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## THE LINGUISTIC REGIME OF THE EUROPEAN COMMUNITIES: SOME PROBLEMS OF LAW AND LANGUAGE

L. NEVILLE BROWN\*

The Treaty of Rome, which in 1957 created the European Economic Community,<sup>1</sup> did more than extend the notion of the pooling of national sovereignty beyond the limited, although vitally important, sectors of coal and steel, to which the Treaty of Paris (1951) had limited itself in constituting the coal and steel community. Additionally, the Treaty of Rome introduced a new linguistic regime. The Treaty of Paris had apparently accepted (*sub silentio*) that there should be only one authentic language version of that treaty, namely, French. However, the participating member states (France, Germany, Italy, Belgium, Netherlands and Luxembourg) by a separate protocol established the principle of equality of their four languages: French, German, Italian and Dutch.<sup>2</sup> Translations of the treaty were prepared in German, Italian and Dutch: these were regarded as official versions since they were made under public authority, but they were not authentic texts as they lacked the imprimatur of the respective governments.

The Treaty of Rome made express provision that the four texts of the treaty should be equally authentic.<sup>3</sup> The treaty also directed the council to determine in detail the rules governing the languages of the Community institutions.<sup>4</sup> The relevant Council Regula-

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1. For a general account of the evolution of European institutions in the period after World War II, see ROBERTSON, *EUROPEAN INSTITUTIONS* ch.1 (3rd ed. 1973).

2. Protocol on the Language Regulation of the European Coal and Steel Community, issued by the Conference of Foreign Ministers of the Member States on July 23-25, 1952. For a perceptive early discussion in English of the linguistic régime of the European Communities, see Stevens, *The Principle of Linguistic Equality in Judicial Proceedings and in the Interpretation of Plurilingual Legal Instruments*, 62 Nw. U.L. Rev. 701 (1967). My indebtedness to this pioneering American study is gratefully acknowledged.

3. Treaty establishing the European Economic Community, March 25, 1957, art. 248 [hereinafter cited as E.E.C. Treaty]: "This Treaty, drawn up in a single original in the Dutch, French, German and Italian languages, all four texts being equally authentic, shall be deposited in the archives of the Government of the Italian Republic, which shall transmit a certified copy to each of the Governments of the other signatory States." Treaty establishing the European Atomic Energy Community, March 25, 1957, art. 225, is in identical terms.

4. E.E.C. Treaty, art. 217: "The rules governing the languages of the institutions of the Community shall, without prejudice to the provision contained in the rules

tions<sup>5</sup> confirmed the principle of linguistic equality and required all "secondary" Community law<sup>6</sup> of general application to be published in the Official Journal in the four Community languages in use in the six member states.<sup>7</sup>

The enlargement of the Community in 1972 by the accession of the United Kingdom, Ireland and Denmark brought no change in the principle of language equality so far as the United Kingdom and Denmark were concerned. English and Danish were added to the original four official Community languages. Irish, however, although the national language of the Republic of Ireland, is not in fact the vernacular of the Irish, all of whom can, and most of whom normally do, speak and write English. The peculiar situation of the Irish language led to it not being elevated to an official language of the Community, although there is an authentic Irish version of the Community Treaties (as distinct from Community legislation) and Irish is accepted as a language before the Court of Justice in both its written and oral procedure.<sup>8</sup> Official Irish versions of the opinions<sup>9</sup> and judgments of the court are not, however, published.

The Court of Justice, while accepting, of course, the principle of linguistic equality, has recognized the necessity in practice, for reasons of convenience and justice, that there should be only one language in a given case. The choice of this procedural language is

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of procedure of the Court of Justice, be determined by the Council, acting unanimously."

5. See Regulation No. 1 of the Council of Ministers of April 15, 1958, on the Use of Languages in the European Economic Community [1958] J.O. COMM. EUR., 385-86.

6. For the various categories of secondary Community law, see E.E.C. Treaty, art. 189.

7. See Regulation No. 1, *supra* note 5, at art. 4.

8. For an account of this procedure, see BROWN & JACOBS, *THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES* ch. 10 (1977).

9. Under the procedure of the court, which is modelled in some respects upon that of the French Conseil d'Etat, an opinion is delivered orally to the court in public session by one of the four Advocates-General of the court. The Advocate-General does not represent a party but is a spokesman for the law, his function is to give authoritative guidance to the court on the legal issues involved in the case. In this respect he resembles closely the Commissaire du Gouvernement of the Conseil d'Etat, and, like the commissaire in the conseil, the Advocate-General has had a great influence in the development of the case law of the court. He has been likened to "an institutionalized amicus curiae" or to a judge of first instance subject to an automatic appeal. For the latter comparison, see Warner, *Some Aspects of the European Court of Justice*, 14 J. OF THE SOC'Y OF PUB. TEACHERS OF L., 15-30 (1976). See also BROWN & JACOBS, *supra* note 8, at ch. 4. The Advocates-General are drawn from the "big four" of the Member States: France, Germany, Italy and the United Kingdom.

regulated by the Rules of the Court.<sup>10</sup> In brief, it is the applicant who decides which of the official languages shall be the procedural language of the case. But if the proceedings are brought against a member state, the language of that member state becomes the procedural language. Where a court of a member state refers to the Court of Justice for a preliminary ruling, the procedural language, as determined by these rules, applies to both the written and oral proceedings in the case. Where, however, a person entitled to participate in the case, whether by submitting written observations or intervening in the oral arguments, lacks competence in the procedural language, then the rules permit that person's intervention in the language of his choice (even a nonofficial language). The registrar arranges for the translation of the intervention into the procedural language. Moreover, to avoid prejudice to an intervenor unfamiliar with the procedural language, the registrar may be required to arrange the translation of everything said or written in the proceedings into the official language of the intervenor's choice. In addition, even where French is not the procedural language of the case, all relevant documents are translated into French, this being, by tradition, the working language of the Court.

This article examines the effect of this complex linguistic regime upon the operation of the Community Court and in particular upon its methods of interpretation of this plurilingual phenomenon that is Community Law.

