INTRODUCTION TO CHINESE LAW
中国法导论

WITHIN THE CONTEXT OF THE LEGAL TRADITIONS

Article 464 A contract refers to an agreement between the parties to civil legal relations for the establishment, modification, and termination of civil legal relations.

Agreements concerning personal relations such as marriage, adoption, and guardianship shall be governed by the provisions of laws on the relevant personal relations; or absent such provisions, this Book may apply mutatis mutandis according to their nature.

第四百六十四条 合同是民事主体之间设立、变更、终止民事法律关系的协议。

婚姻、收养、监护等有关身份关系的协议，适用有关该身份关系的法律规定；没有规定的，可以根据其性质参照适用本编规定。

Art. 1321.
Nozione.

Il contratto è l'accordo di due o più parti per costituire, regolare o estinguere tra loro un rapporto giuridico patrimoniale.

… Synecdoche …

(Are all the agreements contracts?)

Umberto Eco:

The members of Putnam's expedition on **Twin Earth** were defeated by **dysentry.** The **crew drank as water what the natives called so**, while the chiefs of staff were discussing rigid designation, stereotypes and definite descriptions…

LAW AND ANTHROPOLOGY – 人类学

Societies without a written language still manage to make their social rules effective

A given rule and distribution of power may be imposed coercively upon members of a group without any linguistic formulation

LAW AND ANTHROPOLOGY – 人类学

- Even **without a written language societies still manage to make their social rules effective**: human groups regularly abide by **certain rules of behavior which they do not expressly formulate in advance**

- **identical facts do not always produce identical legal rules** the results are affected by other elements like culture, social considerations, language

- **distinction between a rule and the way it is understood and implemented**, there may be broad deviations

Camilla Baasch Andersen: "Uniform words do not create uniform results"

(let alone if even the words may be different since we may be using different languages…)

- **Nietzsche**: **there is no such thing as fact, only interpretation**

- **Clavier**: **although disagreement is always possible with my interlocutor, we speak of the same world**, and it is from this world that we speak to each other, even though we do not necessarily say the same thing

- **Eco**: **Without the assumption that the two interlocutors must in some way share a system**, no matter how asystematic, of directories and files, **interaction is not possible**.

Eco:

“when interpreting a text, we speak of something that pre-exists our interpretation”

Let alone **when we do not have a text** like in the case of a **customary law** or when we have **to translate**…

Legal culture - ‘Rules’ - Language

Rigaux: There is, however, a **close interaction between the concept of the world and the system of signifiers** that name the semantic units of a **given community**.

Legal culture: concept that **connects legal norms to the material and immaterial reality of society**.

However **“Legal culture” and “language” are two interdependent dimensions** that a study international legal discourse cannot overlook

Mamede:

What must be clearly understood is that **language** does not have as referent (‘**it does not refer to**’) **the object of physical and external reality** (that, has been shown, is **inaccessible**, in its essence, by the human being, from which only phenomena can be grasped); **on the contrary**, its referent is the **object as placed in conscience**, the concept of the object, **shaped, in the end, by culture**»

… let alone when we deal with immaterial notions like those we usually deal with in the legal field (contract, obligation etc.)

