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Studies in Legal Language and Communication

Legal Constructs

Reflections on Legal-Linguistic Methodology

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Wydawnictwo Rys

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Preface

This book appears in print in the series *Dissertationes legilinguisticae*/*Legilinguistic studies* that assembles contributions written in the spirit of, or being particularly close to, the Poznań school of legilinguistics (legal linguistics). My book took shape as a result of lectures and discussions with colleagues, especially during the legilinguistic conferences that were organized by The Department of Legilinguistics and Languages for Special Purposes, Faculty of Modern Languages and Literature of the Adam-Mickiewicz University in Poznań. This book mainly reflects material issues and methodological aspects that I could explore and elucidate in my lectures due to regular exchanges during the Poznań conferences between 2013 and 2019. However, unlike my lectures during the conferences, the book makes clear the interrelations of legal-linguistic phenomena that by necessity remained concealed in a series of chronologically disconnected lectures. In this sense, this book is, as I hope, clearer than my lectures that were delivered successively and in considerable temporal isolation from each other. Meanwhile, this book differs from my lectures in the sense that it includes case and statutory materials, broad comments and footnotes, which were used in my lectures only randomly, mainly due to the specifics of the spoken presentation. The book format gives me the opportunity to comment upon certain issues more exhaustively, and I definitely use this opportunity, especially in footnotes. Readers, who prefer to follow the main argument, may omit the footnotes, should they perceive them as too burdensome. For my part, however, I encourage the readers to include footnotes in their reading. Meanwhile, as this book is written from the comparative point of view, some materials and quotes in the footnotes and occasionally even in the main text are not translated into English. This is always the case when the English translation would cause problems rather than facilitate the understanding of a legal-linguistic topic quoted in a language other than English. Furthermore, some best quotes are best also because they were drafted in a particularly elaborate language. Readers should therefore enjoy them in their original linguistic versions. In any case, I tried to signal the content of linguistic samples and quotes in that I briefly commented them in English.

As in my lectures, my main aim in this book is to generalize experience collected from legal-linguistic research in order to understand better the legal-linguistic method. In my view, this book belongs to the area of basic research into the methodological fundamentals of the legal-linguistic research. It should elucidate the paradigmatic requirements for a fully-fledged legal linguistics and pave the way toward an integrated approach to law and to language that would overcome the Law and Language-split in our reflection upon the use of language in law. Meanwhile, and unsurprisingly in a book that concerns methodology, the

book favors one approach to the language of law and mentions other approaches only occasionally. In fact, pragmalinguistic approaches to the language of law and especially the discourse theory clearly dominate the treated legal-linguistic problems. This procedure appears to me more justified than frequently practiced views from nowhere or views from everywhere upon the studied phenomenon. They might suggest that there is no problem of method in legal-linguistic undertakings. Often the attitude that underestimates method results from lack of interest in methodological issues. As far as my view upon the matter is concerned, I am aware about methodological presuppositions of the legal-linguistic research, the more so because I often had to develop makeshift or more stable methodological solutions to progress in my main area of material legal-linguistic studies. While trying to come to terms with a methodological problem I analyzed frequently more or less explicit approaches to legal-linguistic issues adopted by other researchers. I use this procedure also in this book and, where possible, I describe the way of making legal linguistics in other works.

My book consists of four parts. Reflecting upon the contemporary state of the legal-linguistic affairs, it starts with some general remarks about the legal-linguistic method, and then it proposes the concept of legal discourse as the main material and methodological construction able to cope with the complexity of issues in our field. Finally, a broadened paradigm for legal-linguistic studies will be discussed in order to imagine the legal linguistics of our immediate future. At the end, I summarized the most fundamental methodological findings of this research.

Generally, in my reflections on the legal-linguistic methodology, I tried to avoid pedantry and dogmatism, yet I did not try to give up the claim to some intellectual rigour. However, my book will definitely not entertain the reader because its subject is serious and should so remain. Law in its linguistic appearance is sometimes overwhelming, sometimes it is disappointing. Yet, I was never able to identify something funny in it. Therefore, some seriousness in the linguistic description of law and the length of my reflections upon the legal-linguistic method are caused by the subject matter rather than by my lack of talent to entertain. However, I may hope that the reader will not be bored. I am also aware of the circumstance that this book is not perfect as far as the description of the legal-linguistic method is concerned. Also in this respect, my fault is not entire. Legal-linguistic methodology depends upon the development of the whole field of research about legal-linguistic issues, and a perfect method emerges solely when the field of research approaches perfection. Legal linguistics is still remote from such ideal conditions.

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I am particularly indebted for inspiring discussions of the matters exposed in this book and for their support to Prof. Maria Teresa Lizisowa (1937- 2019), Prof. Tatiana Dubrovskaya, Prof. Heikki E. S. Mattila, Prof. Liu Miqing, Prof. Clara Ho-yan Chan, Prof. Stanisław Goźdź-Roszkowski, and Prof. Artur D. Kubacki. Prof. Heikki E.S. Mattila provided also particularly valuable critical comments on the final draft of this book. I am also indebted to Prof. Jerzy Bańczerowski, who stimulated legal-linguistic studies in Poznań and whose introductory course into general linguistics I attended exactly forty years ago. I am particularly grateful to Prof. Aleksandra Matulewska for accepting this research for publication in the legal-linguistic series *Dissertationes legilinguisticae*/*Legilinguistic studies* that she initiated, energetically developed, and expanded with admirable commitment to the systematic study of legal-linguistic problems. I would also like to thank Mr Serge DeBono and Ms Susan Eklöf from the International University of Monaco for their technical support.

Monaco, February 20, 2020

PART I. A METHOD FOR LEGAL LINGUISTICS

When a legal linguist approaches legal texts, oral or written, the question comes up as to what to research in them and how to do it. The legal linguist could focus upon some striking linguistic structures, for instance selected terminological or syntactic particularities of legal texts. The legal linguist could also proceed more precisely, yet this more precise procedure requires a more complex method. As the analyzed texts are legal, the legal element would apparently have to constitute a component of the legal-linguistic method. It is also possible to approach legal texts through the analysis of the concept of language cherished by jurists, especially by legal theoreticians. Such research mainly features logic, while speaking about the language of law. Every research item mentioned above displays problems of method. Therefore, this book stresses particularly methodological aspects that it construes as aspects of understanding the activity exercised by the legal linguist. By so doing, this way of approaching research focuses upon the understanding of fundamentals of one's research activity. It differs considerably from approaches that set up or use methods to develop skills, for instance translation or drafting skills. Therefore, the book is not a formal guide that in ten or fifteen steps introduces into the profession of a legal linguist. Skills necessary to exercise this profession practically are inherent in any issue discussed in this book and can be easily inferred from the text, should the desire to list these particular skills emerge in the reader. The difference between the discussion of the legal-linguistic method and some more practically oriented publications that target mainly legal translators is that this book favors understanding and it does not neglect the discussion of preconditions that enable this understanding. A legal linguist who works methodically in the sense of the term preferred in this book will understand the essence of her work better than other legal linguists will, even if these other linguists may contribute valuable results to our area of knowledge due to their advanced legal-linguistic skills that they acquired during their studies or due to a regular and critical exercise of their trade. Understanding that interests me here is the full understanding of a problem, i.e. a theoretically exhaustive description of a problem in contrast to skillful understanding that leads to fair, yet limited results without any in-depth theoretical analysis of results. For instance, a translator may render the original text of a novel in another language very skilfully, yet she may largely misunderstand the bearing of the original text, its interpretive potential and its multi-layered semantics. Additionally, let us imagine that the translated novel plays in Paris and that the translator assumes that Paris is a small town. The translator's assumption may not have any direct impact upon her translation, yet it constitutes an intellectual failure in the attempt to interpret textually rendered reality. The example illustrates the difference between the understanding of what

a text says in English and of what it means extensively. This difference may not perturb the readers of the translated novel, yet it constitutes an epistemic loss for the translator. Jurists, for instance judges, attorneys at law or public prosecutors, are often in a comparable situation to the translator from the above example. Regularly, they will be able to perform their professional tasks in an acceptable way. Meanwhile, they are frequently unable to state on a theoretical level the rules steering their professional action, especially the regularities of language use in the application of law, which is an epistemic loss for them and for society. In my approach, I tried to prevent such epistemic losses. My approach to methodology is by no means extraordinary as it reflects our daily experience in distinguishing theory and practice. The small modification that I introduce into this approach is that in my search for the legal-linguistic methodology theory and practice will merge and appear as one integrated topic.