#### INTERPRETATION BEFORE THE COMMUNITY COURT<sup>11</sup>

The Court of Justice commonly prefers a teleological or schematic interpretation of a provision of Community Law; the wording, of course, is not ignored, but primary importance is not given to "*les termes*." The Court looks rather to "*l'objet, l'esprit, la nature*" or "*l'economie*" of the text under scrutiny. Professor John Willis wrote many years ago, in relation to the Anglo-American judicial approach, that from the literal, "golden," and "mischief" rules the "court invokes whichever of the rules produces a result which satisfies its

10. The Rules of Procedure of the Court were extensively revised in 1974 and were further amended in 1979, O.J. EUR. COMM. (No. L. 350) (1974). For commentaries thereon, see Jacobs, *The Working of the European Court in the enlarged Communities*, 1 EUR. L. REV. 43 (1976); and Jacobs, *Amendments to the Rules of Procedure*, 5 EUR. L. REV. 52 (1980).

11. See Brown & Jacobs, *supra* note 8, at ch. 12, for a brief account. For a fuller discussion, see Dumon, *The Case-law of the Court of Justice—a critical examination of the methods of interpretation*, and Kutscher, *Methods of Interpretation as Seen by a Judge at the Court of Justice*, in PROCEEDINGS OF JUDICIAL AND ACADEMIC CONFERENCE, SEPT. 27-28, 1976 (Luxembourg, 1976).

sense of justice in the case before it."<sup>12</sup> Certainly, the Community Court in doing justice leans in favor of the "golden" or "mischief" rules in the sense of interpreting by reference essentially to context or to purpose.

A perceptive observer, Dr. Ehlermann, head of the commission's legal service, has stated that the relatively minor significance of the actual wording is easy to explain.<sup>13</sup> He gives three reasons. In the first place, Community law, and the treaties in particular, leave a multitude of legal concepts undefined. To cite only three examples of major importance for the free movement of goods, the concepts of "charges having an equivalent effect," "measures having equivalent effect" and "internal taxes" cannot be elucidated from the text alone.<sup>14</sup> Second, the conditions in which Community law was and is prepared are hardly conducive to careful drafting. This is true not only of the original negotiations preceding the Treaty of Rome but also of the horse-trading which takes place all the time in the Council. Third, and of particular importance for our subject, Community law is of a plurilingual character. It is frequently framed in a language other than the mother tongue of the draftsman. In spite of the many years now of accrued experience, there is still a considerable risk of mistakes creeping into the texts and being missed in revision.

An actual example of such a mistake occurred in the case of *Stauder v. City of Ulm*,<sup>15</sup> a careful analysis of which will provide a graphic illustration of the peculiar problems associated with plurilingual laws, especially in relation to the task of the judge. And it should be remembered that Community law is the business not only of the ten Community judges who compose the Luxembourg Court but also of the many thousands of national judges in the member states who are increasingly faced with applying Community law in their courts as the process of the legal integration of Europe evolves.

#### *The Butter Mountain Case*

The *Stauder* case arose from the existence of the notorious "butter mountain" in the Community; the results of one of those over-productions that discredit the Common Agricultural Policy and

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12. Willis, *Statute Interpretation in a Nutshell*, 16 CAN. B. REV. 1 (1938).

13. Ehlermann, *The Interpretation of Community Law by the European Court*, in THE INTERPRETATION OF COMMUNITY LAW AND THE ROLE OF THE EUROPEAN COURT 1 (U.K. Ass'n for Eur. Law 1976).

14. These terms appear in E.E.C. Treaty, *supra* note 3, at arts. 12, 30 and 95.

15. *Stauder v. City of Ulm*, [1969] E. Comm. Ct. J. Rep. 419.

tend to conceal the great achievements of that policy in securing a prosperous agricultural sector for the farmer and plentiful food at stable prices for the consumer.

To help reduce the surplus stocks of butter, the Commission sought to increase consumption by encouraging the poorer citizens in the member states to turn to butter in place of margarine. The device decided upon was to put cut-price butter on sale for the needy. Because the butter was to be sold through normal retail outlets, it was necessary to prevent abuse of the concession by ensuring that the butter only got to those genuinely in need, a category that was defined as those in receipt of certain social welfare payments in each member state.

The scheme was set out by the Commission in its Decision 69/71 of February 12, 1969. In conformity with the linguistic regime, this decision was issued in the (then) four community languages. In the German and Dutch versions, Article 4 of the decision, which was to become the provision in dispute, provided that member states should take all necessary measures to ensure that those entitled may only receive butter "in exchange for a coupon issued in their names" (in the German version, "*gegen einen auf ihren Namen ausgestellten Gutschein*").

The German government, which had in fact been instrumental in proposing the scheme to the Commission in the first place, proceeded to implement the Commission's decision by having coupon books printed for the cheap butter. The books contained tear-out coupons for detaching by the shopkeeper, but the stub of the book had to carry the name and address of the beneficiary; in the absence of those particulars the coupons were invalid.

In the City of Ulm a welfare recipient, Herr Erich Stauder, was issued such a book, but he objected to the disclosure of his name and address and brought twofold proceedings in the German courts. First, he complained to the Federal Constitutional Court of an infringement of his fundamental rights as guaranteed in the German Constitution; in particular, he alleged that the book infringed his right of privacy by disclosing to shopkeepers and others that he was a recipient of welfare benefits. Second, he brought an action against the City of Ulm in the regional Administrative Court of Stuttgart, asking that the city administration of Ulm be enjoined from requiring him to reveal his name when he purchased his cheap butter.

The fate of the first proceedings need not concern us, for it was the second action that induced the Stuttgart Administrative Court

to invoke the reference procedure under Article 177 of the Treaty of Rome and to ask the help of the Community Court in Luxembourg. The question put to Luxembourg by the Stuttgart Court concerned the legality of the Commission Decision 69/71, on the basis of which the German system of coupon books had been framed.

The Court of Justice in Luxembourg had no trouble in finding that the reference did fall properly within its jurisdiction under Article 177.<sup>16</sup> This meant the Court had to "interpret" the question as framed by the Stuttgart Court. A readiness so to interpret questions put by national courts had been manifested previously by the Community Court.<sup>17</sup> Properly interpreted, said the Court, the question submitted asked for a ruling on the validity of the Commission decision, tested not, of course, in relation to German law but in relation to Community law itself.

