III. Contributions from Guest researchers

Translating Ambiguity

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INTRODUCTION

The object of this paper is to demonstrate that language plays a key role in the development of a unique method of reasoning used by the Court of Justice of the European Union (CJEU), which has impacted on the development of EU law. The paper forms part of a larger study in which the author aims, through interdisciplinary research, to introduce a new facet to the current thinking on the development of the European Union (EU) legal order.[1]

In order to understand how EU law is made, how it is received in the member states and how it works therein, one needs an understanding of different legal orders, some from very different legal families, and the ways in which they interact with the supranational normative order which is EU law. The study and analysis of EU law is, therefore, at some level comparative law. However, the range of tools provided by comparative law, and by legal studies generally, is necessarily somewhat limited. In order to achieve a more holistic and nuanced understanding of the topic, one therefore also

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1 This study, entitled 'Law and Language at the European Court of Justice', has been funded by the European Research Council (ERC). The project, which examines the process behind the production of the CJEU's multilingual jurisprudence, runs from 2013–2018.

needs to use the tools provided by other disciplines. This paper approaches the study of EU law through the lens of the CJEU's multilingual 'jurisprudence' (case law).[2] To fully understand that jurisprudence one needs to take account of the linguistic and cultural compromises involved in its making. The only way to fully investigate the role played by language in the development of EU law is through interdisciplinary research.

The judgments of the CJEU exist in 24 languages.[3] It is obvious to anyone that translation is very important for the dissemination and application of that body of case law. However, the role of translation at the CJEU goes deeper than 'simply' converting judgments from the working language of that Court[4] into the other 23 EU official languages. Translation is, in fact, embedded in the process of drafting, reasoning and deciding a case before the CJEU. The translation of ambiguity between different legal cultures and types of legal reasoning, carried out in a multicultural and multilingual setting, is reflected in the CJEU's method of reasoning and consequently in its multilingual jurisprudence.

Achieving the object of this paper involves analysing the relationship between law, language and translation in the production of the multilingual jurisprudence of the CJEU. Such analysis is inherently interdisciplinary. Thus this paper, and the study of which it forms a part, is of considerable interest in terms of the use of interdisciplinarity in comparative law. It uses a range of methodological tools borrowed from disciplines outside of law, such as linguistics and anthropology. These disciplines traditionally pay little attention to each other but each can offer new ways of understanding how a multilingual, multicultural organisation works.

By providing a better understanding of the inner workings of the environment in which a significant part of EU law is created, this paper provides a starting point to allow scholars across disciplines to work towards delimiting the inconsistencies that inevitably arise in this distinctive,

2 In common law parlance, 'jurisprudence' generally refers to 'legal theory'. In this paper, however, 'jurisprudence' is used in the EU law sense (deriving from the French *jurisprudence*) to refer to the case law of the CJEU, including the non-binding opinions delivered by Advocates General.

3 The 24 EU official languages. These are, in English alphabetical order: Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovakian, Slovenian, Spanish and Swedish. The official order of these languages is to list them according to the way they are spelled each in their own language.

4 The working language of the Court is French. For details of the Court's language policy see below.

multilingual legal system. More generally, the larger study of which this paper forms a part will develop a better, more nuanced understanding of EU law.

WHAT CAN INTERDISCIPLINARY RESEARCH BRING TO THE STUDY OF EU LAW?

Historically, the EU constitutional narrative centred on harmonisation (if not unification) and uniformity, for the sole purpose of serving the European *integrationist* cause.[5] Differences and diversity in the integration process were perceived as obstacles 'originally to free trade and then to [...] integration as such'.[6]

For many reasons, this constitutional vision became increasingly inadequate as a model.[7] Gradually, the EU constitutional narrative has been reworked and developed and today centres on *constitutional pluralism*. However, the meaning of that term has yet to be fully elaborated and clearly defined. In fact, it appears to mean different things to different scholars, from Kumm's theory of 'best-fit universal constitutionalism',[8] to the 'harmonious-discursive constitutionalism' developed by Maduro,[9] and Walker's theory of epistemic meta-constitutionalism.[10] Nonetheless, all of these concepts of constitutional pluralism share an important quality: they each present a theoretical take on EU integration based on analysis of the

5 Cf Avbelj, M (2008) 'Questioning EU Constitutionalisms' (9) *German Law Journal* 1.

6 Avbelj, M and Komarek, J (2008) 'Spaces of Normativity: Four Visions of Constitutional Pluralism' (2) *European Journal of Legal Studies* 325 at 326.

7 Cf Avbelj 'Questioning EU Constitutionalisms' supra note 5 at 2.

8 Kumm, M (1999) 'Who is the Final Arbiter of Constitutionality in Europe?: Three Conceptions of the Relationship between the German Federal Constitutional Court and the European Court of Justice' (2) *Common Market Law Review* 351; Kumm, M (2005) 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty' (12) *European Law Journal* 262.

9 Maduro, MP (2003) 'Contrapunctual Law: Europe's Constitutional Pluralism in Action' in Walker, N (ed) *Sovereignty in Transition* Hart 501.

10 Walker, N (2002) 'The Idea of Constitutional Pluralism' (65) *Modern Law Review* 317. For further elaboration of this discussion see also Baquero Cruz, J (2008) 'The Legacy of the Maastricht-Urteil and the Pluralist Movement' (14) *European Law Journal* 389; Maduro, MP (2003) 'Europe and the Constitution: What If This Is as Good as It Gets?' in Weiler, JHH and Wind, M (eds) *European Constitutionalism Beyond the State* Cambridge University Press 74.

development of a European rule of law, drawing on theories of law and judicial reasoning.

Much of that analysis focuses, of course, on the decisions of the CJEU, since it is generally accepted that much of the 'constitutional' law of the EU has been developed through the jurisprudence of that Court. The extensive bodies of literature on the CJEU (notably the political science and legal bodies of literature) focus on its role in developing the EU legal order. The legal literature is generally concerned with analysing the legal logic behind the CJEU's rulings and discussing the ways in which the CJEU can affect policy changes in the EU, insofar as practice may have to change to comply with a particular ruling. The political science literature, on the other hand, is interested in 'judicial politics', the policy dynamics that can be inferred from the CJEU's decisions and in examining the political context and consequences of those decisions.[11]

However, each of these bodies of literature remain predominantly focused on the decisions of the CJEU and on judicial reasoning/investigating the reasons or motivation behind those decisions.[12] In other words, much has been written on *why* the Court makes certain decisions and the effects of those decisions, but there has been very little research into *how* its multilingual jurisprudence is produced.[13]

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11 Cf Harmsen, R and McAuliffe, K (forthcoming 2014) 'The European Courts' in Magone, JM (ed) *Routledge Handbook on European Politics* Routledge.

12 Ibid.

13 With the exception of work by the present author. See, in particular: McAuliffe, K (2011) Hybrid Texts and Uniform Law? The Multilingual Case Law of the Court of Justice of the European Union (24) *International Journal for the Semiotics of Law* 97; McAuliffe, K (2012) 'Language and Law in the European Union' in Solan, L and Tiersma, P (eds) *The Oxford Handbook of Language and Law* Oxford University Press; McAuliffe, K (2010) 'Language and the Institutional Dynamics of the Court of Justice of the European Communities: Lawyer-Linguists and the Production of a Multilingual Jurisprudence' in Gueldry, M (ed) *How Globalizing Professions Deal with National Languages: Studies in Cultural Conflict and Cooperation* The Edwin Mellen Press 239; McAuliffe, K (2009) 'La traduction dans l'office des juges européens' [Translation at the European Court of Justice] in Ost, F and Bailleux, A (eds) *La construction des droits européens et le paradigme de la traduction: Enjeux d'une rencontre* [Constructing EU Law and the Translation Paradigm] Facultés Universitaires Saint Louis 39; McAuliffe, K (2009) 'Translation at the Court of Justice of the European Communities' in Oslen, F and Stein, D *Translation Issues in Language and Law* New York: Palgrave Macmillan; McAuliffe, K (2008) 'Enlargement at the Court of Justice of the European Communities: Law, Language and Translation' (14) *European Law Journal* 806; McAuliffe, K (2013) 'The Limitations of a Multilingual Legal Order' (26) *International Journal for the Semiotics of Law* 861.

If we step away from legal scholarship and look to other disciplines, we can begin to understand that the question of '*how*'—the process of producing the Court's jurisprudence – is a very relevant concern. And that process of looking at other disciplines also helps us to understand why it is relevant.

