Foreword

Comparative law usually compares different legal systems and more particularly, within those systems, rules of law over similar issues. In the double context of the several trends towards legal globalisation, unification or harmonisation and linguistic diversity, legal multiplicity is here put in parentheses, except as resulting from linguistic multiplicity. All the papers in this special issue on "Law and Linguistic Multiplicities" address questions related to the oneness of law (or adjudication) despite its multiple linguistic versions, the oneness of each language given its multiple categories, the oneness of law in each language despite its multiple possible interpretations. The terms, firstly, are not different legal systems and, across those systems, different rules over similar issues, but the formulations in different languages of legal principles or rules that should remain constant whatever the language and whatever its cultural specificity. Secondly, each language is multiple in that it includes multiple categories of that language (genres, branches, modalities, uses et cetera). Thus, the languages of litigation and AMDR (Alternative Modes of Dispute Resolution) are or were initially intended to be different. Indeed, legal language is so different from ordinary language that diverse attempts have been made within a single language to make legal language understandable for the layman. Moreover, within a single legal system, there are several branches of the law, for instance criminal law and civil law, with different categories, and correspondingly different languages with different terms. The issues that those intra-linguistic comparisons raise revolve around the effects of the categorisation and the interaction between the different categories. For instance, what is the effect of having the same professions operate in different linguistic or discursive categories or of shifting a relationship from one legal category to another? Thirdly and lastly, the terms of linguistic multiplicity are not only different languages, such as Chinese, English or French, and the different linguistic categories within a single language, for instance ordinary English and legal English, but also the different interpretations of the same principles or rules as expressed in one language. The questions that all those comparisons raise are whether legal oneness subsists otherwise than as a fiction in its linguistic or interpretative multiplicity

and if not, how the differences are to be ordered for the legal principles or rules to operate pragmatically as guidelines for action. Such, then, are the several issues explored in this special issue on "Law and Linguistic Multiplicities", with papers, written by linguistics, argumentation theorists and academic or practicing lawyers, on European Union, Dutch, English, Italian, South African or US law.

1 External linguistic multiplicity

Colin Roberston, a European Union lawyer-linguist and author of numerous research articles on the linguistic issues related to his profession, presents the multifarious linguistic difficulties that arise in setting down European Union law. European law is perceived from outside the Union and represents itself as being one and the same for the twenty-seven member states of the Union. Yet, it is formulated through legislative and judicial texts in twenty-three different languages. Each of those linguistic versions has equal standing. None is officially the translation of another. In other words, whatever the text at issue, any one of its twenty-three versions can be referred to as the original version. Moreover, even when two or more states share the same language, each member state has its own pre-existing and continuously developing domestic law. How then can European law be one and the same? Such is the question this first paper explores, with expert insights about how professional EU translators attempt to overcome the difficulties. It does so first in general terms and under Charles Saunders Peirce's semiotics then through the study of a particular case, *Simutenkov* [2005][1], on the occasion of which Advocate General Stix-Hackl stated six different approaches to the interpretation of a multilingual act and the reasons for choosing one approach rather than another.

2 Internal linguistic multiplicity

There is not only a multiplicity of languages, into which one and the same law, for instance European Union law, may be formulated, but

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[1] In this introductory presentation, cases are cited in that minimal form (name, date in brackets). Unless otherwise stated, standard citation is found in the relevant papers.

also within each language a multiplicity of linguistic genres or context-dependent language uses, which may result in a single language becoming multiple and foreign to itself. Thus, English has progressively prohibited the use of foreign languages, Latin and French, for the formulation of English law and for court proceedings, but the "foreignness" of legal English itself subsists, as is acknowledged since 1998 by the adjunction to each statute of "explanatory notes", designed, as the legislation.uk.gov website puts it, "to assist the reader in understanding the Act". Legal English, however, remains foreign to the layman, which is a problem under the rule of law, if that constitutional principle means, among other things, that the law should be, not only understandable with training, but actually understood by all. Yet, can legal language be avoided to resolve disputes, even in AMDR? How else than through explanatory notes, can the law and legal language be made more palatable for the layman? More specifically, within legal language itself, there are several different languages: the languages of criminal law and civil law, the languages of torts and contracts et cetera. What, if anything, happens when the data of a case is translated from one of those languages to another? Grouped under the subtitle "internal linguistic multiplicity", such are the main issues considered in the following four papers. The authors are linguists particularly interested in law as a specialized language or in adjudication as requiring a particular modality of argumentation, except one of the authors of the last paper, who is a practising lawyer.