The Court of Justice agreed with its Advocate-General Roemer, that, before the question of the *validity* of the decision could be considered, there was a prior question of the *interpretation* of that decision. This was so, even though the Stuttgart Court had not expressly raised any question of interpretation. And this question of interpretation arose by reason of the different language versions of the decision, for on their face these four versions were not uniform—an inherent problem, as we have seen, of a plurilingual law.

In the course of its judgment, the Court of Justice pointed out that *all* versions of the relevant text need to be considered in order to ensure uniform application of Community law. This uniform interpretation must involve interpretation, first, of the real *intention* of the author of the text, second, of the *aim* he seeks to achieve, and third, in the light of *all* the official versions (in this instance, four). In a case like the present, moreover, the most liberal interpretation

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16. E.E.C. Treaty, *supra* note 3, at art. 177, states in relevant part: The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

- (a) the interpretation of this Treaty;
- (b) the validity and interpretation of acts of the institutions of the Community

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

17. *E.g.*, Van Gend en Loos, [1963] E. Comm. Ct. J. Rep. 31; Costa v. ENEL, [1964] E. Comm. Ct. J. Rep. 585.

must prevail, provided such interpretation is sufficient to achieve the object of the text in question. In favor of the most liberal interpretation, the Court argued that it cannot have been the intention of the author to impose stricter obligations in some member states than in others.

This historical interpretation in regard to the intention of the author is here reinforced by reference to the *travaux préparatoires* (preparatory work) of the Commission decision. In relation to the treaties, as the primary source of Community law, it may be noted that *travaux préparatoires* are not generally resorted to as an aid to interpretation, partly because they are simply not available and partly because, even if they were, they would have little relevance to the interpretation of such a dynamic, programmatic corpus of law as Community law represents; a photographic snapshot, as it were, of a Community provision at a particular moment of gestation or birth cannot accurately picture the creature it will become. As American experience abundantly demonstrates, a text, especially if constitutional in character, has a life of its own; and the treaties are, in a very real sense, the Community's constitution. The nearest approximation to the use of *travaux préparatoires* in relation to the treaties are the speeches and documents that attended the ratification process in the individual member states when they were adopting the treaties. Thus, the Advocate-General has occasionally referred the Community Court to what was said in a national legislature when a treaty was being presented for ratification.<sup>18</sup>

By contrast, in relation to Community legislation (or "secondary" law) the *travaux préparatoires* of the particular regulation, directive or decision, may sometimes be invoked, as happened in the case of *Stauder*. Here the use of the preparatory stages of the legislation is facilitated by the obligation imposed by Article 190 of the Treaty of Rome that regulations, directives and decisions "shall state the reasons on which they are based and shall refer to any proposals or opinions which were required to be obtained pursuant to this Treaty."

This requirement of "motivation" (as the French would say) is well illustrated in the Decision 69/71 now under analysis. It begins, characteristically, with a series of obligatory recitals by way of a preamble. The Advocate-General used these *motifs*, in conjunction with the written observations presented to the Court of Justice by

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18. See *Netherlands v. High Authority*, [1954-1956] E. Comm. Ct. J. Rep. 103.



the Commission, to show how the variation arose in the different language versions of the decision. We learn that the *fons et origo* of the decision was an initiative on the part of the German government, who sent to the Commission in Brussels a telex message proposing a cheap butter scheme for welfare recipients, the butter to be sold against coupons bearing the name of the recipient.

A draft decision was then drawn up by the Commission in French, the usual working language. The draft was next passed to the "Management Committee for Milk and Milk Products," a body on which all the member states are represented and one which (by Council Regulation 804/68) the Commission is required to consult for an opinion. If then the Commission elects not to comply with this opinion, as it is free to do, the Commission is under an obligation to communicate the difference of opinion to the Council. There were however, no such references to the Council in the present case, because, as the last recital in the preamble to the decision relates, the Commission intended to make its decision conform with the advice of the Management Committee as formulated in its opinion.

What happened then in the Management Committee? The draft before it followed the German proposal and referred both in the recital of the preamble and in the body of the decision itself to "*un bon détaché d'une carte portant l'identité de l'acheteur*" ("a coupon detached from a card bearing the identity of the purchaser"). Some members of the Committee voiced doubts about the naming of recipients, as a result of which the text was changed to "*bon individualisé*" ("an individualized or personalized coupon") both in the recital and in the body of the text.

Decision 69/71, when subsequently issued, accorded with the agreed draft so far as the French and Italian versions were concerned. But the German and Dutch versions did not. The worst departure from the agreed draft was the German, where both the recital and the body of the text kept the original requirement of (in the French) "*un bon détaché d'une carte portant l'identité de l'acheteur*," which became (in the German) "*einen auf ihren Namen ausgestellten Gutschein*" ("a coupon issued in their names"). The Dutch version got it half right: it changed the reference in the recital to the equivalent of "*bon individualisé*" but kept in the body of the text the requirement of naming the recipient: "*een op naam gestelde bon.*"

The Advocate-General concluded, and the Court agreed, that the French and Italian versions should prevail. "*Un bon in-*

*dividualisé*" meant that Community law did not require, although it did not prohibit, the identification of the recipients by name. So interpreted, there was no ground for invalidity of the Commission decision.<sup>19</sup> If the Court of Justice had *not* chosen the more liberal interpretation, the question would then have arisen whether the decision offended, not German law, but "the general principles common to the laws of the Member States,"<sup>20</sup> which the Court considers itself bound to uphold by the terms of the treaty. As the case law of the Court has shown, it will determine the content of those general principles with due regard to the constitutional traditions of the member states.

A tailpiece to the case of *Stauder* deserves mention. The proceedings in the case extended from April to June 1969, the preliminary reference from the Stuttgart Court being lodged at Luxembourg on June 18. On July 29, a new decision was issued by the Commission correcting the German and Dutch versions by removing the offending reference to the names of the cheap butter recipients and substituting the term "*individualisierten*" (and "*geindividualiseerde*").