In recent years anthropologists and sociologists have shown a great interest in EU institutions, in particular the European Parliament and Commission.[14] Various studies and ethnographies of those institutions have been carried out.[15] Such studies, many based on periods of fieldwork research in the services of the European Parliament and Commission, provide a valuable insight into the workings of those institutions. While the activities of those European institutions in Brussels demonstrate that people of many different nationalities, languages and cultures can work together, anthropological studies show *how* they work together. As Bellier and Wilson point out: 'Anthropological methods and practice offer insights into the ways in which culture and identity are problematized within EU institutions, and they clarify how EU institutions, policies and agendas produce new forms of European culture and identity, as well as affect some old ones.'[16]

Although a notion of a common 'European' culture has not (yet) been successfully cultivated in the hearts and minds of EU citizens,[17] perceptions of the EU institutions are entirely different. There exists the idea that the EU institutions create spaces of identity that transcend the logic of nationalism, and that Europe's de-territorialized and de-nationalised supranational civil servants embody a distinctly 'European' ethos and

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14 In particular work by Irène Bellier and Marc Abélès, see below at note 21.

15 Indeed, the European Commission even employed a team of anthropologists to complete a year-long study of that institution in the early 1990s: Abélès, M, Bellier, I and McDonald, M (1993) 'Approche anthropologique de la Commission européenne' [An Anthropological Approach to the European Commission] *Brussels: Commisison Européenne*.

16 Bellier, I and Wilson, TM (2000) 'Building, Imagining and Experiencing Europe: Institutions and Identities in the European Union' in Bellier, I and Wilson TM (eds) *An Anthropology of the European Union: Building, Imagining and Experiencing the New Europe* Berg 1 at 3–4.

17 See for example: Shore, C (1998) 'Creating Europeans: The Politicization of "Culture" in the European Union' *Anthropology in Action* 5 at 11; Shore, C (2001) 'European Union and the Politics of Culture' *The Bruges Group Occasional Papers*; Shore, C (2000) 'Forging a European *Nation*-state? The European Union and Questions of Culture' in Shore, C (ed) *Building Europe: The Cultural Politics of European Integration* Routeledge..

morality. Indeed, the EU civil service presents itself as a cosmopolitan, multilingual and multicultural organisation that has succeeded in creating 'an organisational culture that harmoniously blends together the different administrative traditions of its member states to form a 'European' model of civil service with its own distinctive identity and ethos.'[18] The 'culture' literature that has developed on the European Parliament and Commission investigates the extent to which those EU civil servants embody the kind of 'Europeanist' ethos and identity espoused in their own official documents and proclamations. The general consensus in that literature is that, although they present themselves as unique and unitary, the European Union institutions are, in fact, 'riddled with many different currents deriving from outside [those institutions] and reflecting the national origins, ideologies, and politics of individuals within [them]'.[19]

Those working in EU institutions appear to be engaged in a process of 'translating' cultural and professional norms from their own backgrounds and national environments, which in turn allows those multilingual, multicultural organisations to function relatively efficiently. The resulting mixture of professional norms and cultures thus 'translated', together with the internal dynamics of the institutions, contributes to the development of particular methods of working within those institutions. The norms and conventions that have emerged from such methods of working have formed the basis for the development of what is arguably a new professional culture: '*les métiers de l'Europe*' (professions of Europe).[20]

It is interesting to note the significance of culture, identity and language in the policies, actions and day-to-day life of the institutions. Much has been written about the impact of those factors on the organisation and activities of those institutions.[21] In spite of the fact that EU institutions are

18 Shore 'European Union and the Politics of Culture' supra note 17 at 10.

19 Bellier, I (1997) 'The Commission as an Actor: An Anthropologist's View' in Wallace, H and Young, AR (eds) *Participation and Policy-Making in the European Union* Clarendon Press 91 at 93.

20 Cf. Georgakakis, D (2002) *Les métiers de l'Europe politique: Acteurs et professionnalisations de l'Union européenne* Collection sociologie politique européenne Strasbourg: Presses universitaires de Strasbourg.

21 Bellier, I and Wilson, TM (2000) 'Building, Imagining and Experiencing Europe: Institutions and Identities in the European Union' in Bellier, I and Wilson TM (eds) *An Anthropology of the European Union: Building, Imagining and Experiencing the New Europe* Berg; Bellier, I (2000) 'A Europeanized Elite? An Anthropology of European Commission Officials' (14) *Yearbook of European Studies* 135; Bellier I (1997) 'The Commission as an Actor: An Anthropologist's View' in Wallace, H and Young, A (eds) *Participation and Policy-Making in the European Union* Claren-

staffed by individuals from member states with diverse social and educational backgrounds, languages and cultures, each institution is, by its very nature, 'obliged to express itself with a single voice'.[22] This obligation presupposes that it has resolved any internal conflicts deriving from technical considerations and differing political approaches to similar phenomena.[23]

The question for anthropologists is: how exactly do the EU institutions resolve those conflicts? Abélès and Bellier make the point that *process* necessarily affects *output*.

In the context of the European Parliament and Commission the process involves a cultural compromise, through which European civil servants are able to work together in the unique hybrid environment of those institutions. The output necessarily affected by that cultural compromise relates to the resulting culture of compromise visible in the policies and actions of those institutions.

Those anthropological studies also note the development of a hybrid 'eurolanguage' within the institutions, which is the linguistic manifestation of the cultural compromise by which the institution works. In her work on the European Commission, Bellier points out that this 'eurolanguage' functions perfectly well within that institution but can create problems when the Commission engages in discourse with the outside world.[24]

The literature on the CJEU focuses on its output: its decisions, and what those decisions themselves tell us about the CJEU's reasoning and motivation. However, that literature largely ignores the process through which actors at the CJEU produce those decisions. While there have been some attempts to discuss the cultural aspects of life at the CJEU,[25] such works have been few and far between, and generally deal with culture and language in an incidental manner only. However, since much of the EU's 'consitutional' law was developed through decisions of the CJEU, and

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don Press; Abélès, M (2004) 'Identity and Borders: An Anthropological Approach to EU Institutions' (2) *Twenty-First Century Papers: Online Working Papers from the Center for 21st Century Studies* 1; Abélès, M; Bellier, I and McDonald, M (1993) *Approche anthropologique de la Commission européenne [An Anthropological Approach to the European Commission]* Commission européenne.

22 Bellier, I (2000) 'A Europeanized Elite? An Anthropology of European Commission Officials' (14) *Yearbook of European Studies* 135 at137.

23 Ibid.

24 Bellier 'The Commission as an Actor' supra note 19 at 12.

25 See, for example, Edward, DAO (1995) 'How the Court of Justice Works' (6) *European Law Review* 539; Mancini, GF and Keeling, DT (1995) 'Language, Culture and Politics in the Life of the European Court of Justice' (1) *Columbia Journal of European Law* 397.

in light of the anthropological literature briefly discussed here, it is reasonable to presume that the process behind the production of that Court's multilingual jurisprudence could have implications for the development of EU law. Understanding the situational factors of, and compromises involved in, the production of such jurisprudence could therefore aid our understanding of EU law.

The Need to Consider Language

While interdisciplinary work using methodological tools borrowed from disciplines such as anthropology may allow the operation of the CJEU to be investigated in cultural terms, the question of *language* is particularly relevant in the CJEU.

Reality, of course, exists independently of language, but the description and 'truth' of that reality are properties of language. Language does not automatically mirror reality. To put it another way, there are no core features of language that refer to the essence of entities that exist in reality.[26] 'To say that truth is not out there is simply to say that where there are no sentences there is no truth, that sentences are elements of human languages, and that human languages are human creations'.[27]

Linguistic theory claims that languages constitute cultures. Often, the same communicative systems exist across cultures, but the form and content of those systems are not identical, because different languages represent reality in different ways.

Law can be considered a culture-specific communicative system.[28] Legal concepts and legal language arise from the application of the linguistic resources of the legal communicative system to real life situations. In that process certain areas of life are 'juridified', i.e. they are described in terms of words used in the law, and turned into legal concepts.[29] Those legal concepts are usually specific to a particular legal culture.[30]

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26 Busse, B (2010) 'Recent Trends in New Historical Stylistics' in McIntyre, D and Busse, B (eds) *Language and Style: In Honour of Mick Short* Palgrave Macmillan 32.

27 Rorty, R (1989) *Contingency, Irony and Solidarity* Cambridge University Press at 5.

28 Vermeer, HJ (2006) *Luhmann's 'Social Systems' Theory: Preliminary Fragments for a Theory of Translation* Frank & Timme.

29 Ibid., 38.

30 Much has been written about the concept of legal culture. Credit is generally given to Lawrence Friedman for coining the term in the mid-1970s. Cf Friedman, L (1975) *The Legal System: A Social Science Perspective* Russell Sage Foundation.