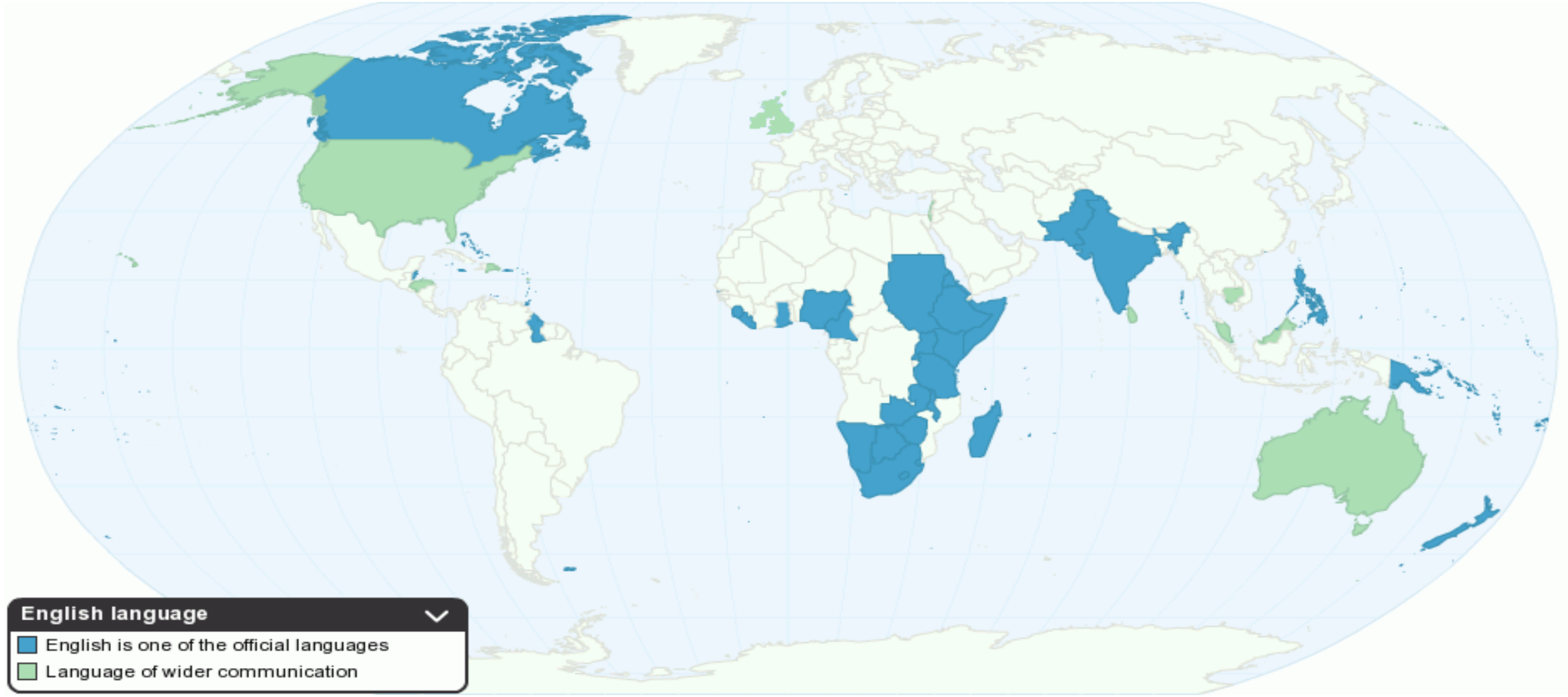
Mamede:

"**Reality" is the reality conceived by our culture**. Initially, we inherit it. However, upon re-elaborating it according to the needs of our survival instinct and our desires for the future, **we build our own conception of the world**

Even if within a certain language we can expect to find a more homogeneous cultural background, it can anyways happen that the same language itself can actually combine more than one legal language

For instance:

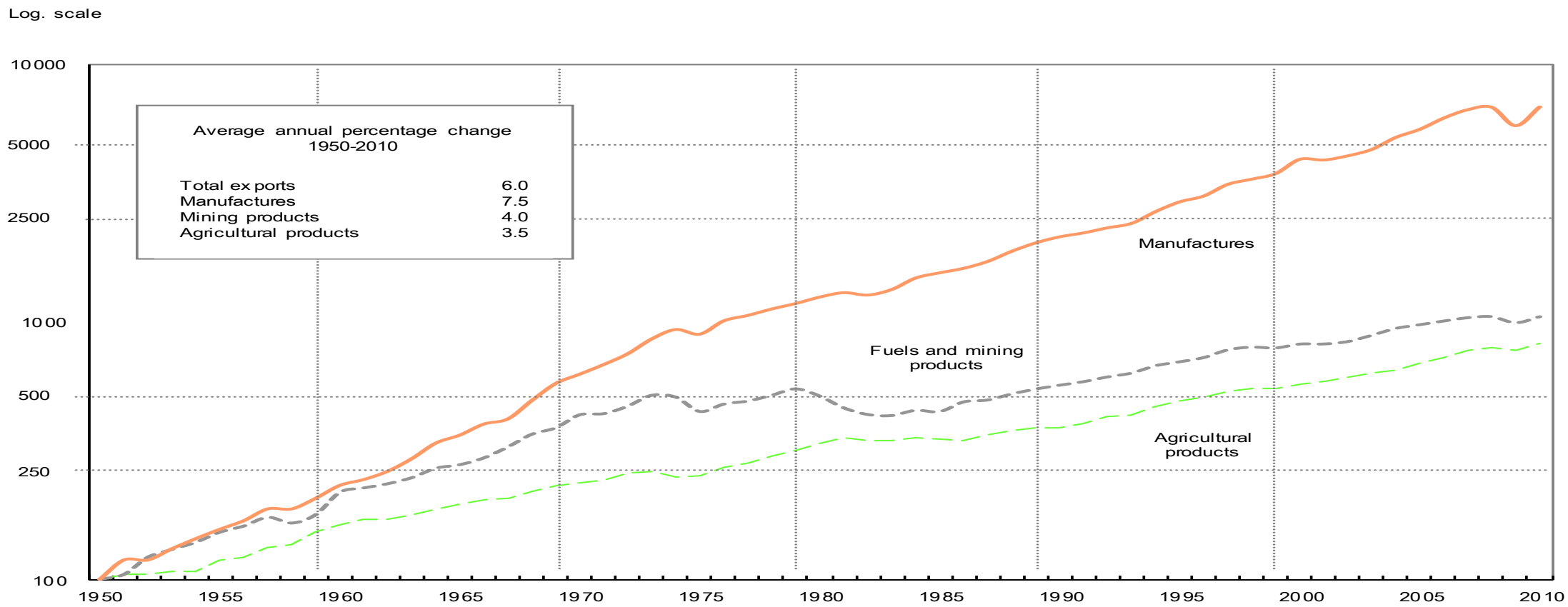
- France-Quebec-Switzerland etc.
- Germany-Austria-Switzerland etc.
- Italy-Switzerland etc…
- Portuguese…
- Spanish…
- English: UK - USA - Australia - India - South Africa etc…


English language
English is one of the official languages
Language of wider communication

Talking about contracts… how to handle this?

World merchandise trade volume by major product group, 1950-2010

(Volume indices, 1950=100)



(Even on an individual basis: how may contracts did you stipulate today?)

Sacco already in 1991 was warning that:

Sometimes a choice of law clause refers to a legal system with a language that does not correspond to the one in which the contract is written.

Or an arbitration clause may permit an arbitrator to be chosen from a third country, and the **same word** may therefore have **three different meanings for three arbitrators**.

We need to apply these ideas to the law:

- **Clavier**: **although disagreement is always possible with my interlocutor, we speak of the same world**, and it is from this world that we speak to each other, even though we do not necessarily say the same thing

- **Eco**: **Without the assumption that the two interlocutors must in some way share a system**, no matter how asystematic, of directories and files, **interaction is not possible**.

… and therefore we have to consider that, **on the one hand** there should be a should be **a "shared system", on the other hand** there should be room for **accommodating the cultural differences**…

In order tackle this issue we need to look at some **elements that arose a fairly long time ago** within **a certain 'legal tradition'** …