Introduction

Paradigmatic determinations – Multitude of legal-linguistic perspectives – Establishing a conceptual framework of reference – Institutionalization – Interdisciplinarity, intradisciplinarity, monodisciplinarity, and transdisciplinarity – Unified science

Legal linguistics (legilinguistics) is still a paradigmatically largely undetermined or under-determined area of knowledge. Its object, its methods, and last but not least, its goals are today a matter of personal choice of researchers who may or may not wish to associate in order to form academic schools or intellectual currents or to join more or less formally defined research programs. Meanwhile, every discipline is well advised to engage in regular self-reflection about its goals and its methods. In a new discipline such as legal linguistics, the question of what we are actually doing when we deal with issues perceived as belonging to legal linguistics is particularly important. Such self-reflection helps us to shape the legal-linguistic field, define and re-define its contours and limits, as well as identify and expand its goals. Shaping and further developing legal linguistics presupposes critical scrutiny of one's research activity and especially the scrutiny of the question as to how this activity is structured in terms of its method. Next to it, the fundamental question as to why one has to deal with issues such as those characterized as legal-linguistic has to be addressed. As said, central to this investigation is the search for the legal-linguistic method. There are several reasons to deal explicitly with this issue. Contemporary legal-linguistic research is methodically multilayered and substantially multifaceted. After decades of a relatively sluggish growth, there is a profusion of works to be acknowledged in legal linguistics, which are worth a more systematic reception than it has been the case to date. This multitude of

theoretical approaches and interests in substantive issues, which are researched, is welcome. Yet it may also lead to confusion in many readers. First, it may dilute the very discipline legal linguistics and blur its contours and final goals. Second, it may embarrass the researcher who is exploring the appropriate conceptual framework of reference for his research.

Overall, the contemporary state of affairs is not necessarily negative as it allows a lot of freedom in the shaping of the legal-linguistic research. Meanwhile, the expansion of an area of knowledge requires also a certain degree of institutionalization, which means also formalization. An academic subject presents, as a rule, a set of basic knowledge that is reflected in teaching curricula and that can be defined more precisely by the state of the art in the area of knowledge that it represents. It also has its own method. Likewise, grading students requires also that the teaching matter represents a clearly defined area where the level of knowledge can be tested and graded along a precise taxonomy. One might object that many researchers perceive legal linguistics as an interdisciplinary area of knowledge and that the particularities of interdisciplinary research oppose a methodological debate as interdisciplinarity is rooted in the methods of the involved disciplines, which are usually methodologically sufficiently determined. What is more, interdisciplinarity does not reflect one type of academic research; there are different varieties of interdisciplinary works (cf. Kocka 1987: 8). Interdisciplinary approaches emerge due to the paradoxical development of academic disciplines that leads to narrow specialization of scholars. This narrow specialization, in turn, engenders deficits of knowledge that can be overcome exclusively through interdisciplinary research (cf. Kocka 1987: 8). Traditionally, it has been a challenge to academia to balance interdisciplinarity and particularity or specialization in scholarly disciplines as specialization is still perceived as a characteristic feature of academic education and research. For some theoreticians of science, academic interdisciplinary research is therefore also paradoxical because it contrasts the primary interdisciplinarity that is characteristic of high school education, for instance in 'life sciences' or 'earth sciences' and more advanced research (cf. Kocka 1987: 8). Therefore, theoreticians of science such as Jürgen Kocka also spoke about the sense and the nonsense of interdisciplinarity (cf. Kocka 1987: 8). At least, in legal linguistics the situation may be less nonsensical than in other academic disciplines, which perceive themselves as 'rigorous', and finally represent formalistic positivism. Additionally, interdisciplinarity must be distinguished from multidisciplinarity as a practical area that combines different disciplines, yet does not necessarily synthesize knowledge that is present in them. An illustrative example is the area of outer space exploration that necessitates the knowledge of astronomy, aeronautics, physiology, and nutrition science in each of its components, yet usually it does not require the knowledge of all of them by one scholar. Some aspects of discussions between jurists and linguists at an earlier stage of the development of legal linguistics displayed the multidisciplinary perspective in form of "the sciences of law and linguistics" (cf.

Mattila (ed.) 2002: 174). This perspective, however, which is occasionally also called 'composite multidisciplinarity', was aptly replaced by interdisciplinarity that has proven much more efficient than irregular contacts between jurists and linguists to discuss a problem identified by one of the groups.

Therefore, it seems that at the contemporary stage of its development, legal linguistics can be perceived as an intradisciplinary area of knowledge, i.e. an independent discipline positioned in the midst of other traditional disciplines, which, however, remains closely connected to them. Unlike law or linguistics, legal linguistics cannot develop independently from both named areas of knowledge, which, for they part, developed independently of each other. Legal linguistics clearly contributes to both disciplines, yet these disciplines continue to perceive themselves as basically independent of legal linguistics, notwithstanding the legal-linguistic findings that may indicate the necessity to modify this view. However, the interest that the two traditional disciplines may show in legal linguistics does not determine its status as a branch of knowledge. The level of integration of matters discussed in the research decides finally whether we can already speak about a new discipline, which is characterized by dense integration of scrutinized matters, or whether we have to do with a loosely organized cooperation of scholars representing different disciplines focusing upon one subject of investigation (cf. Heckhausen 1987: 132). The later constellation clearly does not represent a new discipline. In legal linguistics, examples for both constellations can be found, yet methodically integrated research is also present in the works of many scholars such as Gérard Cornu, Maria Teresa Lizisowa, Edeltraud Bülow, Heikki E. S. Mattila, Tatiana Dubrovskaya, Aleksandra Matulewska, and Peter M. Tiersma. These, in short, are reasons to think about legal linguistics and particularly about its method as a research object and as a teaching subject.

Non-complementarity is one more challenge to many researchers in legal linguistics, as many perceive law and linguistics as unconnected disciplines. As I perceive law and linguistics as very closely connected because both areas of knowledge deal mainly with the analysis of meaning in texts I do not have such methodological problems. Furthermore, the legal element in legal linguistics is not unproblematic. Law integrates with difficulty into other social sciences because it has a methodologically intricate and largely inherent method that reaches back some two thousand years, to the ancient Romans who systematized some theoretical knowledge that they inherited from the ancient Greeks. Other social sciences represent today a methodological level of reflection that is often underestimated by jurists. Monodisciplinarity, due to its often inherent methods engenders also a specific language. When two monodisciplines are combined in the interdisciplinary research, a mixed language emerges (cf. 'Mischsprache' in Heckhausen 1987: 129) that lacks a precise frame of reference. In this sense, interdisciplinarity and integration of knowledge are two different things, as interdisciplinarity does not engender automatically a new, integrated area of knowledge. The same problem concerns the paradigmatic change that will not provide any conceptually coherent

results automatically. Meanwhile, only a robot could describe 'objectively' a subject of studies in terms of its method, i.e. taking a perspective 'from nowhere' (cf. Nagel 1986). Scholars regularly look at their subject taking a view upon it from 'somewhere' and this book is not an exception to the rule.[1] It tries, however, to take into consideration some of the approaches that are particularly visible in the legal-linguistic research. Connected to this issue are choices between encyclopaedic and methodical approaches. Encyclopaedic approaches to knowledge pretend to state knowledge available in a discipline purely descriptively while producing a synthesis of available knowledge that they treat as a collection of facts. These approaches are doubtful as knowledge emerges as knowledge only in terms of the applied method. Without method, there is no knowledge. Likewise, every fact is a fact only in the perspective of the method that is used for its identification and interpretation. Beyond the area of law, whatever encyclopaedia available today in paper format or online bears witness to the methodological dependence of facts and of the methodological approaches that determine them as facts. Therefore, the centrality of methodological choices is regularly stressed in this book.