Therefore, when comparing communicative systems, or legal cultures, it is not enough to engage in a comparison of legal theories without taking account of the significant role that language plays in the development of law. For that reason, in the context of comparative law, an engagement with translation theories, and legal translation in particular, is important, since the flow of information between legal systems takes place through translation.

In translation theory a distinction exists between translation through 'domestication' and 'foreignisation'.[31] The former refers to conforming to the conventions of the target language, whereas the latter refers to departing from those conventions and following the conventions of the source language. However, whichever strategy is used, translation is almost invariably 'into the internal language' of a target system.[32] In other words, in legal translation, expressions from a foreign legal system are almost always interpreted in terms of expressions that exist in the target legal system.

Problems in legal translation generally arise because legal systems conceptualise reality in different ways. Legal translators do not translate *words*. They translate terms embedded in specific cultural models. Legal systems reflect principles and values that underlie the organisation of a society. This is why the translation of legal rules is considered not as a translation of words or ideas but as an import of foreign methods of organisation of a society.[33]

Legal translation is thus concerned with comparative law and the incongruency of legal systems: elements of one legal system cannot simply be transposed into another legal system.[34] In legal translation the comparison of legal terms precedes their translation. Legal translators must compare the meaning of terms in the source and target legal systems, which will

31 Venuti, L (1995) *The Translator's Invisibility: A History of Translation* Routledge.

32 Lotman, YM (2005) 'On the Semiosphere' *Sign Systems Studies* 205 at 210.

33 Kjaer, AL (1994) 'Zur kontrastiven Analyse von Nominationsstereotypen der Rechtssprache deutsch – dänisch' [Contrastive Analysis of Nomination Stereotypes in Legal Language: German-Danish] in Sandig, B (ed) *Tendenzen der Phraseologieforschung* [Phraseology Research Trends] Universitätsverlag Brockmeyer 317 at 321.

34 Sarčević, S (1997) *New Approach to Legal Translation* Kluwer Law International at 12–14.

make them aware of similarities and differences in their use across languages.[35]

It would seem therefore that legal translation is, at best, an approximation. Indeed, many lawyers acknowledge that this is so and that equal meaning and exact translations between legal texts are illusions that cannot be achieved in practice.[36] Thus, many claim that the task of the legal translator is 'to make the foreign legal text accessible for recipients with a different (legal) background'.[37] However, that claim only works with regard to texts that do not have force of law in the target language. It is certainly not true in the case of multilingual supranational law, and EU law in particular. In the context of EU law 'the ultimate goal of legal translation is to produce parallel texts that will be interpreted and applied uniformly by the courts'.[38] The CJEU, therefore, aims to produce statements of law that *will have the same effect* throughout all EU member states, in every language in which they are published, and through such statements to ensure the uniform application of EU law. So the CJEU considers that there is one 'communicative system' within the EU, albeit expressed in 24 linguistic forms, across 28 different legal cultures.

> It must be borne in mind that [EU] legislation is drafted in several languages and that the different language versions are all equally authentic. An interpretation of a provision of [EU] law thus involves a comparison of the different language versions. It must also be borne in mind, even where the different language versions are entirely in accord with one another, that [EU] law uses terminology which is peculiar to it. Furthermore, it must be emphasized that legal concepts do not necessarily have the same meaning in [EU] law and in the law of the various Member States.[39]

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35 Sandrini, P (2009) 'The Parameters of Multilingual Legal Communication in a Globalized World' (1) *Comparative Legilinguistics. International Journal for Legal Communication* 39.

36 Didier, E (1990) *Langues et langages de droit: etude comparative des modes d'expression de la common law et du droit civil, en français et en anglais* [Languages and Legal Languages: A Comparative Study of Common and Civil Law Modes of Expression, in French and English] Montreal: Wilson & Lafleur Itée at 154. See also below.

37 Pommer, SE (2012) 'The Hermeneutic Approach in Legal Translation' in Cercel, L and Stanley, J *Unterwegs zu einer hermeneutischen Übersetzungswissenschaft. Radegundis Stolze zu ihrem 60. Geburtstag* [Towards Hermeneutic Translation. Radegundis Stolze on her 60th Birthday] Tübingen: Narr 274 at 283.

38 Šarčević, S *New Approach to Legal Translation* at 1.

39 Case 23/81 *CILFIT* [1982] ECR 3415.

Although the relationship between semiotics, translation and linguistic theories and their interaction with the law has recently been the subject of important research and academic debate, the linguistic perspectives of supranational adjudication in the European context is a relatively new field of research. While much scholarship on language and EU law has focused on the CJEU, it tends to mainly involve questions of language policy and regime, interpretation of multilingual legislation and pragmatic or logistical concerns.[40] To date there has been no systematic study which has taken account of the fact that the jurisprudence of the ECJ consists primarily of collegiate judgments drafted by jurists in a language that is generally not their mother tongue, undergoes many permutations of translation into and out of up to 24 different languages, and is necessarily shaped by the way in which that Court functions as a multilingual, multicultural

40 Some examples of the existing literature concerning language and the Court of Justice include: Legal, H (2005) 'Le contentieux communautaire de la concurrence entre contrôle restraint et pleine jurisdiction' [Community Competition Litigation Between Limited and Full Review] (2) *Concurrence*; Mancini, GF (1995) 'Crosscurrents and the Tide at the European Court of Justice' (2) *Irish Journal of European Law* 120; Mancini and Keeling 'Language, Culture and Politics in the Life of the European Court of Justice' supra note 23 at 16; Barents, R (1997) 'Law and Language in the European Union' (1) *EC Tax Review* 49; Boulouis, J (1991) 'Quelques réflexions à propos du langage juridique communautaire' [Some Reflections on the Community Legal Language] (14) *Droits: Revue française de théorie juridique* 97; Usher, JA (1998) 'Languages and the European Union' in Anderson, M and Bort, E (eds) *The Frontiers of Europe* Pinter 222; Wainwright, R (2002) 'Drafting and Interpretation of Multilingual Texts of the European Community in Sacco, R (ed) *L'interprétation des textes juridiques rédigés dans plus d'une langue* [Interpreting Legal Texts Drafted in More than One Language] L'Harmattan Italia and Isaidat 320; Berteloot, P (1988) 'Babylone à Luxembourg: Jurilinguistique à la Cour de Justice des Communautés Européennes' [Babylon in Luxembourg: Lawyer-linguists at the Court of Justice of the European Communities] (136) *Vorträge, Reden und Berichte aus dem Europa-Institut* [Lectures, Speeches and Reports from the European Institute] 3; Gallo, G (1999) 'Les juristes linguistes de la Court de Justice des Communautés européennes. Quelques aspects de leurs activities' [Lawyer-linguists at the Court of Justice of the European Communities] in Sacco, R and Castellani, L (eds) *Les multiples langues du droit européen uniforme* [The Many Languages of Uniform European Law] 71; Mullen, PF (2000) 'Do You Hear What I Hear? Translation, Expansion and Crisis in the European Court of Justice' in Green Cowles, M and Smith, M (eds) *The State of the European Union: Risks, Reform, Resistance, and Revival* Oxford University Press 246; Sevón, L (1998) 'Languages in the Court of Justice of the European Communities' in *Scritti in onore di Giuseppe Federico Mancini* [Essays in Honour of Giuseppe Federico Mancini] Giuffré 933.

organisation, as well as the fact that its 'authentic' judgments, as presented to the outside world, are for the most part *translations*.[41]

Taking account of all of those factors requires a level of interdisciplinary research not often seen in legal scholarship on EU law. However, through such research we can gain a more nuanced understanding of the development of that law.

METHODOLOGY

One inherent problem with interdisciplinarity is that there are no clear boundaries delineating separate fields (the 'boundary problem'). Designing an interdisciplinary research methodology can, therefore, be challenging.

The debate about what it means to be 'interdisciplinary' is an ongoing one, with many conflicting definitions and descriptions. One interesting metaphor by which 'interdisciplinary research' has been described relates to food. One may prefer a salad, or soup.

In the salad metaphor, that salad is made up of data from different disciplines. Research is carried out within separate disciplines and each discipline remains independent and autonomous. The data from all of the research is then brought together in a final analysis, but each element can be identified and relatively easily separated from the rest – like the ingredients in a salad.

In the soup metaphor, the basic ingredients, in the form of different disciplines, are the same as those in the salad. However, the way in which they are mixed together is very different. Methodologies borrowed from one field are used in the same or in a different way in another. Different types of analysis come together across disciplines. In that case, the elements in the final analysis cannot be so easily identified or separated.

