: Oxford University Press, 2013, with P. Legrand; *De la traductibilité du droit*, Paris: Dalloz, 2011; 'Comparaison et traduction des droits: à l'impossible tous sont tenus', in P. Legrand (ed.) *Comparer les droits, résolument*, Paris: Presses Universitaires de France, 2009; and 'Speaking Language to Law: The Case of Europe' (2008) 28 *Legal Studies* 161. She is undertaking further work on the relevance of Hans-Georg Gadamer's philosophical hermeneutics for comparative legal studies.

Jennifer Hendry is a Lecturer at the University of Leeds School of Law. Previously, she wrote her doctoral thesis on '*Unitas in Diversitate*? On Legal Cultures and the Europeanization of Law' at the European University Institute (EUI) in Florence and spent a year as a post-doctoral research fellow at the Institute for Comparative and Transnational Law (TICOM) at Tilburg University. Her main research interests are in the areas of legal and social theory with specific reference to comparative law and comparative legal studies. In particular, she is interested in the concepts of 'legal culture' and 'legal pluralism'. Her publications include 'Legal Pluralism and Normative Transfer', in G. Frankenberg (ed.) *Order from Transfer: Comparative Constitutional Design and Legal Culture*, Cheltenham: E. Elgar, 2013; '"Unity in Diversity": Questions of (Legal) Culture in the European Union' (2008) 3 *Journal of Comparative Law* 289 and 'Contemporary Comparative Law: Between Theory and Practice' [Review of E. Örücü and D. Nelken (eds) *Comparative Law: A Handbook*, Oxford: Hart, 2007], (2008) 9 *German Law Journal* 1313.

Pierre Legrand directs the postgraduate programme in 'Globalization and Legal Pluralism' at the Sorbonne. He acts as Distinguished Visiting Professor of Law at the University of San Diego School of Law and also visits at Northwestern University School of Law. In addition to Georgetown University Law School, previous visiting professorships include the universities of Copenhagen and Toronto. He has lectured repeatedly in Australia, Brazil, China and Singapore. Some representative publications include *Pour la relevance des droits étrangers*, Paris: IRJS Éditions [Institut de recherche juridique de la Sorbonne], 2014; 'Foreign Law: Understanding Understanding' (2011) 6(2) *Journal of Comparative Law* 67; '"*Il n'y a pas de hors-texte*": Intimations of Jacques Derrida As Comparatist-at-Law', in P. Goodrich and others (eds) *Derrida and Legal Philosophy*, New York: Palgrave Macmillan, 2008; 'On the Singularity of Law' (2006) 47 *Harvard International Law Journal* 517; 'Issues in the Translatability of Law', in S. Bermann and M. Wood (eds) *Nation, Language, and the Ethics of Translation*, Princeton, NJ: Princeton University Press, 2005; and 'The Same and the Different', in P. Legrand and R. Munday (eds) *Comparative Legal Studies: Traditions and Transitions*, Cambridge: Cambridge University Press, 2003.

Kwai Hang Ng is an Associate Professor of Sociology at the University of California, San Diego. He is primarily interested in studying institutionalised language practices in the common law tradition and has undertaken empirical research on the bilingual legal system of Hong Kong and on the use of court interpreters in the United States. His book, *The Common Law in Two Voices: Language, Law, and the Postcolonial Dilemma in Hong Kong*, Stanford, CA: Stanford University Press, 2009, joint recipient of the Distinguished Book Award, American Sociological Association's Section on Sociology of Law, explores how the introduction of Chinese into the common law has reshaped the social and moral character of the law in Hong Kong. He is working on a comparative study of several post-colonial common law jurisdictions in Asia.

Alexis Nouss (Nuselovici) is Professor of General and Comparative Literature at Aix-Marseille Université. He researches in the fields of European culture and translation studies. Representative publications include *Paul Celan: les lieux d'un déplacement*, Lormont: Le Bord de l'Eau, 2010; *Plaidoyer pour un monde métis*, Paris: Textuel, 2005; *Métissages*, Paris: Pauvert, 2001, with F. Laplantine; *Dire l'événement, est-ce possible?*, Paris: L'Harmattan, 1997, with J. Derrida and G. Soussana; *Le Métissage*, Paris: Flammarion, 1997, with F. Laplantine; and, in the 'Que sais-je?' series, *La Modernité*, Paris: Presses Universitaires de France, 1995. He is the director of 'Non-lieux de l'exil' (http://www.nle.hypotheses.org), a research group working on exilic experiences, and gives a seminar on the same topic at the Collège d'études mondiales, Paris. He sits on the editorial board of *Traduction, terminologie et rédaction* (*TTR*) and on various reading committees. He has taught as visiting professor in Brazil, France, Spain and Turkey.