### *The French Bum Case*

The linguistic regime had previously posed a somewhat different problem in the case of *Bouchereau*.<sup>21</sup> Bouchereau was a young Frenchman who had been engaged in several employments in England as well as running afoul of the police for offenses involving the use of soft drugs. After his third conviction, the Metropolitan Magistrate, before whom he had been tried, recommended to the Home Secretary that he be deported.<sup>22</sup> The defendant's counsel argued that such a deportation would be contrary to the Treaty of Rome as a breach of the principle of freedom of movement of workers guaranteed under that treaty.<sup>23</sup> The prosecution argued

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19. Paragraph 7 of the grounds of the Court's decision states: "Interpreted in this way the provision at issue contains nothing capable of prejudicing the fundamental human rights enshrined in the general principles of Community law and protected by the Court." *Stauder v. City of Ulm*, [1969] E. Comm. Ct. J. Rep. at 425.

20. E.E.C. Treaty, *supra* note 3, at art. 215 (2).

21. *Regina v. Bouchereau*, [1977] E. Comm. Ct. J. Rep. 1999.

22. This procedure is laid down by the Immigration Act 1971, section 6(1). The judge's recommendation to deport is not binding on the Home Secretary but is a precondition for the making by the latter of a deportation order.

23. E.E.C. Treaty, *supra* note 3, at art. 48(1). The quest for general principles common to the laws of the Member States is an exercise upon which the Court of Justice commonly embarks in its interpretation of Community law. The only specific

that the deportation would fall within the exception allowed by the treaty on grounds of public policy.<sup>24</sup> This exception, however, has been the subject of a Council Directive 64/221, which is intended to delimit more precisely the scope of the exception. In particular, Article 3 specifies that "measures taken on the grounds of public policy . . . shall be exclusively based on the personal conduct of the individual concerned . . . (and) that previous criminal convictions shall not, in themselves, constitute grounds for the taking of such measures."

One of the novel points that arose in the case was whether a mere "recommendation" to deport on the part of the magistrate would amount to a "measure" within the meaning of Article 3 of the directive. In all previous cases involving this article, an actual *decision* to deport had been in issue.<sup>25</sup>

The Advocate-General was of opinion that a recommendation did fall within the term "measures." He reached this conclusion by various routes. First, he interpreted the text schematically by reference to its context; he resorted to the device in logic of a *reductio ad absurdum*: "If the Magistrate's recommendation is not a 'measure,' then this could recommend deportation on basis of previous criminal convictions alone, whereas the actual order of the Minister could not do so on this basis without contravening the Directive." Again, in relation to context, he looked at other articles of the directive where the term "measure" is used. He turned also to the directive in the other language versions. Here, the terms used in non-English versions are far from consistent and are not of much assistance.

On this last point, the judgment of the Court of Justice propounds a very clear guideline: "A comparison of the different language versions of the provision in question shows that, with the exception of the Italian text, all the other versions use different terms in each of the two Articles, with the result that no legal consequence can be based on the terminology used." And the Court continues: "The different language versions of a Community text must

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reference to such general principles is in Article 215(2) of the Treaty of Rome which states: "In the case of non-contractual liability, the Community shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties." The court however, has frequently laid down that such general principles are part of "the law" which it is required to uphold by Article 164 of the Treaty.

24. *Id.* Article 48(3) refers to "limitations justified on grounds of public policy, public security or public health."

25. *E.g.*, *Rutili v. Minister of the Interior*, [1975] E. Comm. Ct. J. Rep. 1219.

be given a uniform interpretation and hence, in the case of a divergence between the versions, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms a part."

The Court's conclusion endorses that of the Advocate-General. Where the wording of a provision is not conclusive because of a divergence in the different language versions, the Court declares that it must then refer to the purpose and general scheme of the rules surrounding the provision in question. The Court proceeds to do this in relation to Directive 64/221, the purpose of which was the protection of Community nationals against abuse of the exceptions provided in Article 48(3) to the principle of free movement. In the Court's view, this protection must cover all the stages in the decision-making process leading to a deportation order. Accordingly, the recommendation by the magistrate does amount to a "measure" within Article 3 of the directive.

### *The Dutch Spouse Case*

In *Koschniske*<sup>26</sup> an interesting linguistic point arose from the complex provisions of Community law in the field of social security. The fundamental principle in the Treaty of Rome guaranteeing the free movement of workers and their families from one member state to another has, as a necessary corollary, the principle of non-discrimination against such immigrant workers by the national systems of social security.

Marianne Koschniske was a German citizen working in the Netherlands. In March 1970 she had to give up her work because of ill health. She began to receive from the Dutch social security authorities a disability allowance, her degree of incapacity for work being assessed at between eighty and one hundred per cent. As a recipient of this allowance, she also became entitled under Dutch law to a family allowance for each of her three children, all under 16, who resided with her and her husband in Germany, to which country she had now returned. The Dutch law in this respect was fulfilling an obligation imposed upon member states by Council Regulation 1408/71; this important regulation ensures the application, without discrimination, of national social security schemes to employed persons and their families moving within the Community.

In March 1978 the Dutch authorities stopped payment to her of

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26. *Wörsdörfer (Koschniske) v. Raad van Arbeid*, [1980] 1 Comm. Mkt. L.R. 87.

the family allowance—or at least they stopped the greater part of the Dutch allowances, only continuing to pay the small amount by which they exceeded the German allowances. They did so in reliance upon Council Regulation 574/72 which further implements the basic Regulation 1408/71. Regulation 574/72 propounds the principle whereby a migrant worker by virtue of moving from one member state to another, shall not be entitled to receive more than one family allowance for the same child. Thus, in the present case, family allowances for the three children were also being paid by the German social security authorities, because they were now resident in Germany, where Marianne's husband (their father) was employed.