Both methods can produce a delicious meal, and one cannot claim that either is 'better' than the other. They are merely different.[42]

In spite of the boundary problem and other difficulties, many scholars agree that interdisciplinary research adds something to the various relevant fields. Staying with the soup/salad metaphor: the individual ingredients

41 The ERC-funded project *Law and Language at the ECJ* (supra note 1) carries out such a systematic study.

42 This colourful and insightful description of interdisciplinary research was excellently articulated by Joxerramon Bengoetxea during a workshop on European Case Law Methods 'In Action', hosted by the iCourts Centre of Excellence and the Faculty of Law at Copenhagen University in April 2013.

taste well on their own (are interesting, insightful, analytical), and, when those ingredients are combined, whether in soup or a salad, they produce something new and completely different. So many scholars continue to do interdisciplinary work. However, choosing the disciplines to use in such work, and which methods to employ when using those disciplines, is not always easy.

Various considerations determined the methods chosen for this paper. The choices were premised on the notion that the dynamics within the CJEU, and the perceptions of those who work there of their own professional environment, shape the culture of that institution. In order to understand and analyse such an institutional culture, one must understand the priorities and preoccupations of those who work there.

This paper presents an analysis of cultural compromises and translation of norms within the CJEU, which is similar in many ways to the anthropological research carried out by Marc Abélès and Irène Bellier. However, it differs from that work in a number of respects. Abélès and Bellier investigated the significance of culture, identity and language in the policies, actors and day-to-day life of the European Parliament and Commission. Their focus was on the extent to which EU institutions create spaces of identity that transcend the logic of nationalism and the extent to which EU civil servants (in the European Commission in particular) embody a kind of 'Europeanist' ethos and identity. In that respect they were concerned specifically with Members of the European Parliament (in the case of Abélès) and EU civil servants (in the case of Bellier). This paper, however, concerns the CJEU from an overall standpoint, with a focus on those responsible for drafting and translating the jurisprudence of that Court. More specifically, the paper investigates how and by whom the CJEU's multilingual jurisprudence is produced and developed and the impact that language may have on that jurisprudence.

The following analysis is based on participant observation and interviews with actors at the CJEU.[43] Participant observation involved observing the interactions among lawyer-linguists, and between those lawyer-linguists and members of the Court and their référendaires, both in professional contexts such as meetings, seminars, as well as in more informal contexts such as Court social functions, coffee breaks, lunchtimes; engaging to some extent in those activities; interacting with participants socially;

43 The interview sample consisted of 78 interviewees in total (56 lawyer-linguists; 5 judges; 3 advocates general and 14 référendaires).

and identifying and developing relationships with key stakeholders and gatekeepers.

To overcome any inherent bias in the data obtained though participant observation, the findings were triangulated with existing literature concerning the CJEU, concepts developed in translation theory literature and with the findings of comparable studies carried out in other EU institutions.[44]

This interdisciplinary research adds a new dimension to the literature on EU institutions, and in particular the CJEU, by highlighting the contribution made to the institutional culture of that Court by those who draft and translate its jurisprudence and effectively give that Court its 'voice'.[45]

MULTI-LAYERED LINGUISTIC CULTURAL COMPROMISES IN EU LAW?

Unlike the other EU institutions, the CJEU operates using a single internal working language – French. For every action before the CJEU there is a language of procedure (which can be any one of the 24 official EU languages). The language of procedure must be used in the written submissions or observations submitted for all oral submissions in the action. The language of procedure must also be used by the CJEU in any correspondence, report, or decision addressed to the parties in the case. Only the texts in the language of procedure are authentic, which means that, in most cases, the 'authentic' version of a judgment will be a translation of the original judgment, which was drafted and deliberated on in French.[46]

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44 In particular those carried out by Marc Abélès and Irène Bellier, on the European Parliament and Commission, see supra at 21.

45 The ERC-funded project, of which this paper forms a part, borrows methodologies and different types of analysis from diverse fields. It combines reviews of existing literature (in law, political science, linguistics, translation and cognitive psychology) with linguistic analysis of texts such as judgments and opinions (in particular, concordance analysis using KWIC coding; syntactic and cognitive linguistic analysis; and comparative semantic analysis). Furthermore, over a period of 5 years, participant observation with those responsible for drafting and translating those documents, together with in-depth interviews with actors at the CJEU as well as with national judges, lawyers and EU commentators, will inform a comprehensive analysis of how the CJEU works as a multilingual, multicultural organisation.

46 *Cf.* McAuliffe, K (2012) 'Language and Law in the European Union' in Solan, L and Tiersma, P (eds) *The Oxford Handbook of Language and Law* Oxford University Press.

The following analysis deals first with the drafting of judgments in the internal language of the CJEU and then goes on to consider the translation of those judgments. The institutional dynamics of the CJEU, relationships between its actors and any 'cultural compromises' that may exist within that multilingual, multicultural organisation all affect the way in which that Court functions and consequently affect its 'output'.

Linguistic Cultural Compromises in Drafting

Each judge and advocate general of the CJEU has a '*cabinet*',[47] a small team of personal legal assistants and secretaries working exclusively for him or her. The legal assistants are known as *référendaires*,[48] and they work very closely with the individual judge or advocate general by whom they have been employed, carrying out preliminary research on a case, drawing up procedural documents, preparing first drafts of judgments, and so on. The role of the *référendaire* at the CJEU has been compared with that of the *Conseiller-référendaire* of the French *Cour de Cassation* (a judge attached to that court to assist its senior members)[49] and with the law clerk of the American judicial system.[50]

There are currently 37 cabinets at the CJEU (28 judges' *cabinets* and 9 advocates general's *cabinets*) and 28 *cabinets* at the General Court. The role of the *référendaire* is principally to assist the judge or advocate general in drafting documents such as reports, judgments, opinions and, in the case of the Presidents of the CJEU and the General Court, orders.

However, that role differs to a considerable degree depending on whether the référendaire in question works for the President, another

47 While '*cabinet*' may be translated into English as 'chambers', the French term is used throughout this paper for two reasons: first, to avoid confusion with the use of the word 'Chamber' for a subdivision of the CJEU; secondly, unlike the English word 'chambers', '*cabinet*' in the context of the CJEU is used to refer both to the judge's or advocate general's suite of rooms and to the staff working there.

48 The personal legal assistants who work for the judges and advocates general at the CJEU. Again, the French word '*référendaire*' is used throughout this paper instead of the English translation 'legal secretary', since it is by that title that those assistants are known within the Court, the working language being French.

49 See Brown, N and Kennedy, T (2000) *The Court of Justice of the European Communities* (5th ed) Sweet & Maxwell at 23.

50 See Kenney, SJ (2000) 'Beyond Principals and Agents: Seeing Courts as Organizations by Comparing Référendaires at the European Court of Justice and Law Clerks at the US Supreme Court' (33) *Comparative Political Studies* 593.

judge or an advocate general. The analysis in the present paper focuses only on the production of judgments by the 28 judges cabinets at the CJEU.

Once a case has been assigned to a judge (the judge rapporteur), the *référendaire* dealing with that case will open a file and wait for the submissions to be lodged at the registry of the Court and, where necessary, translated into French. Following the delivery of the advocate general's opinion (where relevant),[51] the judge rapporteur may then begin to draft the judgment. In reality, it is the *référendaire* assigned to the case who drafts, at least the first version, of that judgment.[52] All of the *référendaires* interviewed for the present paper claimed that they had to be 'generalists' who are 'knowledgeable about every area of EU law'. In addition, they have to be able to understand and use their EU law knowledge in French, a language that may not be (and in most cases is not) their mother tongue.

Although the majority of *référendaires* interviewed claimed to find it relatively non-problematic to draft in French, it nonetheless has an impact on the linguistic development of the CJEU's case law in a number of ways.[53]

First, while they certainly draft in French the *thinking process* behind that drafting, for many référendaires, is done in their own mother tongue. Consequently the legal reasoning applied by those *référendaires* is based on the legal reasoning embedded in their national legal systems:

> REFERENDAIRE: all of my own reasoning and thinking about the case is done in my own language and then put into French when I come to the writing stage.
> REFERENDAIRE: I cannot apply legal reasoning from outside of my own legal system because I am of course thinking in my own language. I suppose that this can be seen if you look closely at the judgments that I have written.

Such legal reasoning and its associated concepts are developed through intellectual reasoning processes in a particular cultural context, and then expressed in a legal language that develops along with a particular legal order. Language plays a significant role in Friedman's concept of law as

51 An opinion is not given in every case before the CJEU. Since 2004, if a case raises no new questions of law, then an advocate general's opinion is not necessary.

52 In many *cabinets* the preliminary report, and sometimes even the judgment, begin to be drafted as soon as all of the parties' submissions have been lodged, i.e. without waiting for translation of the relevant documents.