The described state of affairs also indicates dynamic in the shaping of the legal-linguistic subject matter. What is more, inter- and intradisciplinarity tend to develop in the direction of transdisciplinarity. Transdisciplinarity may be understood as the tendency to establish a unified science beyond particular areas of knowledge that is nourished by these particular disciplines (cf. Neurath et al 1971, Nicolescu 2002). It goes without saying that while researching the language of law we aim at more. This added value to the legal-linguistic research could be called the understanding of the world. The step from the limited understanding of the object of the legal-linguistic research that is the language of law to the abstract understanding of the world is a challenge to modern science, as scientific disciplines remain limited by their methodical and material particularisms. Meanwhile, in terms of method, it would be essential to include the postulate of transdisciplinarity in legal-linguistic scholarly undertakings. Fundamental legal-linguistic research covers mainly issues discussed above. It clarifies them and enables legal-linguistic research within a paradigm established in this way.

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[1] T. Kotarbiński, quoted by J. Woleński (1990: 189), reflected in his philosophical work upon the methodological dependence of knowledge: "…niepodobna żądać rozumnie podania toku danego zdarzenia w postaci opisu składu i układu jego stadiów pod wszystkimi względami, ponieważ istnieje zawsze nieskończona mnogość względów, pod którymi jakakolwiek rzeczywistość może być rozważana. Inaczej rzecz się ma ze sposobem i metodą. Wszystkie względy, miarodajne dla wyznaczenia zastosowanej w danym działaniu metody, są jednoznacznie wyznaczone przez intencję działającego. Stosuje on pewien sposób działania, to znaczy, stara się o to, by tok jego działania był taki a nie inny, pod takimi a nie innymi względami. Reszta pozostaje w nieokreśleniu z punktu widzenia jego zamierzeń. I dlatego pytanie o sposób działania jest dostatecznie określone bez relatywizacji." Knut Hanneborg (1967: 39) mentions in the context of our problem: "We have, indeed, many good methods, but they lead to various goals, among which we do not have the means to choose properly – and we badly lack a theory of methods."

Fundamental legal-linguistic research

Fundamental research – Legal-linguistic and linguistic research – Juridicity

An inquiry into the legal-linguistic method such as the one proposed in this book belongs to the fundamental legal-linguistic research. Fundamental legal-linguistic research deals with conceptual foundations of legal linguistics. *Fundamental* or *basic research* is not the main area of interest in legal linguistics. In other areas of knowledge, it is not dominant either. Actually, it is underrepresented in most areas of knowledge. Known in the German speaking academia as *Grundlagenforschung*, in the French scholarship as *recherche fondamentale*, in the Polish research as *badania podstawowe* and sometimes perceived as belonging to the theory of science, it does not dominate scholarly activities, which, as a rule, take place within a predetermined paradigm. For instance, chemists study and research within one main paradigm of chemistry, where different schools can manifest particularities as to the details of chemical problems. Humanities and other social sciences are in a different situation. Due to the multiplicity of conceptual and ideological approaches in humanities and social sciences, commitments to approaches are always required in the research. Without such commitments, a piece of research remains unreadable and can be understood only after a methodological classification has taken place by its readers, if at all.

Fundamental legal-linguistic research makes a step back, away from daily research activities and asks how legal linguistics is possible as an independent academic discipline. After all, the status of legal linguistics as an area of knowledge depends on its paradigmatic anchorage. When a piece of research proceeds in that it applies linguistic methods and standards rooted in purely linguistic paradigms to legal texts, then such research represents and belongs to linguistic studies as whatever text can be scrutinized with the help of linguistic methods and standards. In such studies, the diversity is due to the diversity of methodological approaches within linguistic studies, as linguistics does not speak with only one voice. An attempt to determine and to better understand this problem was undertaken by Heikki E.S. Mattila, who used the main structure of the academic subject 'linguistics' proposed by Jean Aichison in her popular introductory book *Linguistics* (1995). There, and unsurprisingly, linguistics is introduced as being composed of phonology, morphology, syntax, and semantics as well as of socio- and psycholinguistic issues. Mattila imagined the application of this structure to law in order to test its usefulness in legal-linguistic studies (cf. Mattila 2002: 174). Meanwhile, his attempt also unveiled the limits of such an undertaking in legal linguistics, notwithstanding its usefulness for purely linguistic or philological studies. Also Gérard Cornu (2005: 2) noticed this problem in the application of linguistics to law ("une application de la linguistique au droit") and solved it in his own way. Today, it seems evident that pure linguistics applied to legal texts engenders linguistic, yet not legal-linguistic results. For instance, a study

that finds out that the second person of verbs in singular and plural does not appear in Polish statutory texts is purely linguistic because it is epistemically and methodically limited by the conceptual paradigm of linguistics. By contrast, a study that combines linguistic and legal perspectives belongs to legal linguistics. For instance, Chris Heffer (2005) focused on the legal-lay discourse that is an issue for a linguist to study, but he also analyzed strategic tensions between the necessity to use language efficiently at trial and to conform to legal constraints. Particularly, he proposed ways of managing these tensions linguistically, which would facilitate the work of the jury. Heffer's study is written within the legal-linguistic paradigm as it combines problems and methods relevant to linguistics and to legal studies. In addition, linguists can also inform jurists about the semantics and pragmatics of use of words in cases where they appear in a linguistic context that includes other than linguistic prerequisites of meaning constitution such as principles of sport competition or fundamentals of social legislation. For instance, the South African sprint runner, Oscar Pistorius, became the protagonist of a dispute about his use of prosthetics, so-called running blades, in competitions with non-disabled sportsmen. It was assumed that the running blades gave him an advantage over non-disabled runners. Especially, his technique was compared to jumping rather than to running. Legal linguists could participate in the elucidation of the use of words such as 'jumping' and 'running' in this case. The legal-linguistic input would be interesting because 2007 the International Association of Athletics Federations (IAAF) amended its competition rules and it included a ban on the use of "any technical device that incorporates springs, wheels or any other element that provides a user with an advantage over another athlete not using such a device." After some controversial testing by sport specialists, Pistorius was found to be in advantage over non-disabled runners and he was banned from competitions by the IAAF. In 2008, the IAAF decision was quashed on appeal by the Court of Arbitration for Sport (CAS) in Lausanne. The court held that there was no evidence that Pistorius had any net advantage over non-disabled athletes. Both decisions in this case were made with reference to tests of the use of energy during race running by Pistorius in comparison with non-disabled runners. They brought contradictory results because their outcome depends upon the parameters that are taken into consideration during the testing and upon the interpretation whether the device used by Pistorius caused that he "was running with unfair advantage." Other linguistic issues were not considered by the IAAF or by the CAS, although the linguistic analysis of 'running' as compared to 'jumping' might have brought additional material that could be helpful for the court in its decision making process. In brief, the CAS decision as such is typical of a legal-linguistic approach that combines fact finding and the interpretation of the criterion 'unfair advantage' in the application of a rule.

On the other side, studies that scrutinize legal terminology from the point of view of the comparative study of law or of the legal doctrine belong to legal studies. Moreover, numerous publications by jurists that represent their personal digressions about language, its appropriateness or correctness and the like belong

rather to legal studies as in linguistics or in legal linguistics they can be used at best as research objects. Fundamentally, legal linguistics reshapes the linguistic and the legal component in its methodology. Particularly, it introduces the juridicity as a structuring idea for legal-linguistic studies. Hence, studies that remain within the linguistic research paradigm represent linguistics, studies that expand and redefine the paradigms of linguistics and law, for instance by the methodological component of juridicity, represent legal linguistics. Fundamental legal-linguistic research enables the identification of legal-linguistic issues or questions that constitute the main area of interest for legal linguists.