The relevant Article of Regulation 574/72 expresses the principle in the following terms: "If, however, a pensioner who is entitled to (family) benefits (or) *his spouse* . . . exercises a professional or trade activity in the territory of the said Member State, entitlement to family allowances due . . . under the legislation of another Member State shall be suspended." The words used for "spouse" in the above Article were in the other Community languages: Danish—"aegtefaellen"; French—"conjoint"; German—"Ehegatte"; Italian—"coniuge"; and Dutch—"echtgenote." The problem in the present case arose from the fact that, in the Dutch text, "echtgenote" bears the limited meaning of "wife," the Dutch word for "husband" being "echtgenoot." It will be seen that in the other five languages the one word used is apt to denote both husband and wife. The Dutch language, however, lacks any single word which carries the connotation "spouse," without distinction of sex.

Accordingly, in reliance on the Dutch text, Marianne argued that Article 10 was not applicable to her case since it referred in the Dutch version only to the hypothesis "if . . . a pensioner who is entitled to (family) benefits (or) *his wife* . . . exercises a professional or trade activity in the territory of the said Member State. . . ." Thus, she argued, the fact that *her husband* was exercising such an activity in Germany did not justify the suspension of her entitlement to family allowances under Dutch law.

The Dutch Social Security Court, before which Marianne raised this ingenious plea in her proceedings against the Dutch authorities, submitted the following question to the Court of Justice for a preliminary ruling under Article 177: "Must '*diens echtgenote*' ('his wife') in Article 10 of Regulation No. 577/72 also be understood to mean a married man who is engaged in a professional or trade activity in a Member State and whose wife is entitled . . . to family allowances under the legislation of another Member State?" The

Court of Justice accepted that Article 10, if solely the Dutch version were considered, was capable of giving the impression that the term used referred exclusively to a female. However, "the need for a uniform interpretation of Community regulations makes it impossible for that passage to be considered in isolation and requires that it should be interpreted and applied in the light of the versions existing in the other official languages."<sup>27</sup> The Court went on to observe that a comparison with the other versions of the article revealed that in all the other versions, a word had been used which included equally male and female workers ("*aegtefaellen*," "*Ehegatte*," "spouse," "*conjoint*," "*coniuge*").

The Court then characteristically supported its conclusion by considering the purpose of the article in question, which was to avoid the overlapping of family allowances for the same children. The Court was here following the opinion of the Advocate-General, who had contended that a literal interpretation of the Dutch version would lead to two unacceptable results: first, to permitting an overlap of allowances where the principal beneficiary was a woman; and second, to the non-equal treatment of men and women, contrary to the principle of equal treatment of men and women workers expressed in Article 119 of the Treaty of Rome.

In the result, the Court of Justice applied the principle which it had adopted in *Stauder* and *Bouchereau*; namely, that in case of doubt, where the different language versions are divergent in meaning, the text in question has to be interpreted, not in isolation, but in the light of the versions in the other languages. According to the Court, therefore, "*diens echtgenote*" (his wife) embraced, as it were, "*diens echtgenoot*" (her husband), and the question of the Dutch Court was answered in this sense.

#### *The German Bargee Case*

A somewhat different linguistic problem arose in the case of *Rüffer*.<sup>28</sup> This involved the interpretation by the Court of Justice of the EEC Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters,<sup>29</sup> but the Court's approach to this plurilingual text was in no way different from its approach in interpreting the Community treaties and Community legislation.

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27. *Id.* at para. 6, of the grounds of the Court's decision.

28. *Netherlands v. Rüffer*, 814/79 (Court of Justice of the Eur. Comm., Dec. 16, 1980) (Opinion of Advocate-General Warner delivered on Oct. 8, 1980). Neither Opinion nor Judgment have yet been reported.

29. The Convention was signed on Sept. 27, 1968.

Rüffer was a German citizen and the owner and skipper of a German barge, which collided with a Dutch ship in the Ems Estuary in an area over which sovereignty is claimed by both Federal Germany and the Netherlands. The two countries, however, did conclude in 1900 the Ems-Dollard Treaty for cooperation in the Ems Estuary, and pursuant to this treaty the Dutch government exercised "river-police functions" in the Estuary. These functions included the removal of wrecks. Accordingly, the Dutch Ministry of Transport raised the wreck of the German barge and its cargo. The wreck and cargo were sold at a nearby Dutch port by the ministry, which proceeded to claim from Rüffer a substantial sum, being the difference between the cost of the salvage operation and the proceeds of the sale.

This claim was eventually brought before the Dutch High Court, where it was classified expressly as a claim in tort. The Dutch government, as plaintiffs, argued that the Dutch court had jurisdiction in the matter by virtue of the EEC Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters. This convention was concluded in 1968 between the original six member states of the European Communities, with the only authentic texts of it being in German, French, Italian and Dutch. In 1978 a further convention was signed which provided for the accession to the 1968 convention of the three new member states, but this second convention is still in the process of ratification. Upon ratification, versions of the 1968 convention in Danish, English and Irish also will become authentic texts.

Article 5(1) of the 1968 convention provides that: "A person domiciled in a Contracting State may, in another Contracting State, be sued: (3) in matters relating to tort, delict or quasi-delict, in the Courts for the place where the harmful event occurred." The Dutch government relied on this provision as conferring jurisdiction on the Dutch court in the proceedings against Rüffer. It contended that "the place where the harmful event occurred" was the place of the sinking and that this occurred in Dutch territory; alternatively, even if the German government were to dispute that this part of the estuary was Dutch territory, a reasonable interpretation of the Ems-Dollard Treaty required that the place from which the wreck was removed by the Dutch Government, exercising its river-police functions under the treaty, should be regarded as being within Dutch territory. It also was argued on the basis of the treaty that the collision between the two vessels was part of the "harmful event," and that while the German barge might be deemed to be within the Ger-

man territory, the Dutch ship should by parity of reasoning be deemed to be within Dutch territory, so that the "harmful event" occurred also in Dutch territory. Finally, the Dutch government advanced the alternative argument that the "harmful event" occurred not at the place of the sinking but at the place where the state suffered damage by reason of the cost of removing the wreck, not being recoverable in full from the proceeds of sale of the wreck and its cargo; this place, it was argued, was either The Hague, where the state had its seat of government, or the Dutch port to which the salvaged wreck was taken.