53 Cf McAuliffe 'The Limitations of a Multilingual Legal Order' supra note 13.

a system or product of social forces. In his view of legal culture, the law is itself a conduit of those same forces and can be expressed only through the language bound to a particular legal order.[54] It is almost impossible to separate a particular type of legal reasoning from the legal language in which that reasoning is embedded. As Barbara Pozzo points out: a legal scholar is 'reined in' by his or her own legal language.[55]

In addition to that, however, many of the référendaires interviewed reported working from glossaries that they had constructed themselves on the basis of 'the settled case law of the Court':

> REFERENDAIRE: as a starting point […] I scan my glossary of French terms and phrases frequently used by the Court and find something that covers the gist of what I want to say.
> REFERENDAIRE: I will usually have a basic idea in my head of the direction I want to go in and what I want to say and then I use the set phrases that I have collated in my glossary to start me off and shape what I write.

Working in French thus has a clear impact on the linguistic development of the CJEU's case law. On the one hand, although the *référendaires* are working in French and applying EU law, they are reined in by their own legal language and the legal reasoning embedded therein. On the other hand, however, it is clear that the legal reasoning they employ at the CJEU is not fully transposed from their respective national legal systems. Indeed, it would be simplistic to suggest that individual CJEU judgments follow and reflect clear differences between the various legal families and systems that make up the EU member states. As Bengoetxea points out, the CJEU rarely explicitly engages in comparative legal analysis.[56] However, as a number of référendaires explained:

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54 Cf supra note 30.

55 Pozzo, B (2006) 'Multilingualism, Legal Terminology and the Problems of Harmonising European Private Law' in Pozzo, B and Jacometti, V (eds) *Multilingualism and the Harmonisation of European Law* Kluwer Law International 3 at 9.

56 Bengoetxea, J (2011) 'Multilingual and Multicultural Legal Reasoning: The European Court of Justice' in Kjær, AL and Adamo, S (eds) *Linguistic Diversity and European Democracy* Ashgate 97 at 108. The fact that judgments of the CJEU rarely show a trace of comparative reasoning does not mean that no such reasoning has been employed. The CJEU's Research and Documentation Service often produces comparative reports on specific points of law on the request of the Members of the CJEU (Ibid at 109 footnote 29).

> REFERENDAIRE: the various different legal systems and cultures of those drafting the judgments […] have enriched the case law of the Court and contributed to the development of that case law.

The data presented here supports Bengoetxea's submission that the reasoning employed in those judgments is monolingual, but multicultural, and unique to an autonomous supranational EU legal culture.

Another impact on the linguistic development of the CJEU's case law brought about because those drafting the judgments are generally not of French mother tongue, is that: there is (and always has been) a tendency to use the same expressions over and again.

> REFERENDAIRE: because we are writing in a foreign language there is a tendency to do a lot of 'cutting and pasting' and so the style [in which the Court's judgments etc are written] reproduces itself.
> REFERENDAIRE: if something along the lines of what I want to say has been said before by the Court, then I will just use that same expression – I'll 'cut and paste' it.

There are a number of other reasons for that tendency towards repetition of phrases. Some argue that since the CJEU is building up an EU rule of law, it is necessary to use the same terminology consistently throughout that case law:

> REFERENDAIRE: what you are dealing with is the rule of law in a legal system that is still developing, therefore it is important to use the same terminology and phrases all of the time, in particular because that legal system is expressed in many different languages.
> REFERENDAIRE: We *must* draft using the language that has been used by the Court for over 50 years (interviewee's emphasis).

Also, the *référendaires* are encouraged to use the same terminology and to cite phrases from previous cases in their entirety in order to speed up the translation process. Sentences and phrases taken directly from previous judgments will already have been translated and those translations can be retrieved by computer software.[57] That reduces the number of words

57 That software, known as 'Generic Text Interface' (GTI), simply searches for words or phrases. It cannot identify context. (Note: at the time of publication the CJEU is developing its own translation software).

that must be translated in a given judgment and consequently reduces the turnover time for that judgment.[58]

> REFERENDAIRE: it has become important to cite entire phrases from previous judgments or even from preliminary reports instead of merely referring to them or paraphrasing. Then that phrase will be translated sentence-for-sentence since there is the danger that the text 'pulled up' by the [computer software] might not fit into the context of the case in hand unless every single word is exactly the same. There is a huge pressure for one single word to be translatable into another single word.

One interesting result of *référendaires* feeling bound by the language previously used by the CJEU is that a type of precedent is developing in judgments of that Court, in spite of the fact that no such rule actually exists within the EU court system:[59]

> REFERENDAIRE: On paper the decisions [of the CJEU] are not binding on future decisions, but because there is so much repetition between cases and because we are under pressure to cite entire phrases from previous judgments, it seems that precedent [in CJEU judgments] is sometimes more binding than in common law countries!

Another factor that affects the way in which CJEU judgments are drafted, and thus impacts on the linguistic development of the CJEU's case law, is the collegiate nature of those judgments. Because a final judgment is a collegiate document, there are often compromises embedded in it. However, because the deliberations of the CJEU are secret and no dissenting opinions are published, it is impossible for anyone other than the judges involved in those deliberations to know where such compromises lie in the text. As many of the *référendaires* interviewed commented:

> REFERENDAIRE: you don't always know which have been the 'contentious' points in the deliberation […] or how important a specific wording of a particular phrase may be […] therefore it is safer just to stick with phrases that may sound awkward or badly-worded instead of changing them to sound better or more clear.

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58 One of the most significant challenges faced by the CJEU today is that of its increased workload. See Harmsen and McAuliffe 'The European Courts' supra note 11 at 8.

59 Cf McAuliffe, K (2013) 'Precedent at the ECJ: The Linguistic Aspect' (15) *Current Legal Issues* 483.

It is thus clear that, regardless of the level of fluency in, or command of the French language of, those drafting the judgments of the CJEU, the fact that they are working in a language that is not their mother tongue has an effect on the linguistic development of that court's case law. In fact *all* of those interviewed for the present paper commented that the CJEU's judgments are 'shaped by the fact that the working language at the Court is French'. That 'French' is not quite the language of the French *Cour de Cassation*, nor the French legal language as used in France, Belgium or Luxembourg. The many cultural compromises involved in the drafting process and the multlicultural reasoning employed in producing the case law are reflected in a French unique to the CJEU:

> JUDGE: The status of French at the Court has forced it to become more supple, leading to the development of 'Court French'.
> REFERENDAIRE: 'Court French' is its own unique language! For example, the phrase '*prester un service*' is used by the Court [instead of, eg '*executer*' or '*fournir*'] but it is used on its own – there is no explanation as to *where* or *how* – it just happens: you work. The phrase exists in the case law of the Court of Justice but will not be found in a French dictionary – in 'real' French you cannot use the verb '*prester*' in this way.[60]

That new legal language demonstrates elements of 'hybridisation'.[61] In addition to the language impacts briefly described above, those drafting the texts that make up the case law of the CJEU are constrained by the very formulaic style the CJEU uses. That distinctive style is then repeated over and again, contributing to the development of a new 'hybrid' text type:

> REFERENDAIRE: as the judgments and reports etc. are so formulaic, they have gradually created a new kind of "mixed" text.[62]

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60 Interviewee's emphasis. However, it should be noted that this *référendaire* is a French national, and that the expression '*prester un service*' is in fact commonly used in Belgium, both in legal and everyday language. It is likely that the phrase came into use as a result of a 'Netherlandic corruption'. The verb '*presteren*' and the noun '*prestatie*' are used in this way in Dutch.

61 Since the mid 1990s translation theorist have been exploring the concept of hybridization. It is generally accepted that texts produced within multilingual/multicultural settings show elements of hybridization. For a discussion of this concept in the context of the CJEU see McAuliffe 'Hybrid Texts and Uniform Law?' supra note 11.

62 This interviewee is a judge.

The question then arises whether language is therefore a constraint on the development of EU law. Does the formulaic style that constrains the *référendaires* in what they can write actually constrain the development of the jurisprudence? The members of the CJEU interviewed for the present paper were of the opinion that, to a certain extent, that is indeed the case:

> JUDGE: It is surprising how much the French language influences how the judges deliberate and draft judgments – the fact that French is used as the language of the deliberations and is the language in which the very formulaic judgments are drafted forces [the CJEU] to speak or rule in a certain way.
> JUDGE: It is often difficult to say exactly what you want to say in a judgment […] often the Court will want to say X but in the very rigid French of the Court that is used in the judgments you have to get around to X by saying that it is not Y! [...] such use of language necessarily has implications for the way in which the case law develops.