Legal-linguistic questions

Goals of legal linguistics – Sense of academic activity – Method and methodology

The deeper sense of existence of legal linguistics as an academic discipline is that it deals with legal-linguistic questions in contradistinction to legal questions and to linguistic questions. As for the linguistic questions, one may posit that whatever utterance may be approached from the linguistic point of view, yet we have seen above that this issue is not decisive. It is also understood that a linguist can analyze a medical or a legal text with the help of the conceptual frame of reference of the science of language. However, this procedure does not turn such research into medical or legal linguistics. A legal question, which is frequently of doctrinal nature, such as whether rules concerning the application of the statute of limitations to claims are to be perceived as belonging to substantive or to procedural law are as such not legal-linguistic questions. Yet, they can be researched with legal-linguistic means. In such a research, the legal linguist can ask himself why actually such legal questions come about and what sort of epistemic and interpretive problems they might engender. In the above distinction, one might see the beginning of an answer to the question as to what legal linguistics is actually about. This means also that some research that is characterized as belonging to Law and Language studies would prove to be either linguistics (e.g. history of language, text linguistics, lexicology etc.), philology, or general legal theory, yet not legal linguistics. This circumstance does not mean that such research is less valuable than is the legal-linguistic research. It means that this research is different from legal-linguistic research because it proceeds methodically differently. As of now, and due to the state of the art in legal-linguistic studies, it might be, however, premature to insist upon all too categorical determinations and upon a strict partition of tasks among disciplines that deal with issues related to law and language.[2] In

[2] Advanced legal linguists determine clearly the domain of their undertakings. M. T. Lizisowa (2016: 44) characterized the dominant epistemic perspective of her communicative theory of legal language: "Problemem badawczym jest, w jakim stopniu języki komunikujące prawo

due course, a more consolidated legal linguistics will emerge from the ocean of published research papers as Botticelli's Venus had emerged from the waves by an act of artistic creation. Meanwhile, even artistic creation can be influenced and prepared. Many methodological questions will have to be asked and also answered until the ground will be ready for more advanced intellectual undertakings.

Scholars traditionally stressed two problems with the scientific method. These problems emerge first, when one has no method and second, when one has a method. In the first case, a piece of research that is not led by a clearly determined method may become unintelligible, in the second case the strict application of a determined method may produce rigid and sterile research. A method is the way in which academic research proceeds systematically.[3] It means that not all research activity is taken into consideration but solely systematic research that is rooted in an explicitly or implicitly complex and coherent, goal-oriented method. Methodology, in turn, is the area of knowledge that scrutinizes methods, as for every scholarly approach there are several methods. In a broader, epistemic approach to methodology, it comprises the whole discursively constituted world of methods and not only their formal or formalized aspects that can be stated with the tools of logic. Methodology uncovers ways of reasoning and methodical patterns in approaches and paradigms. It also establishes paradigmatic preferences. Furthermore, it determines the status of a branch of knowledge among other sciences and it clarifies fundamental notions that constitute this branch of knowledge (cf. Kotarbiński 1955: 6). The combination of paradigmatic reflection and conceptual analysis is typical of fundamental research into every branch of knowledge. It is also the main characteristic methodical feature of this book.

Formally, or rather formalistically, one could claim that unsolved methodological problems prevent the development of an area of knowledge until the solution to them is found. From this statement it would follow that substantive, i.e. subject-matter related knowledge can be acquired when open methodical issues mentioned above and below have found a convincing solution.[4] However, human

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spełniają funkcje kognitywne, tj. umożliwiają tworzenie, porządkowanie, utrwalanie i transferencję wiedzy prawnej."

[3] Cf. T. Kotarbiński, quoted by J. Woleński (1990: 183-196), who wrote about the interrelation of method and systematic scrutiny: "…metoda to sposób systematycznie stosowany. Ta definicja podciąga pojęcie metody pod pojęcie sposobu – i to uważamy za trafne. Wyróżnia ona jednak spośród sposobów te sposoby, które są systematycznie stosowane, i te tylko są wedle niej metodami…Tymczasem przez metodologię rozumie się zazwyczaj jakąś naukę, traktującą wyłącznie o metodach rozumowania i budowania systemów naukowych. Wszelka metodologia staje się w ten sposób częścią logiki w szerszym tego słowa znaczeniu. Zerwijmy z tym zacieśnieniem. Uznajmy za domenę metodologii cały świat metod."

[4] Alex Rosenberg (2000: 14) writes about this issue: "Until we are clear about what the methods of science are, these enterprises are at risk of frustration and failure in attempting to attain their scientific objectives…This does not mean that we cannot do science of any kind until we have established what exactly the methods of science are, and ascertained their justification. But it means we should scrutinize those sciences already widely recognized as successful in the

knowledge develops differently in that methodical and substantive problems are analyzed in interrelation. Progress is frequently achieved in this way as the strict formal or formalistic claim about the methodical priority can scarcely be fulfilled by the researcher who works in an emerging area of knowledge. It seems that this approach to methodological and substantive matters can also be recommended to legal linguists. However, it does not mean that methodological issues could be neglected simply because the most fundamental epistemic problems have a relatively limited chance to be solved conclusively in the near future.[5] Traditionally, critical scrutiny of well-established research in other social sciences and the study of methods used by classics of legal linguistics may help legal linguists to clarify some of the fundamental questions of this area of knowledge.

Are jurists legal linguists?

Jurists as jurists – Jurists as linguists – Jurists as legal linguists

The range of legal-linguistic activities comprises basically all action undertaken by jurists. Therefore, the question comes up as to the identity between the legal and the legal-linguistic profession. The question could be discussed both in the theoretical and in the practical perspective. Theoretically, as jurists become involved in all legal-linguistic operations because acting within these operations constitutes their profession, no fundamental difference seems to exist. Practically, however, the difference in handling theoretical issues will manifest itself in analogy with the relation that linguists and native speakers of a language maintain with language. Native speakers speak their language effortlessly and grammatically correctly. They do not need to research it in order to be able to communicate in it. Linguists may occasionally be less fluently conversant in the language they research than are its native speakers, yet they will be able to state the rules underlying the structure and the use of this language better than most of its native speakers. Already Ludwig Wittgenstein was aware of this problem and he coined the aphorism that marks the difference between following a rule and

pursuit of their objectives, in order to identify the methods likely to succeed in less well-developed sciences…"

5 Georg Henrik von Wright (1986: 11, 124) justified research undertakings in a situation of limited insight into epistemic problems that may appear decisive: "Vi måste finna oss i våra begränsningar, men inte låta dem förstumma vår röst…'Sanningen' är ett gränsvärde, som man närmar sig och inte en uppnådd plattform till vilken utomstående kan förvägras tillträde – ens temporärt." In addition, Aulis Aarnio (1989: 42) mentioned the interdependence of concepts and theory: "Mitä korkeammalle tieteellisten teorioiden asteikossa edetään, sitä ohuemmiksi käyvät käsitteet. Ja sitä *teoriapitoisemmiksi* ne muodostuvat. Kun kysymys on aineen submikroskooppisista osista, ollaan itse asiassa jo kokonaan teoreettisten käsitteittemme armoilla jopa niin, että voimme jäsentää vaihtoehtoisia – yhtä tosia – teorioita näkökulman mukaan."

stating a rule.[6] Therefore, one may contend that jurists follow the linguistic rules of their profession and legal-linguists, like all other theoreticians of law, state these rules. Earlier, this problem was recognized also in the legal science by Rudolf von Jhering (1818-1892) who rendered it in another frequently quoted aphorism arguing that from all rules, which the jurists master, they know the least the rules of their own profession. It goes without saying that in both groups there will be persons who fulfill the criteria of following as well as of stating rules. The American judge and legal scholar, Benjamin Cardozo, is an illustrative example of such a person. Many jurists are skilful legal linguists and they are able to reflect upon the rules of the use of language in their professional area of activities, while others do not have this ability or lack professional skills to undertake such intellectual inquires. Additionally, many jurists will be able to express rules that also linguists identify, yet they will use another conceptual language for it than linguists who follow the conceptual frame of reference of their profession.

Legal history shows that since the ancient Greek and the ancient Roman times jurists were perfectly aware of the intricate relation between language and law and they tried to come to terms with this challenging intricacy. Of course, they were not able to solve the problems they identified because they developed speculative and individualistic theories about language and did not care much about the developments in linguistics. Indeed, the old problem of the legal science is, as mentioned already, that it is since its inception in the ancient Rome committed to its own, largely implicit, method and refuses to broaden its methodological perspective by other methods of social sciences. Therefore, it remains in essence a doctrinal area of studies. This fundamental methodological problem will be treated later in this study. One more practical difference exists between jurists and legal-linguists. Jurists are exposed to limits in their freedom of interpretation that they accept more or less eagerly. Judges have to follow precedents of higher courts, public prosecutors follow instructions from their hierarchical superiors, and other public servants follow administrative guidelines. Legal linguists reflect upon and take into consideration these limitations when they develop proposals about the content of rules that are applicable to cases, yet they are not limited by the practices of the exercise of power in society that govern judicial institutions, i.e. persons who are employed in them. In fact, limits to legal discourses are rarely transgressed in judicial institutions as these institutions live on imposing limits and sanctioning their transgression. All these limits considered, one might conclude that at least the academically advanced jurist is also a legal linguist.