Ferdinand Prinz zur Lippe is a German lawyer. In addition, he holds degrees in political science, psychology and philosophy. He is a Private Lecturer at Trinity College Dublin and a Lecturer at the German Army University in Munich. He also practises law at a leading law firm in Munich where he specialises in the fields of commercial and corporate law, distribution law, cartel law, real estate law and construction law.

Bénédicte Sage-Fuller, who studied law in France and Ireland, is a Lecturer at the Faculty of Law, University College Cork, where she directs the 'Law and French' and 'Law and German' degrees. Before her appointment, she worked as Law of the Sea consultant and principal researcher in pan-European maritime research projects (DG TREN). Since 2009, Dr Sage-Fuller has been involved with UNCTAD and the Dublin Port Company on 'Modern Port Management'. This programme is aimed at providing aid in the form of teaching on sea ports in developing countries. She is the author of *The Precautionary Principle in Marine Environmental Law, with Special Reference to High Risk Vessels*, London: Routledge, 2013.

Régine Tremblay is a Doctor of Juridical Science (SJD) candidate at the University of Toronto. She holds a Bachelor of Civil Law (BCL) and a Bachelor of Laws (LLB) from McGill University in addition to a Master of Laws (LLM) from the University of Toronto. She has also been a member of the Barreau du Québec since 2011. She is a co-editor of *Les Intraduisibles en droit civil*, Montréal: Thémis, 2014, with A. Popovici and L. Smith, and sits on the Editorial Committee of the *Private Law Dictionary of the Family*, F. Allard and others (eds), 2nd edn, Montréal: Éditions Y. Blais, 2015 (forthcoming).

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S.G.

Contents

Chapter 1

Translation matters

Simone Glanert

> 'All forms of comparison are problems of translation and all problems of translation are ultimately problems for comparison'
>
> Aram Yengoyan (2006: 151)

As languages are deterritorialising on an unprecedented scale, as monolingualism is being denaturalised, not least on account of the emergence of global assemblages such as the European Union, translation is materialising as never before. *Everything* is being translated. However, it remains the case that *nothing* is translatable. Indeed, it has become trite to observe that 'secularism' does not carry the same meaning as *laïcité* or that 'contract of sale' does not mean the same as *Kaufvertrag*. Law, immingled as it is with language, could not have escaped this aporetic manifestation of linguistic post-nationalism. Or could it? Can French law, for instance, exist in a significant manner (that is, in the sense that it would make *sense*) beyond the French language? Specifically, can the German translation of an English casebook usefully account for English contract law in the German language?

To move one step further, is it possible to design a law that would mean the same thing across various legal languages and that could therefore legitimately claim the status of 'uniform' law? Can the language of the law really unbelong, that is, detraditionalise itself? Or does it have a border, in French *un bord*, that would suggest an inside and an outside of it, that would entail that it can find itself, at some juncture, *débordé* (or overcome), facing something like intractable alterity? But then, does legal translation need to imply (as it is reflexively assumed to do) sameness, isomorphism, commensurability and *adaequatio*? Could it not depart from the philological tradition and legitimately involve something other than fidelity to an original text? Is legal translation not an original work in and of itself?

In an era marked by an increased interaction between different legal cultures, one would expect that comparative law would offer a privileged space for reflection on the many issues arising from legal translation. Indeed, the process of legal comparison implies the activity of translation since the task of the comparatist

is to explain, using her language, a foreign law, which moreover is generally formulated in a different language. Unsurprisingly, then, recently some scholars have repeatedly urged comparatists to recognise the importance of translation in comparative legal research (Weisflog 1996; Großfeld 2003; Pommer 2006; Curran 2006; Legrand 2008; Brand 2009; Glanert 2011; Pozzo 2012).[1]

However, many academics writing in the field do not show any interest in translation. For example, neither Konrad Zweigert and Hein Kötz's textbook *Introduction to Comparative Law* (1996), which has dominated comparative legal studies both in Germany and the United Kingdom for the past 40 years, nor René David's monograph *Les Grands systèmes de droits contemporains* (2002), which after 11 editions is still highly regarded in France, addresses difficulties arising from legal translation. Other comparatists also fail to apprehend legal translation as problematic for comparative legal studies. In particular, H. Patrick Glenn argues, in the most recent edition of his *Legal Traditions of the World*, that 'differences in languages are obstacles to understanding and communication, but not insuperable ones. The translation industry in the world stands as testimony to this' (2010: 49).