Rüffer, on the other hand, contested the jurisdiction of the Dutch court. He relied, in the first place, on Article 57 of the 1968 convention which provides: "This Convention shall not affect any conventions to which the Contracting States are or will be parties and which, in relation to particular matters, govern jurisdiction and the recognition and enforcement of judgments." According to Rüffer, this Article excluded the application of the convention "in relation to the particular matter" now in issue, since the present claim fell within the scope of the Ems-Dollard Treaty. Alternatively, he argued that the "harmful event" occurred, not in the Netherlands, but in Germany.

The Dutch High Court put a number of questions to the Court of Justice in Luxembourg on the correct interpretation of the 1968 convention. The Court of Justice may be seized of such a preliminary reference by the terms of the Protocol of June 3, 1971. This protocol has adopted as its model the machinery for preliminary references contained in Article 177 of the Treaty of Rome. Only the first two questions need to be considered in the present context. The first question involved the Advocate-General in an excursus into comparative law, whereas the second more directly concerned matters of language. But to understand the approach to the second question a full consideration of the comparative matters raised in the first is necessary.

The first question asked whether the concept "civil and commercial matters" referred to in Article 1 of the convention included a claim such as that brought by the Dutch state against Rüffer. Rüffer himself conceded that Article 1 did extend to the claim against him. Observations to that effect were submitted before the Court of Justice by the Dutch and United Kingdom governments and the Commission of the European Communities. The Advocate-General, Mr. Warner, on the other hand, gave a contrary view. He reminded the Court that Article 1 defines the scope of the convention and that



the expressions used there connote concepts that are *independent* of the law of any particular member state. Article 1 therefore, he said, "must be interpreted by reference, first to the objectives and scheme of the Convention, and secondly, to the general principles which stem from the corpus of the national legal systems." In support of this approach, he cited three previous decisions of the Court in which the convention had been interpreted in this way.<sup>30</sup> In all three cases, the Court had explained that such an approach was necessary in interpreting Article 1 "in order to ensure, so far as possible, that the rights and obligations which derive from the Convention for the Contracting States and the persons to whom it applies are equal and uniform." In *LTU v. Eurocontrol*, the Court went on to say:

if the interpretation of the concept ('civil and commercial matters') is approached in this way . . . certain types of judicial decisions must be regarded as excluded from the area of application of the Convention, either by reason of the legal relationships between the parties to the action or of the subject-matter of the action.

Thus, the Court concluded that certain judgments given in actions between a public authority and "a person governed by private law" may fall within the area of application of the convention, but this would not be so where the public authority "acts in the exercise of its powers as such."

Accordingly, it was not enough to look at the way in which Dutch law classified the present action. Rather, it was necessary to consider the legal systems of all the member states to see whether a general principle emerges from them according to which the action could be regarded as a "civil" or "commercial" matter. The Advocate-General then proceeded to examine the laws of the original member states, where he found that only Dutch law accorded to a waterway authority an action in tort in circumstances such as those arising in the case of *Rüffer*. The laws of Belgium, Germany, France, Luxembourg and Italy empower waterway authorities to remove or to require the removal of wrecks; but any proceedings to recoup the cost of so doing are regarded as administrative in character and do not come before the ordinary courts. Since all these laws classify the matter as public in

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30. *Gourdain v. Naylor*, [1979] E. Comm. Ct. J. Rep. 733; *Bavaria v. Eurocontrol*, [1977] E. Comm. Ct. J. Rep. 1517; *LTU v. Eurocontrol*, [1976] E. Comm. Ct. J. Rep. 1541.

character, the Advocate-General concluded that the authors of the 1968 convention could not have intended the phrase "civil and commercial matters" in Article 1 to include an action of the present kind, notwithstanding the fact that Dutch law classified it as "civil" or "commercial." In his view, to follow the Dutch law would be incompatible with the principles laid down in *LTU v. Eurocontrol*, and incompatible also with the concept of reciprocity in the preamble to the convention.

For completeness, although he doubted their relevance, the Advocate-General referred to the laws of the new member states and to the 1978 convention by which, after ratification, these three states will accede to the 1968 convention. Danish law was in line with the majority of the original member states. The laws of the United Kingdom and of Ireland, on the other hand, were broadly in line with Dutch law by allowing a waterway authority to sue in tort for the cost of removing a wreck.

Nevertheless, the possible support that these common law systems might afford to the argument of the Dutch government in the present action was counter-balanced, in the Advocate-General's view, by the fact that it had been thought necessary in the 1978 convention to amplify (or "adjust") the original text of Article 1 of the 1968 convention by adding a sentence providing that the convention "shall not extend, in particular to revenue, customs or administrative matters." The draftsmen of the 1978 convention recognized that in the United Kingdom and Ireland the distinction commonly made in the original EEC states between private law and public law is hardly known, which meant that the problems of "adjustment" could not be solved simply by a reference to these classifications. Instead, especially having regard to the judgment of the Court of Justice in *LTU v. Eurocontrol*, the draftsmen thought it sufficient to declare in Article 1, as adjusted, that revenue, customs or administrative matters were not civil or commercial matters within the meaning of the convention.

The second question which the Dutch High Court put to the Court of Justice (and which would only arise if the first question were answered in the affirmative) was whether the present claim fell within the concept of "matters relating to tort, delict or quasi-delict" referred to in Article 5(3) of the convention. This question also led the Advocate-General into extensive comparative and linguistic analysis.

The United Kingdom had submitted that the phrase in Article 5(3) should not be interpreted as having its own independent mean-

ing and as being thus common to all the member states. Rather, it referred to the substantive rules of the law applicable in each case under the conflict of laws rules of the court before which the matter was first brought: thus, in the present case, Dutch law should apply as being the law indicated by the conflict rules of the *lex fori*, which likewise was Dutch law.

The Advocate-General, in his opinion, disagreed sharply with this argument of the United Kingdom. He distinguished the Court's decision in *Tessili v. Dunlop*,<sup>31</sup> upon which the United Kingdom had relied, as limited to the peculiar complexities which exist in the law of contract. That case was the first case on the convention to be decided by the court. The Court held that "the place of performance of the obligation in question" in Article 5(1) was to be ascertained by reference to the law governing that obligation, which was to be determined according to the conflict of laws rules of that court before which the matter was brought. The Court was led to this conclusion by the differences between the laws of contract of the member states and the absence of any uniform guide to the substantive law applicable.