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[6] Ludwig Wittgenstein (1988: 345: 202) wrote: "Darum ist 'der Regel folgen' eine Praxis. Und der Regel zu folgen *glauben* ist nicht: der Regel folgen. Und darum kann man nicht der Regel 'privatim' folgen, weil sonst der Regel folgen glauben dasselbe wäre, wie der Regel folgen."

Legal linguistics and legal-linguistic method

Method and legal-linguistic subject matter – Legal concepts and legal constructs

The legal-linguistic method is an amalgam of theory and practice. As this publication is not an introductory book, basic methodological concepts are not explained in it and traditional debates about, for instance, the relation between theory and practice are left aside or are reduced to some digressions that may facilitate their incorporation and their understanding within the conceptual framework of this research. However, there is reason to insist upon an old academic wisdom that sound practice will not survive without solid theory. Likewise, theoretical aspects within one subject remain dependent on issues that represent applied branches of study. Some research belongs or declares itself belonging to general theoretical science, some research insists upon representing applied science, as well as formal or discursive currents of the academic work. In the area that interests most in our context the close relation between general linguistics and applied linguistics has to be stressed rather than loosened as is sometimes the case in the research that insists on a strict split between them, although both are connected like two sides of the same coin. A good piece of legal-linguistic research reflects solid theoretical linguistics and solid applied linguistics. As a rule, also a tolerant approach reigns as to the distinction between research and studies. The Poznań legilinguistic series uses the Latin term *dissertationes* that it renders in English as *studies*. Among other varieties, there are in Latin *investigationes* and the English *inquires*. Moreover, some research concerns the synchronic; other the diachronic approach to the legal language, and some research combines both. Hence, legal-linguistic research may cover various material issues, yet it has to be well defined in terms of its method.

Issues of method will be often discussed in this book with reference to a material legal-linguistic problem in order to avoid an abstract treatment of methodological issues that occasionally may appear sterile. However, the interest in the legal-linguistic method dominates the perspective taken in this book. Therefore, when the methodological problem is exhausted, the material analysis stops sometimes halfway as it interests in this inquiry only as a sample of the legal-linguistic method. I tried to include references for further reading in such cases, especially when there is more advanced research into the issue than the one offered in this book. More often than not, however, an inquiry into the legal-linguistic method helps us to discover a material problem that was not treated previously in the research. In such cases, my book may disappoint the reader because it will stop after the discovery of such a problem and include only its brief discussion. Yet this is a book about the legal-linguistic method and not about the legal-linguistic subject matter. Dealing with this largely unexplored issue is already quite challenging and the procedure that combines methodological and selected material problems is a compromise that is rooted in the legal-linguistic state of the art. Another methodological problem can be mentioned at this place as

well. In academia, there is a tendency to research small issues pretending that while actively researching them results that can be generalized and form big theories could be achieved. This claim may be sometimes even true, for instance in cases of serendipity where a great discovery is made by chance. Otherwise, it represents wishful thinking as by researching small things, i.e. those "nasty little things" in William James's parlance, one will at best clarify these small things. More often than not, it is the justification of facile choices in research. Overall, one may hold that this methodological guideline is, as a rule, a trap. Fundamental research is best conducted through the analysis of conceptual fundamentals of an area of knowledge and not by circumventing procedures of whatever sort.

Hence, in this book I do not intend to introduce the reader into legal linguistics because I did it in some previous publications, especially in my *Lectures on Legal Linguistics* (2017a). In my introductory publications, legal linguistics appears as an area of knowledge that scrutinizes legal-linguistic operations in order to understand law, i.e. the legal language as law interests the linguist because of its particular language. Most striking are legal argumentation, legal interpretation, and (because of its practical importance) also legal translation. Less well understood are multiple legal-linguistic operations such as fact description, witness testimony, accusation, lying, or even laughing or giggling in court procedures. The number of legal-linguistic operations is basically unlimited and it corresponds to our knowledge of pragmalinguistic phenomena of which legal-linguistic operations are a reflex in law, i.e. in its language. Due to this mirror image correspondence, philosophical and linguistic pragmatics seems to be best suited to cope with the language of law. Central to this investigative enterprise are speech acts and discourse as leading theoretical concepts of all reflection upon the language of law. In the pragmatic approach to legal language, law emerges as a result of discursive practices that are steered by legal-linguistic speech acts. Legal language appears as language used in legal contexts, for instance terms such as *family*, *person* and *student* may make part of it or be used in other contexts that only indirectly reflect their meaning in law, if at all.[7] Legal language is identifiable in professional and non-professional

[7] 'Family' became an issue in the U.S. Supreme Court opinion City of Edmonds v. Oxford (514 U.S. 725, 1995) in the context of the zoning code of the City of Edmonds. The code allowed only single-family dwelling units in certain designated areas of the city. The code defined 'family' as "an individual or two or more persons related by genetics, adoption, or marriage, or a group of five or fewer persons who are not related by genetics, adoption, or marriage." The defendant opened a group home for ten to twelve adults who were recovering from alcoholism and drug addiction in the zoned area. The City of Edmonds opposed this project as "the facility housed more than five unrelated persons in a single-family area." Lower courts held that the code provided a reasonable occupancy restriction. The U.S. Supreme Court held in its opinion: "Family living, not living space per occupant, is what (the family composition ordinance) describes. Defining family primarily by biological and legal relations, the provision also accommodates another group association: five or fewer unrelated people are allowed to live together as though they were family...It is curious reasoning indeed that converts a family values preserver into a maximum occupancy restriction…" The term 'person' became a prob-

discourses about law where the meaning of law is constituted (cf. Dubrovskaya et al. 2017: 7). The description of the legal discourse is also the final word in legal linguistics as this discipline is limited by the tasks of identification and characterization of the legal discourse in all its forms of appearance. That much about legal linguistics, whose method is scrutinized in this book.

However, problems of the legal-linguistic method and the legal-linguistic subject matter cannot be totally separated. I did not try to forcibly distil method from the

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lem in the application of the U.S. Freedom of Information Act, especially in FCC v. AT&T (562 U.S. 397, 2011). The U.S. Supreme Court had to decide whether the Exemption 7 (C) of the Act applies to corporations. Exemption 7(C) covers law enforcement records the disclosure of which "could reasonably be expected to constitute an unwarranted invasion of personal privacy." Can corporations have 'personal privacy'? AT&T claimed that they could, because they are legal persons. The court distinguished the use of 'person' and 'personal': "AT&T argues that the word 'personal' in Exemption 7(C) incorporates the statutory definition of 'person,' which includes corporations. But adjectives do not always reflect the meaning of corresponding nouns. 'Person' is a defined term in the statute; 'personal' is not. When a statute does not define a term, the Court typically 'give[s] the phrase its ordinary meaning.'…'Personal' ordinarily refers to individuals. People do not generally use terms such as personal characteristics or personal correspondence to describe the characteristics or correspondence of corporations. In fact, 'personal' is often used to mean precisely the *opposite* of business-related: We speak of personal expenses and business expenses, personal life and work life, personal opinion and a company's view. Dictionary definitions also suggest that 'personal' does not ordinarily relate to artificial 'persons' like corporations. AT&T contends that its reading of 'personal' is supported by the common legal usage of the word 'person.' Yet while 'person,' in a legal setting, often refers to artificial entities, AT&T's effort to ascribe a corresponding legal meaning to 'personal' again elides the difference between 'person' and 'personal.' AT&T provides scant support for the proposition that 'personal' denotes corporations, even in a legal context." For 'person' in the U.S. Constitution cf. Chomsky (2016: 91). The term 'student' caused problems in the application of § 312b (10) of the U.S. Federal Insurance Contributions Act (FICA) in the lawsuit Mayo Foundation for Medical Education v. U.S. (562 U.S. 44, 2011). The FICA provision facilitates employment of students because funds for the Social Security program need not to be collected as payments for their services do not constitute 'wages'. Specifically, the provision excludes from taxation any "service…performed …in the employ of…a school, college, or university… if such service is performed by a student who is enrolled and regularly attending classes." The plaintiff offered residency programs for physicians who graduated from medical schools and sought additional instruction in a specialty. Residents worked in a medical clinic for three to five years and participated in weekly lectures and conferences. They were paid annual stipends not lower than forty-one thousand dollars. The plaintiff viewed the residents as students; the tax authorities claimed they were regular full-time employees. Residents clearly learn a lot in the program, yet they mainly spend their time caring for patients. Are they nevertheless students? The statute in question does not define the term 'student'. Therefore, the legal and the terminological controversy between the parties had to be decided finally by the U.S. Supreme Court. The U.S. Supreme Court solved the ambiguity in following and definitely also favoring one interpretive proposal for purposes of statutory implementation. The court held that the residents were not students as the aspect of employment predominates in their case. Hence, calling someone a student does not make of him a student in terms of law. One of the tasks of legal linguistics is to develop methods that clarify such interpretive choices. Traditional linguistic approaches to disambiguation of terms fail at this point as they cannot explain the preference of courts in a situation where two or more semantic alternatives are at stake in legal proceedings.