… by starting asking ourselves: **what is the law?**

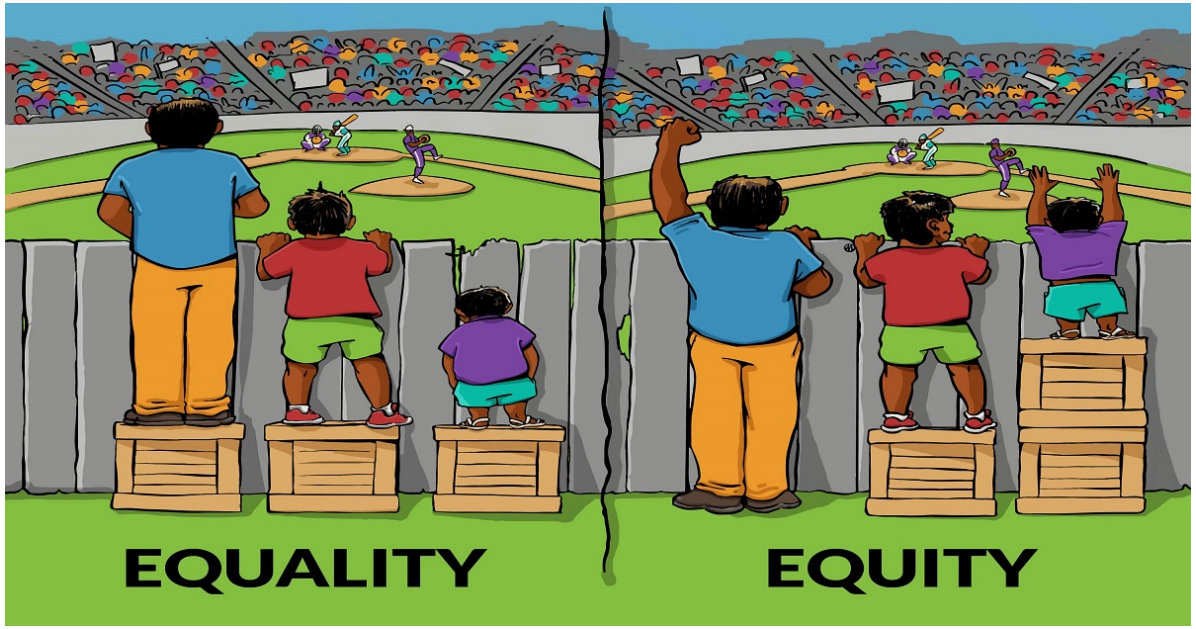
And what are its main features?

D. 1.1.1.

Ulpianus *libro primo institutionum*

pr. Iuri operam daturum prius nosse oportet, **unde nomen iuris descendat**. est autem **a iustitia appellatum**: nam, ut eleganter **Celsus** definit, **ius est ars boni et aequi**.

Ius – Iustitia
Ius = «ars»
Bonum, and not optimum
Aequitas, and not aequalitas



Starting from a perspective based on which:

D. 1.5.2 (Hermogenianus *libro primo iuris epitomarum*)

Cum igitur hominum causa omne ius constitutum sit, primo de personarum statu ac post de ceteris, ordinem edicti perpetui secuti et his proximos atque coniunctos applicantes titulos ut res patitur, dicemus.

We know from a II century jurist and legal historician that:

D. 1,2,41 (Pomponius *libro singulari enchiridii*)

Post hos **Quintus Mucius** Publii filius pontifex maximus **ius civile primus constituit generatim** in libros decem et octo redigendo

Socrates (?) – Plato – Aristotles

- **Generatim** = employment of the **διαίρεσις**: a **taxonomy of concepts**, **ordered according** to a **general–specific relation** (*ius est ars boni et aequi*)

- **Syllogism**: a form of reasoning in which a conclusion is drawn from given or assumed propositions (premises)

  A=A / if A= B, then B=A / if A=B and B= C, then A = C

  (e.g. all dogs are animals; all animals have four legs; therefore all dogs have four legs)

- **Non contradiction principle etc…**

INTRODUCTION

THE genesis of the *Topica* is explained fully in the opening paragraphs, nor is there any reason to doubt the essential facts of the story or to assume that it is merely a literary artifice. Trebatius had found in Cicero's library at Tusculum a copy of Aristotle's *Topica*, and had asked Cicero to explain it to him. For a while Cicero declined, but finally, while sailing from Velia to Rhegium, composed the treatise entirely from memory. This is confirmed by the letter (*ad Fam.* vii, 19) which Cicero wrote from Rhegium on July 28, 44 B.C. and sent to Trebatius with the *Topica*.

So far so good. But we are immediately confronted with the problem of what Cicero was doing, and what he thought he was doing. The work professes to be a translation or adaptation of the *Topics of Aristotle*, with illustrations and examples from Roman jurisprudence, but it bears little resemblance to this treatise. True, some of the topics presented by Cicero can be discovered in Aristotle's *Topica*; more can be found in the list given in the twenty-third chapter of the second book of Aristotle's *Rhetoric*; still others are demonstrably later, and of Stoic origin. There is a further consideration that the same topics, classified according to the same scheme, are given in the *de Oratore*, II, 162–173.