In all cases subsequent to *Tessili v. Dunlop*, as the Advocate-General points out, the Court of Justice had tacitly or expressly adopted the view that expressions used in the convention had an independent meaning, without reference to national concepts.<sup>32</sup> The Court justifies this approach to interpreting the convention by the need for its equal and uniform application in all the member states as well as the avoidance of proliferating special jurisdictions under Article 5 which would defeat one of the main purposes of the convention.

The Advocate-General saw a further and decisive objection to the submission of the United Kingdom government that the phrase "matters relating to tort, delict or quasi-delict" was a reference to national legal concepts. In his view, this would only be possible if the phrase, where it appears in the authentic text of the convention in the official language of each member state, connoted a concept known to the law of that state. He then demonstrated that this is not so, first by reference to the texts in the official languages of the original member states, namely:

German: "*wenn eine unerlaubte Handlung oder eine Handlung, die einer unerlaubten Handlung gleichgestellt*

31. *Tessili v. Dunlop*, [1976] E. Comm. Ct. J. Rep. 1473.

32. *E.g.*, *Somafer v. Saar-Ferngas*, [1978] E. Comm. Ct. J. Rep. 2183; *De Bloos v. Bouyer*, [1976] E. Comm. Ct. J. Rep. 1497.

*ist, oder wenn Ansprüche aus einer solchen Handlung den Gegenstand des Verfahrens bilden";*

French: "*en matière délictuelle ou quasi-délictuelle*";

Italian: "*in materia di delitti o quasi-delitti*";

Dutch: "*ten aanzien van verbintenissen uit onrechtmatige daad.*"

No difficulty arose over the French or the Dutch. "*En matière délictuelle ou quasi-délictuelle*" was appropriate to connote the concept of French law corresponding to tort. Likewise, the French phrase was apt to connote the corresponding concepts of Belgian and Luxembourg law. Similarly, the Dutch phrase was apt to connote the corresponding concepts of Dutch law and, in Dutch, of Belgian law.

Difficulties, however, arose with the German and Italian texts. Thus, in the German, the phrase "*eine unerlaubte Handlung*" connoted the German concept of tort, but the circumlocution "*eine Handlung, die einer unerlaubten Handlung gleichgestellt ist*" did not refer to any concept known to German law. Again, the Italian phrase "*in materia di delitti o quasi-delitti*," while it would be intelligible to any Italian lawyer familiar with Justinian, the Napoleonic Codes and the former Italian Civil Code, was not appropriate to modern Italian law, in which the current term of art is "*fatti illeciti*."

So far as the laws of the three new member states might be relevant, the Advocate-General pointed out that "tort" in the English text was obviously appropriate to English law as well as to Irish law, while "delict or quasi-delict" was appropriate to Scottish law. The Irish text had "*in ábhair a bhaineann le tort, míghníomh no samhail mhíghníomh*," which was a direct rendering of the English text. The last four words, however, which correspond to "delict or quasi-delict" did not connote any concept known to Irish law. Finally, the Danish text had "*i sager om erstatning uden for knotrakt*," which meant literally "in matters concerning compensation unconnected with contract." That or similar phrases, however, were only used in Denmark in certain procedural statutes in order to connote a wide and somewhat undefined range of claims arising otherwise than out of contract. Accordingly, the Advocate-General concluded that it was impossible to interpret the phrase "tort, delict or quasi-delict" in Article 5(3) as referring to national legal concepts; it must rather be taken to have an independent meaning. This meaning was not necessary to define, but Mr. Warner observed that in the three member states where the subject-matter of an action of the present kind was not considered as belonging exclusively to the sphere of

public or administrative law (viz., the Netherlands, Ireland and the United Kingdom), it was considered to belong to the province of tort. Thus, assuming that the present action fell within the scope of the convention at all (concerning which see the negative reply to the first question), then it did come within the scope of Article 5(3).

The case of *Rüffer* well illustrates both the difficulties of interpretation which plurilingual texts may present and the skill and thoroughness with which members of the Community Court seek to overcome these difficulties. Among members of the Court, it is upon the Advocate-General that the main burden falls since, as we have seen, it is his function to guide his colleagues on the bench through the linguistic labyrinth.

### *The Italian Rapist Case*

A shorter linguistic point arose in *Santillo*.<sup>33</sup> This case involved, *inter alia*, the interpretation of a phrase in Council Directive No. 64/221 "on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health." This same directive was the subject of the *Bouchereau* case discussed above.

Santillo was an Italian national but had worked in London from 1967 to 1973. In December 1973, he was convicted by a London court of serious sexual offenses, including rape, and sentenced to eight years imprisonment. The judge also recommended his deportation. In September 1978, after Santillo had served some 4½ years of his prison sentence, the British Home Secretary made a deportation order against him based on the recommendation of the judge at the trial in December 1973.

Santillo sought to challenge the deportation order in the English High Court. He asked for an order of certiorari to quash the order on the ground that it was in breach of Article 9(1) of the Directive 64/221. The Article states:

Where there is no right of appeal to the court of law, or where such appeal may be only in respect of the legal validity of the decision, . . . a decision . . . ordering the *expulsion* of the holder of a residence permit from the territory shall not be taken by the administrative authority, save in cases of urgency, until an opinion has been ob-

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33. Regina v. Secretary of State for Home Affairs, *ex parte* Santillo [1980] Comm. Mkt. L.R. 308.

*tained from a competent authority of the host country. . . . This authority shall not be the same as that empowered to take the decision ordering expulsion.*<sup>34</sup>

It was argued on behalf of Santillo that the Home Secretary in 1978 could not rely on the judge's recommendation of 1973 without infringing the terms of the directive. For the language of the directive indicated that the Home Secretary, as part of the process of reaching his decision, should take the initiative in obtaining an opinion from the relevant authority. The directive did not, it was argued, allow him to rely upon a pre-existing opinion, such as that of the judge at the trial in 1973.