legal-linguistic analysis as such a task appears to me formalistic and even orthodox. This means that the reader will be confronted with numerous legal-linguistic problems even if the book actually is not about them, at least primarily. More often than not, substantive legal-linguistic problems emerge from their methodological surroundings and they vanish in them. As a substantive legal-linguistic problem, the book highlights legal constructs that it analyzes from different methodological perspectives. Such an approach enables to understand law, legal linguistics, and especially the legal-linguistic methodology. In addition, a method for legal linguistics that is particularly helpful in legal-linguistic analyses of textual samples will be better understandable. This method is not without reason rooted in this research in linguistic pragmatics. An example may be helpful to understand this part of investigations that will follow. Since the ancient Romans, most claims can be presented in courts within a certain period. After this determined period has passed, courts will refuse to deal with the plaintiff's case, at least when the defendant requests this. In the Roman law, this situation was conceptualized as *præscriptio* (*longi temporis*), later on, in the French law as *prescription*, and in the Polish law as *przedawnienie*. In legal English, the problem is conceptualized as *statute of limitations* and it appears in syntactically more complex forms as *statute barred*, for instance in *This claim is statute barred*. The semantic complexity is not present in legal French coinages *prescription* and *est prescrite*, for instance in *Après combien de temps ma dette de redevance* télévision *est-elle prescrite?* ..., in legal German *Verjährung* and *Die Forderung ist verjährt* or in legal Polish, *przedawnienie* and *Roszczenie jest przedawnione*. In Russian, conceptualizations such as давность or *срок* давности in Срок давности истек (cf. Dydynskij 1997: 430), and in Chinese 追诉时效/ 追訴時效 (zhuī sù shī xiào) follow the same track. Thus, epistemologically, we can identify the moment in history when conceptualization, which interests the linguist regularly as an issue of terminological research, took place.[8] Questions of etymology are connected to it as well. Unlike in many cases of more spontaneous development in the legal language, we can state clearly the epistemological and the etymological stages of emergence of the concept and the linguistic forms connected to it. We can furthermore assume that in all legal languages mentioned above the main concept exists because the ancient Romans coined their basic concept of reference. Meanwhile, questions such as why such a conceptualization takes place remain unanswered at this stage of analysis. It remains furthermore unclear what does the concept of *præscriptio* actually represent ontologically, i.e. does it actually exist and if this is the case, which is its form of existence. Problems of linguistic diversity are equally visible

[8] P. F. Girard (1929: 772) wrote about *prescription libératoire*: "La même notion primitive… excluait l'extinction légale des obligations par le laps du temps. Les obligations de l'ancien droit sont perpétuelles. Si l'action *auctoritatis* s'éteint par un délai d'un ou deux ans, s'est par un contre-coup forcé de l'expiration du délai de usucapion, après laquelle l'éviction, qui est sa condition d'ouverture, ne pourra plus se produire."

in the mentioned examples. Somewhere a supposed concept of *præscriptio* could be assumed when the term *statute of limitations* is analyzed. Here, the traditional philosophical divide between concept and term manifests itself also linguistically. At this stage, also the first difference between a purely legal-theoretical conceptual approach and the legal-linguistic approach becomes clearer. While the main concepts and their syntactic metamorphoses correspond pragmatically, their actual linguistic expression in texts differs considerably. We may therefore speak about the use of terms in relation to concepts (cf. Nagel 1987). Many problems of legal translation are connected to this issue. Some constructs are even more complex than the *statute of limitations*, for instance the *burden of proof*, in Latin *onus probandi*. They organize law argumentatively, i.e. as discursive formations that are semantically undetermined. While structuring law in a specific way the legal doctrine constantly produces problems of the named sort. Independent of the mentioned problems is the issue discussed in the legal doctrine whether the *statute of limitations* is a feature of the substantive or of the procedural law. Understanding the above problems means understanding legal linguistics. Therefore, it seems to make sense to write and to read a book about these problems.

Among legal-linguistic approaches I will also discuss my approach. My approach to legal-linguistic methodology has been always two-prong. First, I questioned the existing or imposed research paradigms and then I provided material research based upon modified or newly set up paradigms (cf. Galdia 2009, 2014, 2017a). Some other books are written in this vein, e.g. Aleksandra Matulewska's *Legilinguistic Translatology* (2013) where a parametric approach to legal translation as a method is developed toward the background of material linguistic analysis. In other books, method and abstract issues prevail and no material linguistic issues are discussed in them. More often than not, method is implicit and has to be reconstructed in the legal-linguistic research. Such reconstruction is accomplished in that the material is scrutinized toward its conceptual background. For instance, a translated document is compared with its original in order to infer the methodological commitments of its translator. Such a method is independent of the declarations of authors, for instance of translators, containing explicit methodological commitments. Frequently, it provides better results than the inquiry, which directly involves the translator in the discussion of the methodological principles of his or her work. Such reconstruction is also objectively valid, which means that it does not need to be confirmed by the concerned authors. More often than not, commitment and practice fall apart in intellectual activities as well as in other practical activities of daily life. Therefore, one can only encourage the reconstructive method to be used also in legal linguistics.[9]

[9] The Finnish legal scholar Matti I. Niemi (1999: 727-732) researched the semantics of 'legal institutions' in the legal language and he contrasted them with the ordinary language use. In the area of law, they cover multiple juridical constructs such as *foreclosure*, *estate*, and *personal property*. M. I. Niemi (1999: 731) characterized the multiplicity of juridical constructs while

A lot has to be reconstructed in legal linguistics to come closer to its fundamental problems. A fundamental question in the legal-linguistic research is the elucidation of the relation between *concept* and *term* in the legal language (cf. Stawecki (2011: 514) who spoke about "Legal concepts (terms) interpreted autonomously"). The linguistically marked difference between concept and term requires a thorough scrutiny from the pragmalinguistic perspective. In daily life, we can imagine a *dog* without calling it 'dog'. We can also imagine some abstract concepts such as *triangle*, yet not prototypically, i.e. exclusively within the mathematical definition. We can, however, perfectly imagine a *square* as it is by definition always absolutely the same. Meanwhile, already more complex ideas like *liberty* cause problems in this respect. Doubtless, however, we cannot imagine the *promissory estoppel* without using its linguistic expression in one way or another. Generally, in the area of law there is no legal concept without a corresponding legal term. Apparently, it would be impossible to think about a legal concept, were a term not at speaker's disposal. On the other side, when a term is not a concept, what is it then? The linguistic expression of a concept is the term, which means that both are united like two sides of the same coin. One could therefore ask why legal theory still operates with the split of one thing in two. The reason may be practical, as shown on the example of the coin. *Adverse possession* in the American law and *Ersitzung* in the German law refer to the same concept, yet express it with different linguistic means. Certain legal linguists and comparative lawyers perceive this superficial difference of term formation as substantial. They will say that two terms correspond with one concept. The divide between concept and term is used to mark this difference. From the pragmalinguistic perspective, the propositional content of the terms is the same, no split in term and concept is necessary.