Maurizio Gotti, director of the CERLIS (a research centre on specialized languages, based at the University of Bergamo), argues that AMDR have from a linguistic and discursive point of view become linguistically similar to litigation, as though the latter had "colonised" or "contaminated" the former. This phenomenon may be due to the arbitrators, who are often lawyers, but may also result from internal generic pressure for discursive homogeneity and a renewed response to the practical need for accuracy, all-inclusiveness and order, which accounts, arguably, for the characteristic features of legal language and discourse and their foreignness within ordinary, non-specialized language.

Martin Solly, an associate Professor of English language and translation at the University of Florence, who is involved in a nation-

wide Italian research project on "Tension and change in English domain-specific genres", directed by Maurizio Gotti, analyses the several linguistic and literary devices (narrative, characterization, humour, ordinary language dialogue) used by the author of *BabyBarista*, a highly successful blog, to bridge the linguistic gap between the lawyer and the layman and so enable even the lay reader to have an understanding and fictional inner experience of the activities in the chambers where barristers work.

Ross Charnock, a senior lecturer at the University of Paris-Dauphine and a member of the CRCL (Centre for Research on Common Law, based at the University of Paris Ouest Nanterre La Défense), argues that in judicial argumentation, the factual premise is always conditioned by the legal premise, so that different legal premises result in different analyses of identical facts. In the three examples he examines, the facts were considered under both the law of tort and the law of contract. After showing how different views of the law allow different arguments on the same data, the paper concludes that legal reasoning is neither true nor false and that the availability of alternative justifications means that there can be no guarantee of sincerity. However, even when insincere, judicial argumentation can make a positive contribution to the law.

Considering a new disequilibrium in South Africa between landlord and tenant, to the disadvantage of the former, **Maureen and Tamara Klos**, respectively a senior lecturer in the Department of Applied Languages at Nelson Mandela Metropolitan University and a practising lawyer also in Port Elizabeth, South Africa, argue paradoxically that the law should complete the transplantation of landlord and tenant relations into the language of consumer law and include landlords in the category of consumers as it already does tenants. The effect of that re-categorisation within the several branches and languages of the law would be to provide landlords with consumer protection against abusive tenants.

3 Internal interpretative multiplicity

The rule of law, it has been said above, may be understood as requiring that the law should be, not only understandable with training, but

actually understood by all. Yet, each language is internally multiple for a second reason, which is that utterances, often, if not always, allow several interpretations. The next four papers focus on that second modality of internal linguistic multiplicity. The first two refer to a civil law system, the Dutch legal system. The second two refer to the common law systems of respectively the United Kingdom and the United States. It is to counter interpretative multiplicity that many legal systems have adopted the literal rule as the preferred approach for the interpretation of statutes. Such was the case in England, until recently, when the purposive approach to the interpretation of statutes and contracts enabled the courts to do away with the literal meaning. According to the first paper, such is the case in the Dutch legal system, although this approach can be rejected. It is also because unclear utterances are interpretatively multiple that the Dutch Supreme Court, according to the second paper, normally requires judgements to be clear or univocal and can quash judgements that are not. The two papers present models to explain why the courts can sometimes set aside respectively the literal rule or the clarity requirement. The next and last two papers further the inquiry on departures from the requirement of clarity, arguing that the interpretative multiplicity of a language and its terms can be exploited rhetorically, for instance by the courts, as support for a decision or the adaptation of a rule of law to new circumstances. The authors of the first three papers are argumentation theorists who are especially interested in judicial argumentation[2]. The fourth is a lawyer.

Eveline Feteris, a senior lecturer in the Department of Speech Communication, Argumentation Theory and Rhetoric in the University of Amsterdam and a member of the ILIAS (International Learned Institute for the Study of Argumentation), extends pragma-dialectical theory (also called pragma-dialectics), originally elaborated by Frans van Eemeren and Rob Grootendorst, and "strategic maneuvering" (thus spelt), first defined and explored by Frans van Eemeren and Peter

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[2] The first two papers indirectly continue the theme of the previous papers, in that, firstly, their theoretical framework has been formulated in several languages (especially, English and Dutch) and that, secondly, the theory and its concepts form a language within a language, the language of pragma-dialectics (which remains or should remain constant in all its linguistic versions, as though the language difference made no difference).

Houtlosser, to statutory interpretation and more specifically the "linguistic argument" (or literal rule argument). Pragma-dialectics has isolated and ordered rules for an ideal reasonable resolution of disputes. Here, the starting point rule (rule 6) and the burden of proof rule (rule 2) are particularly relevant. The concept of strategic maneuvering identifies strategies that balance dialectically reasonable and rhetorically effective discussion moves. When the balance is not observed and rhetoric prevails over dialectics, for instance because rules 2 and 6 are not observed, the strategic maneuvering "derails", in other words argumentation becomes fallacious. Exploring statutory interpretation as from that double theoretical framework, the author distinguishes three forms of strategic maneuvering with the linguistic argument and defines the rules for their acceptability. The literal meaning can be referred to as (1) an independent argument, (2) a supplementary argument or (3) an argument overridden by others. In Dutch law, as opposed to English law, in which statute law provides countless statutory definitions that prevail over ordinary meaning, a condition for the correct use of linguistic arguments is that the meaning relied on should be the generally accepted meaning, or, in any case, should not be inconsistent with the generally accepted meaning. The analysis of two Dutch cases enables the author to verify the adequacy of the rules she has formulated for both the acceptable and the fallacious uses of linguistic arguments.