Finally, there are comparatists who, while they show themselves to be sensitive to translation issues, do not provide their readership with the requisite theoretical background. For example, Werner Menski, although he emphasises the need for the comparative lawyer to take into account irreducible linguistic pluralism, refrains from exploring the issue of legal translation at any length (2006: 78). In effect, the pressing practical significance and considerable theoretical interest raised by questions of translation has hitherto been neglected by most comparatists. As such, a recent guidebook to comparative constitutional law, an emerging field within comparative legal studies engaging various aspects of national constitutional law and investigating, among others, the possibility of a generic or transnational constitutional law, does not feature any serious analysis of language and translation issues over its many hundreds of pages (Rosenfeld and Sajó 2012).

But why are comparatists so reluctant to discuss the matter of legal translation? At least four reasons seem to explain the absence of a meaningful focus on translation in comparative legal studies. First, comparatists tend to lack interdisciplinary knowledge. Very often, a lawyer will have developed an expertise in her own field but know little about other disciplines. Spanish philosopher José Ortega y Gasset famously referred to such a person as a 'learned-ignoramus', that is, someone who 'will act in all areas in which he is ignorant, not like an ignorant man, but with all the airs of one who is learned in his own special line' (1930: 98). Many comparatists therefore find it difficult to come to terms with writings that are not deemed 'legal' in the traditional sense. Indeed, a French comparatist laments how 'complex cultural and interdisciplinary comparison [...] renders the discipline so complicated' (Fauvarque-Cosson 2006: 61).

Secondly, there are comparative lawyers who do not undertake interdisciplinary research for what they regard as practical reasons. The underlying idea governing these comparatists is that they must provide concrete solutions to specific

legal problems involving foreign law. In this respect, one comparatist, showing great scepticism with respect to interdisciplinary approaches, argues that 'this new material is not likely to be of use to applied research of the kind that judges, legislators, and practitioners would ever wish to consult' (Markesinis 2006: 142).

Thirdly, the ascendancy of law may explain some at least of the comparatist's unwillingness to take an interest in translation studies. Traditionally, law has been envisaged as more prestigious than other disciplines such as anthropology, sociology or linguistics. For example, in France, during their first year of studies, law students learn to distinguish between 'the law' and 'the auxiliary sciences of the law' (Aubert and Savaux 2012: 47–51; Cornu 2007: 128–32).

Fourthly, in civil law countries, where statutes are considered to constitute the epistemological substance of the law and where most legal knowledge is articulated around the idea of 'law as science', there is but little epistemological room left for the interaction of law with other fields of knowledge (Kiesow 2010). Against this background, it is perhaps not so startling after all that the majority of comparatists tend to ignore, minimise or disqualify translation issues.

In this introductory chapter, I briefly address what I deem to be some of the most important problems arising from translation in the context of comparative legal studies. In the first part, I foreground the impossibility of translation. Contrary to unexamined assumptions, law simply cannot be faithfully translated from one language to the other. Turning to the second aspect of my argument, I claim that the comparatist must, however, make the impossible possible. Despite the irreducible differences across languages and cultures, the comparative lawyer cannot refrain from translation. Moreover, she must choose, among the various available strategies, an approach to translation that values the otherness of the foreign law. In my third section, I introduce the various contributions to this volume, which all offer comparatists' invaluable insights into the theory and practice of translation in comparative legal studies.

In a paper entitled 'Issues in the Translatability of Law', Pierre Legrand suggests that 'the task of comparatists-at-law is to measure the gap or the *écart* between laws, not unlike the way in which literary translators constantly seek to apprehend the distance between languages' (2005: 41, original emphasis). For example, comparatists should not assume that the French words *plaider coupable* could account for the US legal 'reality' as it is expressed in *plea bargaining*. The comparatist should also be aware of the fact that the German expression *Eigentum* ('property') cannot adequately reflect the French legal landscape where the matter is about *propriété*. The whole history of translation in fact shows that faithful renderings from one language into another are impossible. Indeed, the numerous retranslations of literary or religious texts, such as Shakespeare's plays, Dostoyevsky's novels or the Holy Scriptures, demonstrate that a 'true' and 'ultimate' translation cannot be achieved. In fact, all translators, including legal translators, have to face at least two important challenges.

First, *languages do not signify identically*. In his influential essay 'The Task of the Translator', published in the early 19th century, German philosopher Walter

Benjamin explains that the disparities between languages are essentially due to there being different 'modes of intention [*Arten des Meinens*]' at work (1923: 75). The translation of the German word *Brot* (bread) into the French *pain* strikingly illustrates this phenomenon. In the two languages, what is 'meant' is essentially the same. Both the word *Brot* and the word *pain* thus refer to 'bread', that is, a consumable good made of water, salt, flour etc. Therefore, the German and French expressions are readily presented as equivalent. However, in the two languages, the 'modes of intention' are not the same. Certainly, one would not want to schematise national behaviours. Nevertheless, one can reasonably assume that a German, when using the word *Brot*, will probably be thinking of *Vollkornbrot* (whole-grain bread). By contrast, the French person, when referring to *pain*, will most likely have in mind a *baguette*. Because of the different 'modes of intention' – whole-grain bread and *baguette* – the two words ultimately signify something different for the German and the French. In the event, *Brot* and *pain* are therefore not interchangeable. Indeed, they can be said to *exclude* each other.