The cultural compromises involved in manipulating a language that is not one's own, applying a distinct type of multi-layered legal reasoning, constraints due to a formulaic style and pressures due to the translation process and the fact that judgments are collegiate documents are all reflected in the 'output' of the CJEU. However, for that 'output' to resonate outside of that Court and be applied throughout the EU it must first be translated. According to Bengoetxea, it is at the translation stage that 'genuine multilingual legal reasoning occurs'.[63]

Linguistic Cultural Compromises in Translation

The translation directorate at the CJEU is the largest directorate within that Court, employing almost half of the entire staff of the Court.[64] Most of that number are lawyer-linguists, who are responsible for the translation of judgments, all of the various other internal and outgoing documents and all the documents received by the CJEU.[65]

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63 Bengoetxea 'Multilingual and Multicultural Legal Reasoning' supra note 56 at 118.

64 In 2013 the staff of the Translation Directorate numbered 924, or 44.7 % of the Court's total staff, 610 of whom were lawyer-linguists. Available at: <http://curia.europa.eu/jcms/jcms/P_80908>.

65 Such as orders, opinions of the Court and of advocates general in particular cases, references for preliminary rulings and other notices for actions submitted to the

The title 'lawyer-linguist' brings to mind two very different professions, lawyers and translators. There exists a vast literature on the subject of lawyers – who they are, what they do, their role definitions, as well as on the concept of the legal profession. While such role definitions and concepts of legal profession may differ between states and legal orders, those legal orders nonetheless have many legal professional norms in common.[66] Such norms relate to the need to remain faithful to 'the law', or the effort to avoid an uncertain rule of law,[67] and are referents for lawyers' behaviour.[68] In order for 'the law' to function it has to be considered definite, precise and deliberate. Lawyers' role definitions are thus grounded in a specific, positive concept.

A similar literature exists concerning the profession of translators.[69] That literature focuses on concepts such as the translator as author and the

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CJEU and press releases. Sometimes, owing to time pressures, the CJEU's press and information division will produce their own translations.

66 Abel, RL and Lewis, PSC (1988) *Lawyers in Society: The Civil Law World* Vol II University of California Press; Abel, RL and Lewis, PSC (1988) *Lawyers in Society: The Common Law World* Vol I University of California Press.

67 This notion of an obligation on the part of 'lawyers' to be faithful to 'the law' is an underlying theme in much of the literature concerning the sociology of legal professions. See, for example, Abel, RL (1988) *The Legal Profession in England and Wales* Blackwell; Abel, RL (1997) *Lawyers: A Critical Reader* The New Press; Abel, RL and Lewis, PSC (1988) *Lawyers in Society: The Civil Law World* Vol II University of California Press; Abel, RL and Lewis, PSC (1988) *Lawyers in Society: The Common Law World* Vol I University of California Press; Flood, JA (1983) *Barristers' Clerks: The Law's Middlemen* Manchester: Manchester University Press; Heinz, JP et al (2005) *Urban Lawyers: The New Social Structure of the Bar* University of Chicago Press; Huyse, L (1995) 'Legal Experts in Belgium' in Abel, RA and Lewis, PSC (eds) *Lawyers in Society: An Overview* University of California Press 168; Kelly, MJ (1994) *Lives of Lawyers: Journeys into the Organization of Practice* University of Michigan Press; Kritzer, HM (1999) 'The Professions are Dead, Long Live the Professions: Legal Practice in a Post-Professional World' 33 *Law and Society Review* 713; Morison, J and Leith, P (1992) *The Barrister's World and the Nature of Law* OUP; Cownie, F (2004) *Legal Academics: Culture and Identities* Hart.

68 For a discussion of the relationship between the concept of professional norms and cultures and the behaviour of lawyers see: Rosen RE (2001) *What Motivates Lawyers* (paper presented at the Socio-Legal Studies Association Conference, University of Bristol April 4–6).

69 See, for example: Fraser, B and Titchen Beeth, H (1999) 'The Quest for the Roots of Quality' (2) *Terminology et Traduction* 76; Goulet, D (1966) 'Le cas du traducteur fonctionnaire' [The Case of the Public/Civil Service Translator] (11) *Meta* 127; Martin, T (1993) 'Image and Self Image: Public and Private Perceptions of the Translator' (paper presented at the VIII Fédération Internationale de Traducteurs World Congress: Translation – The Vital Link, London 1993);

power, limitations or constraints of the translator. Underlying those role perceptions is the implicit (and in many cases explicit) acknowledgement of the indeterminate nature of translation. Translation is considered a process of negotiation, and translators are considered as mediators. Their work is, at best, a compromise. As discussed above, legal translation is concerned with the effect of the translated text. While legal translation may involve approximation on a linguistic and/or cultural level, it is possible, in theory, for a legal translator to produce a target text which expresses the meaning and achieves the legal effects intended by the author of the source text. In practice, however, that is extremely difficult to achieve, as it is largely dependent on the rules and methods of interpretation applied by the receiver of the target text.[70] The role of the legal translator is thus also defined by the indeterminate act of translation.

The contradictions between those two professions are significant. On the one hand, lawyers are defined relative to a definite and determinate concept of 'the law'. On the other hand, translators' role definitions are based on the acceptance of the indeterminate nature of language and translation. So the two professions, and their respective norms, appear to be incompatible. Yet, in the context of the lawyer-linguists at the CJEU, they are brought together. While dealing with the classic problems of translation on a daily basis, the lawyer-linguists at the CJEU also appear to be trying to balance a dual professional identity – that of lawyer *and* linguist. Among the lawyer-linguists interviewed for the present paper, ten feel very strongly that they are lawyers:

> LAWYER-LINGUIST: lawyer-linguists are simply lawyers who work exclusively with a particular sphere of law.

Mossop, B (1983) 'The Translator as Rapporteur: A Concept for Training and Self-Improvement' (28) *Meta* 244; Round, NG (1996) 'Interlocking the Voids: The Knowledges of the Translator' in Coulthard, M and Odber de Baubeta, PA (eds) *The Knowledges of the Translator from Literary Interpretation to Machine Classification* Edwin Mellen Press 1; Wolf, M (2002) 'Culture as Translation – and Beyond: Ethnographic Models of Representation in Translation Studies' in Hermans, T (ed) *Crosscultural Transgressions: Research Models in Translation Studies II: Historical and Ideological Issues* St Jerome Publishing 180.

70 Cf. McAuliffe, K (2006) *Law in Translation* PhD Thesis, The Queen's University of Belfast at 53–57.

Many feel that the work of lawyer-linguists at the CJEU is actually an exercise in comparative law:

> LAWYER-LINGUIST: In order to be able to translate a legal term from one language to another in which that translation will also have force of law the lawyer-linguist must be able to understand both the concept in the source language and the meaning of that concept within the relevant legal system as well as the legal system of the country in which the target language is spoken.

Those who disagree with that notion (that the work is an exercise in comparative law) nonetheless agree that some form of legal training is necessary in order to be able to grasp a concept from a legal system other than one's own and subsequently express that concept in another language:

> LAWYER-LINGUIST: someone might be able to explain a legal concept to you, but without legal training you would not be able to subsequently translate that concept into the relevant legal language.

As proof of their lawyer status, many point to the control function fulfilled by lawyer-linguists in the production of judgments/statements of law:

> LAWYER-LINGUIST: Lawyer-linguists […] have a different view of the judgment from the référendaires or judges – lawyer-linguists are much more focused on specific things which the cabinets don't focus on – for example, making sure sound terminology is used and not just any old words – *référendaires* are sometimes afraid of over-using a word and so will use a different one without realising that there may be subtle or even not so subtle legal differences between the words.

Thus, lawyer-linguists are responsible for dealing with legal issues that arise because of linguistic ambiguities. In the eyes of those lawyer-linguists:

> LAWYER-LINGUIST: Our job is not so much a linguistic one, and certainly not mere translation, but is a *legal* one.[71]

Of those interviewed 19 asserted that they are *not* lawyers but *translators*. Interestingly however, each and every one of them immediately qualified their statement by pointing out that as translators of judicial texts, with law degrees, they are 'much more than simply translators'. All but one insisted that they could not do their job to a sufficiently high standard without having a legal qualification and that 'that sets us apart from

71 Interviewee's emphasis.

"mere" translators'. They feel that the job would hold no interest for them 'if the law element wasn't there as well as the translation element', that they would not enjoy being 'just a translator'. The majority feel that 'mere' translators (i.e. translators who do not have a legal qualification) would not be able to follow the line of (legal) argument of a judicial document:

> LAWYER-LINGUIST: In order to be able to translate a judgment you have to be able to understand and follow the legal reasoning [of that judgment]—otherwise how can you possibly even begin to attempt to translate it? Mere translators, those without any legal qualifications, experience or training, are unlikely to be able to do this.