Advocate-General Warner was not impressed by this argument. In his opinion addressed to the Court he agreed that the phrase "not until an opinion has been obtained" in the English text of Article 9(1) suggests that the initiative should come from the administrative authority (i.e., the Home Secretary) rather than from the independent advisory body (i.e., the judge). If, however, the phrase were "only after an opinion has been given," it would then be quite neutral, in the sense that it would equally cover a case where the initiative came from the independent body. It was the equivalent of the latter formula that one found in the Dutch, French, German and Italian texts. Thus, the French text had "*qu'après avis donné.*" The sense of the Danish text was midway between that of the English and that of the others. In the Advocate-General's opinion, the present case illustrated how mistaken it can be to seek to interpret a Community instrument on the basis of a semantic analysis of the text in only one language. Bearing in mind the manifest purpose of Article 9(1), he saw no reason why the opinion of the independent body should not precede consideration of the case by the administrative authority having the power of decision.

In the instant case, the opinion of the trial judge had preceded the decision of the Home Secretary by as long a period as five years. In answer to a further question raised in the reference under Article 177, the Advocate-General expressed his view to the Court of Justice that mere lapse of time between the opinion referred to in Article 9(1) of the directive and the decision ordering expulsion did not of itself invalidate the opinion. However, it would do so if the lapse were so long that a new factor arose that ought to be taken into account in making the decision and that the "competent authority" had had no opportunity of considering in framing its opinion.

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34. Emphasis supplied.

Characteristically, the Advocate-General did not specify whether the five years in the present case had had such an effect, and the Court of Justice was equally enigmatic, leaving it to the referring court (the English High Court) to draw its own conclusion on the facts before it. The High Court upheld the deportation order; an appeal to the Court of Appeal against that decision was dismissed.<sup>35</sup> The Court did, however, stress that the social danger resulting from the alien's presence should be assessed at the very time when the decision ordering deportation was made because the facts to be taken into account, particularly those concerning his conduct, were likely to change in the course of time.

### CONCLUSION

The cases that have now been considered show the problems which confront the Court of Justice in interpreting plurilingual texts. The Court is of course well equipped to deal with such problems by both its composition and its organization. Thus, its members include the ten judges of the Court, each drawn from one of the member states and therefore bringing to their judicial task knowledge of their own language and law.<sup>36</sup> So far as the major languages are concerned, the four Advocates-General reinforce the linguistic competence of the Court.<sup>37</sup> Moreover, the administrative organization of the Court includes a language division in which a team of over 50 legally qualified linguists cope with the heavy demand for translations which the plurilingual character of the Court promotes. Thus, written pleadings may need to be translated into French as the working language as well as whatever procedural language is prescribed for the particular case. In addition, the opinions of the Advocates-General and the Court's judgments have to be translated into all six official languages.<sup>38</sup> Besides translators, the Court also has need for interpreters to provide simultaneous translations during the oral proceedings.

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35. For the judgment of the High Court (Divisional Court), see *THE TIMES*, July 23, 1980; for that of the Court of Appeal see *THE TIMES*, Dec. 23, 1980. For a critical comment, see O'Malley, 5 *EUR. L. REV.* 333 (1980).

36. It is expected that the number of judges will, in the not too distant future, be increased to eleven. This will not only assist the court in dealing with its ever-increasing docket, but also avoid the problems inherent in an even number of judges (when the Communities consisted of only six Member States, the Court of Justice had seven judges).

37. The Advocates-General are French, German, Italian and English. See note 9 *supra* and accompanying text.

38. From January 1, 1981, *seven* by reason of the accession of Greece.

The principle of linguistic equality entrenched in Article 248 of the Treaty of Rome has been maintained despite the expansion of the original Community of six member states to ten: that expansion increased the number of languages from four to six (Greek will add a seventh). The next two candidates for accession (Spain and Portugal) will bring the number of languages to nine. Some critics may argue that the Community institutions, as they struggle to maintain the linguistic regime, will begin to resemble the legendary Tower of Babel. But it may be claimed that the linguistic regime has increasing importance with the expansion of the Community and the increasing legal integration of its member states.

This importance can be attributed to several factors. First, the use of one's own language is a fundamental freedom of the citizen of the Community; a freedom which should be upheld whatever the cost and difficulty of operating the linguistic regime. Second, the principle of linguistic equality of the various versions of Community law is itself a guarantee of the uniform application of that law, and this in turn safeguards the equality in law of every citizen. Finally, if at some future date (however distant) a more complete degree of federation were achieved by the community (as the logic of its past development would suggest), then linguistic equality would serve as "a strong bulwark against centralist tendencies."<sup>39</sup> Support for this last proposition can be found in the experience of such plurilingual states as Switzerland, Canada, Belgium, and even the United Kingdom in its recent acceptance of Welsh as an "official" language for certain purposes.<sup>40</sup>

To date, the Court of Justice has shown remarkable skill in solving the problems raised by the linguistic regime. As this discussion of some characteristic cases has illustrated, the Court has evolved methods of interpretation appropriate to multilingual texts. In the event of a disparity of texts, it looks always behind the verbal symbols to the spirit and intention of the provision in dispute. It also leans in favor, as a general rule, of the more liberal version of variant texts. This is an approach consistent with its own doctrine of proportionality whereby the Court requires a Community act to use the minimum of means to achieve the desired end.<sup>41</sup>

39. See Stevens, *supra* note 2, at 734.

40. See Walters, *The Legal Recognition and Protection of Language Pluralism (A Comparative Study with Special Reference to Belgium, Quebec and Wales)*, in 3 ESSAYS IN HONOR OF BEN BEINART 305 (1979).

41. For the doctrine of proportionality, see SCHERMERS, *JUDICIAL PROTECTION IN THE EUROPEAN COMMUNITIES* 55-57 (2nd ed. 1979). For a comparison with English law, see Brown, *General Principles of Law and the English Legal System*, in *NEW PERSPECTIVES FOR A COMMON LAW OF EUROPE* 171 (Cappelletti ed. 1978).