It is important to keep in mind that languages evolve in particular economic, geographical, historical, legal, social and political contexts. In his famous essay on the 'The Misery and the Splendor of Translation', Ortega y Gasset highlights the fact that the German word *Wald* (forest) cannot constitute a faithful translation of the Spanish expression *bosque*, although most dictionaries present these two words as equivalent (1937: 96). Indeed, for a German, the signifier *Wald* evokes the idea of an immense terrain with a significant number of trees. By contrast, the Spaniard associates the signifier *bosque* with probably only a small parcel of land featuring only a small number of trees.

These divergences between the German and the Spanish language are a result of the fact that, in Germany, the wooden surface is much more important than in Spain. Here again, the 'modes of intention' are fundamentally different in the two languages, which is why, on reflection, *Wald* cannot be regarded as equivalent to *bosque*. One can even go one step further by asking whether a German citizen of the 21st century from the industrial area of the *Ruhrgebiet* has the same understanding of the word *Wald* as a German painter of the Romantic period of the 18th century during which some trees, such as the oak, were mythified. Appositely, Martin Heidegger observes that translation operates even within a language (1943: 63).

Lawyers should not suppose that legal language is exempt from such challenges, as described by Benjamin and Ortega y Gasset. In this respect, the word 'privacy', which is part of the legal language both in the United States and in the United Kingdom, presents a useful illustration. A close examination of this term reveals that even two legal cultures sharing the same law world (that is, the common law tradition) and using the same language (that is, English) do not have the same understanding of certain legal concepts. The idea of a right to privacy, which commonly refers to the law governing the treatment of personal information (for example, the prohibition on the use of a person's name without consent for trade or advertising purposes), was first addressed within a legal

context in the United States. Louis Brandeis (later appointed to the US Supreme Court) and another young lawyer, Samuel Warren, published an article entitled 'The Right to Privacy' in the *Harvard Law Review* in 1890, arguing that the US Constitution and the common law allowed for the formulation of a general 'right to privacy'.

A few decades later, William Prosser, a US tort lawyer, developed specific principles of privacy law (1960). By contrast, in the United Kingdom, there is no independent 'privacy tort doctrine'. The Supreme Court of the United Kingdom, formerly the House of Lords, which refuses to recognise a tort of privacy, requires the claimant to refer either to an existing tort such as a breach of confidence or a specific legal text such as the Data Protection Act 1998. The highest court has repeatedly confirmed its position on this issue, for example, in the landmark cases of *Wainwright v Home Office* [2003] and *Campbell v MGN Ltd* [2004].[2] As a result, the word 'privacy' carries a different meaning for US and English lawyers.[3] The 'modes of intention', as Benjamin would argue, are not the same in the United States and in the United Kingdom.

Secondly, *every act of translation involves a process of interpretation*. Indeed, the translator, before translating from one language to another, must first understand the source text. This act of interpretation is neither neutral nor objective. In his ground-breaking book *Truth and Method*, first published in 1960, Hans-Georg Gadamer, one of the most influential German philosophers of the 20th century, offers useful insights into the matter of understanding (1986). Contrary to the processes prevailing in the sciences, Gadamer argues that understanding never follows a logical method: rules, as precise and rigorous as they may be, simply cannot lead the interpreter straight to the 'right' meaning of the text. The text does not contain 'one' sense that the interpreter would 'discover', for example in the way an archaeologist digs up an amphora that has been lying hidden under stone slabs or a museum director unveils a statue on the occasion of an opening ceremony. On the contrary, an interpreter's understanding of a text or situation is realised through her 'pre-understanding', that is, through an anticipatory apprehension of meaning. Access to the text and to the questions arising from it is already, perhaps unconsciously, fashioned according to the historical tradition to which the interpreter belongs.

The modalities under which understanding takes place can be illustrated through the following example. Suppose a German tourist is visiting New York's Bronx Zoo for the first time, which is often described as the world's largest metropolitan zoo. While walking around, the German comes across an exotic animal, an okapi, native to the Ituri rainforest located in the northeast of the Democratic Republic of Congo, in Central Africa. Now, the German tourist has never encountered this animal before and she is struck by its quite peculiar physical characteristics. The body shape is similar to that of a giraffe, except that okapis have much shorter necks. Further, okapis have dark backs, with striking horizontal white stripes on the front and back legs making them look like zebras. How can the German tourist ascribe sense to this unfamiliar creature? As I have