The remainder of the lawyer-linguists interviewed feel that a lawyer-linguist is something distinct from both a lawyer and a translator, a sort of hybrid between the two, or, as one put it: 'a perfect synthesis of a lawyer and a linguist'. The job requires expertise in law *and* expertise in translation, and most find it very satisfying to be able to 'tie-up' their interest in law and their love of languages. Some feel that the law *is* a language, that it is an expression of a society, and that those who become lawyer-linguists:

> LAWYER-LINGUIST: are lawyers who are more interested in the *theoretical* aspect of law than in the practice of law. Those who practice law actually deal less with concepts of law and more with business and administration – in applying the rules – and rarely deal with any [theoretical] legal problems.[72]

They feel that the work of a lawyer-linguist involves 'working at a deep level of understanding of legal concepts' and that it is much more than translation:

> LAWYER-LINGUIST: in short, it is the manipulation of law as language and language as law.

From the interviews carried out it became clear that, while the lawyer-linguists at the CJEU take their responsibilities as translators very seriously, they also feel responsibility as lawyers since they are effectively giving the Court its 'voice'. The struggle to merge those two professions successfully sets those who work in the CJEU's translation service apart from both lawyers and translators. As one lawyer-linguist pointed out:

72 Interviewee's emphasis.

> LAWYER-LINGUIST: [the lawyer-linguists at the CJEU] are walking a tightrope, continuously trying to balance their responsibilities as linguists with their responsibilities as lawyers.

There appears to be two approaches to the attempt to balance that dual professional identity. Some lawyer-linguists see themselves primarily as lawyers, and they have a different approach to the role from those who consider themselves primarily linguists.

> LAWYER-LINGUIST: Those who are primarily linguists sometimes overlook or fail to appreciate legal issues and those who are primarily lawyer can often make crass linguistic mistakes but they better see the relevant legal issues.

With careful management, those two approaches adopted by the lawyer-linguists can actually complement each other. One failing that both approaches have, however, is the unwillingness on the part of some lawyer-linguists to translate very literally in certain cases. Those who consider themselves primarily linguists tend to object to producing texts that do not read well, that 'read as translations', while those who deem themselves primarily lawyers find it difficult not to use the obvious or closest legal equivalent in the target language.

However, it is sometimes very important to produce a literal translation, for example, so as not to resolve an ambiguity where the Court has wanted to preserve one. Ultimately it is the revisers who decide what approach is best in a particular case. If, for example, the problem concerns a point that has been settled long ago in the case-law of the CJEU and there are no new legal terms to deal with, then the lawyer-linguist can generally translate it in any way he or she wishes. However, if it concerns an important new point then great care must be taken. In such cases it is the reviser who decides what approach is best.[73] As one reviser stated:

> LAWYER-LINGUIST: If you've been here long enough you'll see your chickens coming home to roost! Often you see a word or phrase that sounds very clumsy and you translate it using something that's not quite literal but sounds neater in [the target language] and then a few years later the phrase comes back to you in another case and

73 Experienced lawyer-linguists may be promoted to the role of reviser. Revisers are responsible for checking the translations of less experienced lawyer-linguists. Most revisers also continue to translate and so split their role between translating themselves and revising the work of others.

> you realise you shouldn't have translated it the way you did in the first place because you've resolved an issue that shouldn't have been resolved at that time. That is why we tend to translate very literally at the Court even though the translation may sound very awkward – the idea is to preserve ambiguity where [the members of the Court] want it. Often the wording of a judgment is a compromise formula as a result of disagreement in the deliberations and must therefore be translated very literally.

There are, however, also instances where conceptual translation is more important. Joserramon Bengoetxea uses the example of the translation of 'direct applicability' in Advocate General Kokott's opinion in the *Mikelsson*[74] case to highlight the importance of conceptual translation and the role that translation plays in the CJEU's 'genuine multilingual reasoning'.[75] In the different translations of the relevant point, there appears to be confusion as to whether the advocate general is referring to *direct applicability* (a literal translation followed in the English, Dutch, Swedish and Danish texts) or *direct effect* (a more 'conceptual' translation, followed in the French, Spanish, Portuguese and Polish translations).[76] Bengoetxea asks: 'Have the translators or the reviewers confused the concepts, have they corrected the confusion of the AG, is there a distinction without a difference after all?'[77]

Whatever the answer, those types of difficulty represent the issue at the very core of the lawyer-linguists' role: the reconciliation of the notions of 'law' and 'translation'. As noted above, it is generally accepted that translation of any kind, including legal translation, involves some measure of approximation, but this concept of approximation in translation does not sit easily with traditional notions of law – an authoritative force, necessarily uniform throughout the jurisdiction within which it applies, in particular the EU legal order where the principle of uniformity has formed the basis for the most important doctrines of EU law introduced

74 Case C-142/05 *Åklagaren* v*Mickelsson and Roos* [2009] ECR I-4273.

75 Bengoetxea 'Multilingual and Multicultural Legal Reasoning' supra note 56 at 118.

76 A significant point since the concepts of direct applicability and direct effect mean different things in EU law. Direct applicability is where a provision has immediate legal effect in member states' legal systems with no need for any further implementation. Direct effect is where an individual can rely on a provision of EU law before a member state national court.

77 Bengoetxea 'Multilingual and Multicultural Reasoning' supra note 56 at 119.

by the CJEU. All of the lawyer-linguists interviewed agreed that translation necessarily involves some degree of approximation, and that:

> LAWYER-LINGUIST: as in any kind of translation, it is impossible to transpose exact equivalents when translating legal texts from one language to another.

They all also agreed that the approximation inherent in translation has a significant impact when it comes to translating ambiguity. Maintaining the ambiguity (intentional or not) of a text is not always an easy exercise due to the characteristics of different languages and language families. It is relatively easy, for example, to render ambiguity in Italian, Spanish or Portuguese when the source language is another Latin language such as French. However, it is far more difficult to render such ambiguity in a language such as English or German, simply because of the different nature of those languages. When questioned about the difficulty of knowing how to deal with such ambiguity, the Portuguese, Italian, Spanish and Greek lawyer-linguists claimed to have no problem whatsoever. However, without having been asked, all of the English, German, Finnish and Swedish lawyer-linguists interviewed noted that difficulty as a major hurdle of their job. Without exception, those lawyer-linguists felt that translation from French (or indeed any similarly Latin-based language) into their language(s) results in a final text that is in some ways more clear and precise than the original:

> LAWYER-LINGUIST: Translating ambiguity is a real problem because in some cases in some languages you *have* to be more precise and therefore will lose some or all of the ambiguity […] in other languages you may even increase the ambiguity.[78]

Such divergences in the relative ambiguity of texts are particularly significant in the case of judgments the authentic version of which is in a language other than French. An authentic version of a judgment that is less ambiguous or more precise than the original language version that has been deliberated over by the relevant chamber could have widespread legal implications:[79]

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78 Interviewee's emphasis.

79 Although the precaution is usually taken to sent the authentic (translated) version of a judgment for review to the member of the CJEU whose native tongue is that of the language of the case, that member may not necessarily have been in the Chamber of judges that decided the particular case, and therefore could not be aware of the deliberations in that case.

> LAWYER-LINGUIST: if the translation of a judgment ends up more precise than the French original, and that translation is the authentic language version of the judgment, then presumably lawyers and courts in the relevant Member State (and perhaps even in other Member States) will follow the authentic language version assuming that that is the correct version.[80]

From the data gathered through the interdisciplinary research methods described above it seems, therefore, that there are two types of linguistic cultural compromise at play in the working of the CJEU.

First, the linguistic cultural compromise involved in *producing* the Court's case law. As we have seen, the factors involved in that first linguistic cultural compromise have led to the development of a 'Court French', which necessarily shapes the case law produced and has implications for its development.

Secondly, the case law of the CJEU is 'filtered out' through the linguistic cultural compromises involved in translation. Translation itself is a 'linguistic cultural compromise' and all translation, including legal translation, involves an element of approximation. In addition, the necessary compromise resulting from the struggle to reconcile the notions of 'law' and 'translation' is reflected in the process of filtering out that case law to the wider EU.

The resultant texts that make up the case law of the CJEU are hybrid in nature – consisting of a blend of cultural and linguistic patterns, constrained by a rigid formulistic drafting style and put through many permutations of translation. Maintaining that hybrid character through translation can arguably help to ensure the uniform application of EU law by alerting those applying that law to the fact that they are dealing not with their own language, but with a new and distinct EU legal language.[81] But it is only through understanding the multi-layered linguistic cultural compromises involved in the production of that case law that one can fully understand how this multilingual legal system has evolved.

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80 For a recent example of this precise scenario occurring before the UK Competition Appeal Tribunal see McAuliffe 'The Limitations of a Multilingual Legal Order' supra note 13.