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referring to Finnish terms: "Myös erilaisia juridisia konstruktioita (yhteisomistus, kuolinpesä, lainhuudatus jne.) on kutsuttu instituutioiksi. Termillä voidaan niin ikään viitata erityiseen menettelyyn, esimerkiksi oikeudenkäyntiin tai kunnan etuosto-oikeuteen. Useimmiten instituuutiolla on tarkoitettu tiettyä asiakokonaisuutta, joka muodostaa funktionaalisen, säädännäisen tai muutoin normatiivisen ykseyden. Tällaisia ovat mm. pesänselvitys ja perinnönjako sekä kiinteistönkauppa." Courts are aware of this structural feature of law. The Spanish Constitutional Court mentions 'construcción' in J. J. González Rivas et al. v. Consejo de Ministros (No. 5790-2019): "La construcción del recurso de amparo como mecanismo procesal que tutela situaciones subjetivas impide el uso de esta vía reparadora, pues en relación con la falta o no del citado presupuesto habilitante no consta de forma concreta y efectiva qué derecho fundamental puede haberse lesionado." In Obsidian Finance Group v. Cox (740 F. 3d 1284, 9th Cir. 2014) the court says: "The Supreme Court's landmark opinion in New York Times Co. v. Sullivan,…, began the construction of a First Amendment framework concerning the level of fault required for defamation liability." In Safeco Insurance Co. of America v. Burr (551 US 47, 2007) the U.S. Supreme Court says: "(W)here willfulness is a statutory condition of civil liability, we have generally taken it to cover not only knowing violations of a standard, but reckless ones as well…This construction reflects common law usage, which treated actions in reckless disregard of the law as willful violations." Legal linguistics researches such 'constructions' that may appear in legal discourses as 'terms', 'concepts', 'speech acts' or 'argumentative structures'. Their function is to steer the legal discourse, i.e. to establish the structure of the debate about the valid law.

As said, we can imagine the *dog* or the *triangle* spontaneously, yet we cannot imagine the *promissory estoppel*. This is understandable because lexemes such as *promissory estoppel* are not visual concepts. They do not refer to any visible or visualizable representations. T. Kotarbiński described the difference between reference and representation in that he distinguished the content of representation and its object as well as the content of the process of representing.[10] He adds to it the *word*, i.e. *lexeme* in our understanding. This *word* is also the *term* in law.[11] Many jurists, especially legal comparatists dealt with the analysis of actual problems to understand better the distinction between *concept* and *term*. G. R. de Groot (1987: 20) dealt with the problematic equivalence between the Dutch *moord* (murder) and *doodslag* (homicide) as well as the German *Mord* (murder) and *Totschlag* (homicide). He says significantly that *Mord* is defined in Art. 211 of the German criminal code.[12] Meanwhile, the code mentions the *murder* only in the headline of

[10] T. Kotarbiński (1969: 21) expressed the problem precisely while reflecting upon the diversity of concepts in the penal law: "Kto by natomiast chciał wejrzeć głębiej w arkana pracy analitycznej i zarazem konstrukcyjnej na terenie pojęć ogólnej teorii działania skutecznego, najlepiej uczyni, jeśli się odda studiom nad pojęciem sprawcy, rozczytując się w piśmiennictwie z zakresu podstaw ogólnych prawa karnego. Dysharmonie życia społecznego zelektryzowały ten problem. Aby trafnie wymierzyć karę wedle intencji danego prawodawstwa, niezbędne jest wiedzieć, kogo uznać lub nie uznać za sprawcę danego zdarzenia…" Furthermore, Kotarbiński (1969: 39) wrote about the constructivist approach to concepts such as *homicide*, *manslaughter*, *murder* etc. that are discussed below: "Teraz jesteśmy przygotowani do zastanowienia się nad rozmaitością dzieł z uwagi na pozytywny lub negatywny charakter końcowego fragmentu zdarzenia w zestawieniu z jego fragmentem początkowym. Dzieła bywają konstrukcyjne lub destrukcyjne…Konstrukcyjne jest dzieło z danej chwili zawsze i tylko wtedy, jeżeli polega na wyposażeniu przedmiotu w cechę, której on na początku tej chwili nie posiadał."

[11] Cf. T. Kotarbiński (1958: 892-893) referring to Kazimierz Twardowski's theory of representations: "Zawierają one teorię przedstawień (bo tym słowem obejmuje Autor zarówno wyobrażenia – czyli przedstawienia naoczne, jak pojęcia – czyli przedstawienia nienaoczne). Czytelnik uczy się z nich odróżniać z jednej strony treść przedstawienia od jego przedmiotu, z drugiej – treść i przedmiot od samego procesu wyobrażenia sobie lub ujmowania pojęciowego… Krytyka poznania musi docierać do pojęć, badając bowiem poprawność twierdzeń i uzasadnień napotyka się na zagadnienie sensu słów. I coraz jaśniejszym się staje, iż rola zawodowa filozofów obejmuje jako część istotną doprowadzenie sensu słów, a więc i treści pojęć do określonej i wyraźnej postaci." For Kotarbiński's own view on the epistemology of concepts, cf. his *Kurs logiki dla prawników*, (1955: 39-40): "Przeciwstawiamy się natomiast hipostazowaniu pojęć, czyli rojeniu sobie, jakoby istniały jakieś obiekty będące pojęciami…"

[12] The version of Art. 211 in the German penal code (Strafgesetzbuch, StGB) from 1872 reads in its original spelling as follows: Wer vorsätzlich einen Menschen tödtet, wird, wenn er die Tödtung mit Überlegung ausgeführt hat, wegen Mordes mit dem Tode bestraft. Modified version of 1941 (under the Nazi regime) says: (1) Der Mörder wird mit dem Tode bestraft. (2) Mörder ist, wer – aus Mordlust, zur Befriedigung des Geschlechtstriebs, aus Habgier, oder sonst aus niedrigen Beweggründen, – heimtückisch oder grausam oder mit gemeingefährlichen Mitteln oder – um eine andere Straftat zu ermöglichen oder zu verdecken, einen Menschen tötet. (3) Ist in besonderen Ausnahmefällen die Todesstrafe nicht angemessen, so ist die Strafe lebenslanges Zuchthaus. The modern version currently in force says: Art. 211 (Mord) (1) Der Mörder wird mit lebenslanger Freiheitsstrafe bestraft. (2) Mörder ist, wer aus Mordlust, zur Befriedigung des Geschlechtstriebs, aus Habgier oder sonst aus niedrigen Beweggründen, heimtückisch oder

Art. 211 and actually regulates the question who is a *murderer* (cf. *Mörder ist, wer aus Mordlust…Murderer is who out of desire to murder…*) and in its wording it does not characterize explicitly the act of *murder*. De Groot's challenging remark is significant because it enables to grasp the difference between concept and term in the legal language. Jurists think in concepts, linguists identify terms. Therefore, the jurist perceives the *murder* in the provision that deals explicitly with the *murderer*. This perception is not irrational and it is also justified by syntax and by semantics of the provision in question. In fact, the linguistic transformation of the provision in the sense of de Groot's perception is easy in the German language: (1) *Mörder ist, wer aus Mordlust…*can be transformed into (2) *Einen Mord begeht, wer aus Mordlust…*as this content is inherent in the language of the original. Hence, the provision, while explicitly referring to the *murderer* sanctions the *murder*.[13] Linguists understand the possibility of such transformations, yet for them language starts with terms, not with concepts, as terms are uncontroversially present in the language.[14] Jurists accept in their work on legal texts the approximate approach to language and proceed intuitively. This approach is justified by the fact that they are native speakers of the language in question. Yet, complex legal questions that involve semantic intricacies cannot be solved with the intuition of the native speaker alone. In our case of the *murderer*, the prerequisite of the *murder* that he might have committed is a.o. the action *aus Mordlust* (*out of desire to murder*) that necessitates a legal-linguistic analysis in cases where it might be applicable. For

grausam oder mit gemeingefährlichen Mitteln oder um eine andere Straftat zu ermöglichen oder zu verdecken, einen Menschen tötet. Significantly, an attempt was undertaken in Germany to replace Art. 211 by a new wording of Art. 212 and 213 under the headline 'Tötung' (i.e. manslaughter). Art. 212 could be reformulated in the following way: Wer einen Menschen tötet, wird mit Freiheitsstrafe nicht unter fünf Jahren oder mit lebenslanger Freiheitsstrafe bestraft, and Art. 213 would say: Im minder schweren Fall der Tötung ist die Freiheitsstrafe ein bis zehn Jahre. The requirement 'niedrige Beweggründe' would be repealed as no more adequate. The reformulated text of the provisions was criticized as much too vague in its possible application (cf. NJW-aktuell 2014: 32). Dutch Penal code provides in its Art. 289: Hij die opzettelijk en met voorbedachten rade een ander van het leven berooft, wordt, als schuldig aan moord, gestraft met levenslange gevangenisstraf of tijdelijke van ten hoogste twintig jaren.