Trebatius – Labeo and the role of the **jurists**

***Ius controversum* between Proculeians and Sabinians**

Law as a 'science'

Heylighen

Advantages of formal expressions:

- formal expressions allow **knowledge to be stored in the long term**
- capacity for **universal communication**
- **testability** of formalised knowledge

combination of the previous advantages leads to what is perhaps the most important benefit of all: **formal expression makes it easier to accumulate and improve knowledge**

Nonetheless it can be shown that complete formalization is impossible in principle. The reason for these restrictions is that the context cannot be eliminated:

- **The infinite regress of definitions**: the general problem is that you can only define expressions by means of other expressions which need to be defined themselves **- Gallo**: in **Kelsen's Pure theory of law a norm is the foundation of the validity of another norm.**

- **Primitive terms refer to the context:** to evade such an infinite regress is to stop with some terms that are considered primitive, in the sense that their meaning is assumed to be given – **Gallo: Kelsen's *grundnorm* is assumed – it is not possible to be demonstrated you have to accept it as a matter of faith!**)

- **Intrinsic limitation of the formal systems connected to the fact that formal systems retain a basic ambiguity… for instance…**

Heylighen

Gödel theorem states that in any formalism that encompasses numbers, there are expressions of which the truth or falsity cannot be proven within the formalism itself

Heisenberg Uncertainty Principle: the **observer perturbs the observed system** (observer effect) – **possible to be seen either the position or momentum**

Stoeva on Heisenberg Uncertainty Principle in Law:

when applied to law, Heisenberg's uncertainty principle of unavoidable indeterminacy would hold that:

An increase in a rule's precision at a definite time, decreases its accuracy in an indefinite future case, and vice versa

In 1794 Prussia enacted the "Preussisches Allgemeines Landrecht" that had more than 19.000 articles – however it did not solve the problem that all possible cases could have been solved on the basis of the legal text itself

Smith

The simple structures of the law are open to exploitation by opportunists. **Formal law provides information about where the line exactly is, and evaders can use this information** to take unforeseen advantage of the gap between the law's purpose and its literal terms.

- **Formalism comes in degrees**, and **different parts of the law can be pushed further towards the formal end of the spectrum than others**.
- We can also hypothesize that parts of the law can be as formal as they are because they are **backed up with a safety valve of anti-evasion intervention**

The safety valve can be for instance:

- Something like the **dinstinction between law and equity was theorised by Aristotles: Νόμος / ἐπιείκεια – then employed by the Anglo-American law** through the 'intermediation' of the **Chancellor (bishop)** who probably was **inspired by** its version reproduced in **Thomas Aquinas (Gordley)**

- Something like the 'general principles' such as the ***bona fides***, the **objective good faith** - the **诚实信用原则** (*chengshi xinyong yuanze*) **considered by the Chinese jurists as the 帝王条款** (*diwang tiaokuan*)

Lotman - Eco:

Cultures can be **governed by** a **system of rules or by** a **repertoire of texts imposing models of behaviour**.

In the former category, **texts are generated by combinations of discrete units** and are judged **correct or incorrect according to their conformity to the combinational rules**. [Those are therefore leveraging on the formal systems we were discussing above].

In the latter category, society directly generates texts, which constitute **macrounits from which rules can eventually be inferred**, **but** which initially and **most importantly propose models to be followed and imitated**.

Lotman - Eco:

A grammar-oriented culture depends on 'Handbooks', while **a text-oriented culture depends on The Book'**.

A handbook is a code which permits further messages and texts, whereas **a book is a text, generated by an as-yet-unknown rule which**, once analyzed and reduced to a handbook-like form, can suggest new ways of producing further texts

Roman Law (i.e. what we have been discussing so far) is an example of grammar-oriented culture, the so-called Common Law is an example of a text-oriented culture

Peter Stein: Bracton got his Roman law from the Glossators […] Bracton found a **legal grammar** with which he was able to **build up a picture of English law in substantive** rather than procedural terms

The legal grammar has been the ground that has been used by **China to build its 'new' legal system** by **combining 'scientific' notions and legal schemes** with **elements descending from its legal culture**

In the next classes we will look at the **Chinese ancient legal tradition** and then at **how this legal grammar has been metabolized in the light of the Chinese legal culture**: this is extremely important to **understand the nowadays Chinese law** as well as to **identify a methodology to deal with law in a 'global' perspective** (I use it at the China University of Political Science and Law to teach a course on Fundamentals of Transnational Contracts and International Arbitration).