José Plug, also a lecturer in the Department of Speech Communication, Argumentation Theory and Rhetoric in the University of Amsterdam and a member of the ILIAS, examines the Dutch Constitutional requirement that judicial decisions must be justified (that is to say, supported by a ratio decidendi), which has been understood by the Dutch Supreme Court to mean, among other things, that the justification must be linguistically clear and unequivocal. She relates the requirement to the ideal pragma-dialectical model of dispute resolution, more specifically the language use rule (rule 10), following which unclarity, whether deliberate or not, amounts to a fallacy, that is to say, for pragma-dialectics, an obstacle to dispute resolution. Litigants, in the Dutch legal system, can appeal against a decision because it lacks clarity. However, the study of several cases suggests that the Supreme Court, the highest Dutch court, quashes a decision for

obscurity only if the language was actually obscure for the parties and third parties and if the obscurity has actually frustrated the resolution of the dispute.

Victor Ferry, a researcher of the Belgian Fonds National de la Recherche Scientifique (F.R.S- FNRS) and a member of the GRAL (research group on rhetoric and argumentation in language, based at the Free University of Brussels), addresses the perennial issue of the rationality of common law and argues that rationality or logic and rhetoric should be viewed, not as opposed, but as complementary in situations where no certainties can be found and yet a decision must be made, as is frequently the case in common law. He upholds, it appears, what one might call an "oracular" conception of adjudication, under which judgements on cases that admit arguably no rationally certain solution are handed down in terms, which are uncertain, but in that peculiar manner satisfy the requirement of "effability" or expressibility. To argue this point, he focuses on the dissociation of notions, a technique which exploits the ambivalence latent in lexical semantic indeterminacy. It was identified by Chaïm Perelman and originally, but negatively as a sophistic move, by Aristotle, in *Sophistical Refutations*, among verbal fallacies. Victor Ferry questions recent ILIAS analysis and evaluation of this technique as taking for granted that clarity, as it is in Aristotle, should be referred to as a standard. He illustrates the operation of this technique, in two leading and frequently commented cases on negligence, *Donoghue v Stevenson* [1932] and *Hedley Byrne v Heller* [1964]. In the first case, Lord Atkin, interpreting the principle of liability for negligence, dissociated moral and legal liability. In the second, interpreting the hypothetical principle that common law should develop logically, Lord Devlin dissociated surface logic and root logic. The two judgements resolved the issue of their respective cases, but their ratios remained uncertain and have therefore been debated repeatedly.

Although unconnected with the ILIAS or the GRAL, **Anne Richardson Oakes**, a senior lecturer at the school of law of Birmingham City University, revisits the issue of clarity in the law and can be understood to provide another instance of the dissociation of notions in her analysis of how as from *Brown v the Board of Education* [1954], the courts have interpreted "discrimination". *Brown* struck out

the "separate but equal" doctrine, but was not clear as to whether it prohibited racial classification in itself or racial classification if and only if it resulted in racial subordination. At first, the difference between the two interpretations had no effect, because at the time classification generally resulted in subordination. However, the post-racial presumption, strengthened by Barrack Obama's presidency, is that subordination, in present society, has become distinct from racial classification. Accordingly, the courts now tend to prohibit only subordination and have even condemned attempts at desegregation or integration as unconstitutional discrimination. The dissociation of classification and subordination is said to rest on self-declared empirical research in the social sciences, but the social sciences have also provided contrary evidence that the dissociation of subordination and racial classification is not empirically founded.

The articles presented in this issue have been subjected to review and more or less rewritten, but were delivered in their original versions at the *International Law, language and literature* conference, which was held on 17 and 18 June 2011 at the University of Paris Ouest Nanterre La Défense (formerly, the University of Nanterre or Paris X) and organised around the CRCL by Christian Biet, Ross Charnock and myself. The conference brought together several European research units on law, language and literature, the AIDEL (the Italian Association of Law and Literature) and, mentioned previously, the CRCL, the CERLIS, the GRAL and the ILIAS. Most of the twenty-three speakers came from Europe, but some from other continents, North America, Africa and Asia. It is hoped that publication in the *International Journal of Law, Language & Discourse*, which is based in China (Hong Kong) and Australia, will be followed by further intercontinental research cooperation on law and language.

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