81 Cf McAuliffe 'Hybrid Texts and Uniform Law' supra note 11.

CONCLUSION

The interdisciplinary work set out in this paper makes an original contribution to the bodies of literature on the CJEU. Whereas those bodies of literature generally tend to focus on judicial reasoning or on investigating the motivation behind the CJEU's decisions, the analysis in this paper goes beyond that. Borrowing methodological tools from disciplines outside of law allows us to gain an in-depth understanding of how the multilingual jurisprudence of the CJEU is produced. More specifically, we can investigate the impact that language has on the CJEU's jurisprudence and the limitations of that jurisprudence.

In her work in anthropology, Irène Bellier analyses the development of a 'eurolanguage' within the European Commission. However, the texts produced by the CJEU also have to resonate comprehensively outside of that institution in terms of an EU legal language that is applicable throughout all 28 member states. That legal language, which is expressed in 24 linguistic variations has shaped the development of the CJEU's case law, which has in turn developed the unique and supranational EU legal order. Developing a better understanding of the inner workings of the environment in which a significant part of EU law is created allows us to work towards delimiting the inconsistencies that inevitably arise in this evolving multilingual system.

The CJEU's jurisprudence is not created and translated by machines, but by individuals of many mother tongues, from many different legal cultures, and is necessarily shaped by the dynamics of that institution. The translation of ambiguity embedded in the process – from drafting, to reasoning, to deciding a case before the CJEU, as well as the many layers of translation involved at different stages of that process – highlights an inherent approximation in that jurisprudence. However, the question is whether that approximation, which is necessary for a multilingual jurisprudence, produces a satisfactorily unambiguous jurisprudence. Moreover, does that approximation, and the notion of a 'new' EU legal language, allow for unproblematic 'mediation' at national member state level?

This paper is thus illustrative of the limitations of a multilingual legal system. Accordingly, an awareness of issues of language and translation should condition our understanding of such a system. The EU legal order functions precisely because of the implicit understanding among those who work at EU level of the indeterminate and imprecise nature of language and law. That legal order, its expression and application throughout

the EU is thus based on a legal linguistic fiction, which, while it may be a workable one, is nonetheless a fiction.

The paper also demonstrates how interdisciplinary study can introduce a new dimension to established sub-fields of EU law. The paper and the study of which it forms a part are relevant in particular to the constitutional pluralism debate. In order to gain a true understanding of the EU constitutional narrative and current theories of constitutional pluralism in the EU context, we should not ignore those linguistic cultural compromises involved in the production of the CJEU's case law. Indeed, the issue of approximation in translation and the hybrid nature of EU law seem to reinforce the pluralist argument.

Conducting interdisciplinary research can be difficult in terms of research design, methodology and analysis. Often the most difficult part is convincing others in the relevant field(s) that such methods are appropriate and valuable. Good quality interdisciplinary research will contribute not just to one particular field but will make a valuable contribution across a number of, often disparate, fields. That is the case with this paper, which contributes not only to the literature on the CJEU and theories of EU constitutional pluralism, but also to fields such as sociology and translation theory. With regard to sociology, by problematizing the CJEU in a way in which other EU institutions have been problematized – focusing on how it operates as a multilingual, multicultural institution – the paper addresses a gap in the literature on how EU institutions function. Furthermore, the analysis of the linguistic cultural compromises involved in producing the CJEU's case law contributes in particular to the emerging concept of 'professions of Europe'. In terms of translation theory, the Study supports the work of Susan Šarčević by highlighting why legal translation, in the context of supranational law, should be about more than making a foreign legal text accessible or understandable in the target language. The linguistic cultural compromises involved in the translation processes at the CJEU epitomise the relationship between law and language in a system in which translated texts are expected to produce the same legal effects across jurisdictions.

This paper also demonstrates that interdisciplinary research can be invaluable in comparative law or legal studies more generally. Stepping away from legal scholarship and looking to other disciplines allows us to develop a fuller understanding of not only the topic being studied but also the field itself. The inherent interdisciplinarity involved in analysing the relationship between law, language and translation in the production of the CJEU's multilingual jurisprudence is thus particularly relevant for comparative law. In legal studies, as mentioned above, the focus tends to

be on the '*why*' and comparing legal systems focuses on differences. Social Science research methods require the researcher to take a step back from that focus on difference and to instead look at the '*how*'. Understanding the situational factors of, and compromises involved in, the production of supranational law can provide a fuller insight into how such law has evolved. Finally, by focusing on language, this paper sets out a level of interdisciplinary research not often seen in comparative law research. Legal cultures are of interest, not only to legal scholars, but also to scholars of other disciplines. In particular, as set out above, linguistic theorists and translation theorists are interested in the relationship between law, language and culture. Moreover, the flow of information between legal systems takes place through translation. It follows therefore that engaging with translation theories, and legal translation in particular, can bring a new aspect to our understanding of comparative law.

Comparative law research would appear to be an inherently multilingual and interdisciplinary exercise. However, all too often the range of tools provided by legal studies is limited and scholars approach such research through a monolingual and monocultural lens. Without being interdisciplinary we cannot hope to gain a 'holistic' understanding of the development of certain concepts and theories across a number of fields and disciplines. Interdisciplinary research can allow us to make connections between ideas and ultimately lead us to a more nuanced understanding of the law.

My iCourts experience

In 2011, Anne Lise Kjær invited me to Copenhagen, to participate in a RELINE workshop on Language and Law. At the time, I was a lecturer in law at the University of Exeter in the UK, and, since completing my PhD at the Queen's University of Belfast in 2007, had yet to really find my research community. Having entered academia with lofty ambitions to challenge EU scholarship by highlighting the importance of language in the production and application of multilingual EU law, I had found those early years, without a real research community and support, challenging. Needless to say, I jumped at the chance to participate in that workshop, which was held in the building that would become iCourts' first home. It was my first visit to Copenhagen, and I fell in love with the city (yes, even in winter!) but more importantly, I met colleagues with similar research interests, and, while chatting with a new acquaintance, Mikael Rask Madsen, learned of a potential future interdisciplinary centre for the study of international courts. One thing that struck me during that conversation was the value that Mikael placed on people and space in order to cultivate innovative and truly collaborative work. And a year later, he was able to bring together an outstanding group of people, in a space that facilitated collaboration and the organic building of relationships in order to develop original and impactful work.

I've made many visits to iCourts over the past ten years, for workshops, short research visits, and to teach on the excellent PhD summer school. iCourts provided an important space for me to think and develop some of my ideas in my *Law and Language at the European Court of Justice* project. In 2014 I spent a semester there as a visiting researcher, and also brought one of my postdoctoral researchers, Aleks Trklja, with me for part of that time. During that research visit, I wrote my paper *Translating Ambiguity*, which is republished in this volume, and Aleks and I developed the models and theories which would form the basis of future publications on language and superdiversity, and on a corpus-based model for studying discourse relations of legal texts. The interdisciplinary team at iCourts challenged me intellectually, providing robust critiques of theory, method, and the interpretation of results, all in a supportive and collegial environment (and usually accompanied by kanelsnegle!). Moreover, that support didn't vanish once my visit was complete – over the years colleagues at iCourts have provided me with valuable feedback on writing, grant applications,

and even career development. In fact, I've received some of the most valuable mentoring of my career to date from iCourts colleagues. During my 2014 research visit, Mikael took the time to talk to me about career development, and urged me to consider moving to an institution that would offer a more appropriate intellectual home for my work than the one I was at. It was directly as a result of that mentoring and advice from Mikael that, in 2015, I applied for, and got, a prestigious fellowship at the University of Birmingham, the Birmingham Fellowship. I am still based at the University of Birmingham, where I now hold a Chair in Law and Language, and am a Professorial Birmingham Fellow. iCourts has played a significant role in getting me to where I am today.

For me, the most special thing about iCourts is its people. By cultivating a genuinely collegial space in which intellectual relationships can flourish, acquaintances become colleagues, who become friends. One thing that iCourts does really well, is to value the 'downtime' as much as the academic endeavours. This is what really sparks the creativity and innovation that is the hallmark of much of the work coming out of the centre. The importance of the extra-curricular can be seen right across the board – from the social programme of the PhD summer school, to the thought put into workshop coffee breaks and dinners, to the impromptu after-work get-togethers, often instigated by Juan Mayoral! Where else would a Culture Night visit to a museum with colleagues end up with you all performing on the stage of the Danish Concert Hall (perhaps a story for another time!)? Does any other Centre of Excellence boast its own house jazz band? I have yet to encounter a research centre or institute quite like iCourts – it is a truly special and inspiring place, and I look forward to many more years of collaboration and friendship there. Thank you all.

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