13 The linguistic transformation of '*wegen Mordes'* (*because of the murder*) into '*Der Mörder…*' (*The murderer…*) reflects changes in the criminal doctrine of that time. As it seems, it never had any influence upon the application of Art. 211 in the legal practice. Also M. T. Lizisowa (2016: 105) dealt with this problem with reference to Art. 148 (1) of the Polish penal code: "Odczytany według semantyki powierzchniowej (filologicznej) tekst nakazuje karanie zabójcy…norma ta bezpośrednio nie zakazuje zabijania człowieka…Natomiast na poziomie dyrektywnym…znaczy tyle co 'zakazuje sie zabijać i nadto nakazuje się za zabójstwo karać."

14 The comparative perspective further enriches our understanding of the problem. The argumentative chain in the French Code pénal preceding '*meurtre*' includes: Titre deuxième Des atteintes à la personne humaine, Chapitre premier Des attentes à la vie de la personne, Section première Des atteintes volontaires à la vie. The French provisions say : Art. 221 – 1 Le fait de donner volontairement la mort à autrui constitue un meurtre. Il est puni de trente ans de réclusion criminelle. Art. 221 –3 Le meurtre commis avec préméditation constitue un assassinat. Il est puni de la réclusion criminelle à perpétuité.

such questions, jurists set up a methodology including, for instance, interpretation canons. These canons have, however, proven deficient in theory and in practice. It is the task of legal linguistics to describe and to set up a method of legal interpretation that would replace jurists' tentative and occasionally even fitting statements about the meaning in laws. This is necessary because modern law requires court decisions that are rationally justified and that fulfill the requirement of legal certainty. Attempts to grasp meaning intuitively will not satisfy these requirements.

Fundamental choices

Selecting an approach to language – Determining the concept of law – Thinking together law and language

Methodically, fundamental choices are unavoidable. A methodical decision in favor of one approach is, as a rule, also a decision against other, contradictory, yet not necessarily irrational approaches. In legal linguistics, one of the main issues is what conception of language to choose. Then, when legal linguistics is seen in its relation to law one has to determine one's concept of law and one's approach to the legal science. Many choices were exercised in this book. For linguistic choices, the linguistic pragmatics is favored here as are non-positivist approaches to law, especially the discursive perspective as far as law is concerned. Methodological aspects of choice are made transparent and no 'Indian method' that facilitates covering up one's track is applied here, be it only for a moment.[15] Thus, research into legal language requires the preliminary clarification of at least two issues: ontology and epistemology of law as well as ontology and epistemology of language. The order of the named areas is already a problem as law and language are so closely intertwined in legal linguistics that the question, which is primary and should be named first, may sound as a metaphysical question borrowed from a set of medieval disputations. Additionally, the methodical question whether legal linguistics is actually a linguistic discipline or a legal discipline does not make the choice any easier. What is more, often legal linguistics is counted among interdisciplinary areas of knowledge, and some authors perceive it as intradisciplinary, i.e. a new discipline situated amid other more traditional disciplines such as linguistics, law, legal theory and comparative law. In the combination of two monodisciplines also the question emerges as to the leading disciplinarity. In legal linguistics, at least in most works, linguistics is the leading discipline. This is visible in the method

[15] The 'Indian method', which scientists inherited from Apaches and Sioux, is occasionally used in the bibliographies of research papers where abundant literature is quoted with the exception of the most important publication upon which the research in question was based. Meanwhile, specialists are able to reconstruct the original source of intellectual inspiration in a piece of research, notwithstanding all undertakings to conceal it.

and in the interest of scholars. Some authors also reflected upon legal interests in legal-linguistic research. Following their methodological typology, P. Kozanecka, A. Matulewska, and P. Trzaskawka (2017: 12) write: "Legilinguistic translatology is a subdiscipline of translatology, and, in consequence, a subdiscipline of applied linguistics on the one hand and legal linguistics, which is part of theory of law, on the other." Hence, some fundamental results depend on the answer to the questions: what is language and how to research language in legal linguistics, and what is law and how to research it in legal linguistics. When these questions are neglected, no further reaching understanding of the subject can emerge from the research.

The above issues determine also the specific legal linguistics that the researcher gets involved in; there is no uniform or united legal linguistics. Legal linguistics appears today as Poznań school of legilinguistics, M.T. Lizisowa's communicational theory of law, Heikki E.S. Mattila's comparative legal linguistics, or my pragmatic legal linguistics. Some approaches developed within the named methodological inquiries are complementary; others such as forensic linguistics may coincide partly or differ substantially from legal-linguistic interests due to different views upon the two mentioned topics. When, like in this book, the discursive analysis is favored, then additional choices have to be exercised. They are connected to the question, which approach to discourse to adapt, as they are at least two, the affirmative and the critical approach at our disposal. I will later spend some time upon the discussion of this choice, which for many researchers is not difficult to make.

Explicitly semiotic approaches to legal language

Semiotics and legal semiotics – Semiotics of the visible – Semiotics of the visible and the invisible

Sometimes, there is no choice in fundamental methodological matters. All legal-linguistic research is in one way or another semiotic. Semiotics is the basis for our orientation in the world and therefore it cannot be excluded by a deliberate choice of the researcher.[16] Reasoning without semiotics is comparable to Monsieur Jourdain's speaking in Molière's *Le bourgois gentilhome* where Monsieur Jourdain was surprised that he was speaking prose. Methodological approaches to the legal language are by the nature of things semiotic approaches because they deal with meaning. Some of them are however explicitly semiotic, i.e. they use

[16] Bernard S. Jackson (2017: 5) characterized the role of semiotic inquiries into law: "…the primary task of semiotics is not exegesis or hermeneutics, but rather to understand the underlying processes by which an already-established interpretation 'makes sense'…Traditional legal theory treats rules, doctrine, argument and acts (notably, speech acts) as part of a single, coherent whole: the legal system. Semiotics, on the other hand, looks to each in their individuality, as well as seeking to understand how the sense of the whole is constructed."

semiotic methods in order to interpret the signs of law. Such analyses start often in the symbolic part of law and prefer visible phenomena. Classical semiotics can be explained on the example of το δεξίωμα (to dexioma) that in ancient Greek meant handshake, and by extension also a contract. The handshake is the image of the contract and it symbolizes the intentions of the parties to be bound, which are visible also to third persons. These persons can become witnesses in case of necessity. In addition, the borderline or frontier, ο όρος (o oros), delimiting property, which was later marked even clearer by fences, and that visibly constitutes a property right, accompanies law since antiquity. In Anglo-Saxon England, cultivated land was as a rule divided into *hides*. A hide was perceived as a magnitude necessary to support a household; it did not have any further determined size. In contemporary understanding of ownership to land, it is therefore difficult to determine exactly how much land someone owing 'five hides' in a medieval English village actually possessed. A corresponding German term to hide is *Hube*. *Hube* defined the part owned by a peasant family on common land, ca. fifteen to sixty morgues. Later it developed to a better determined measure of land encompassing one thousand and seven hundred acres. History of law provides numerous examples of visible artifacts that reflect law.

Visual aspects of meaning constitution in law are particularly interesting, yet the semiotic method may also indicate their relative insignificance. In re Hotels. com, L.P. (573 F. 3d 1300, Fed. Cir. 2009), the court had to decide the complaint about the refused registration of the domain name HOTELS.COM. The U.S. Patent and Trademark office found the term too generic and not sufficiently distinctive of services provided under that description. In essence, it found the name descriptive of regular hotel reservations services. The plaintiff contended that he did not wish to register the domain 'hotels' but HOTELS.COM, spelled with capital letters. Indeed, generic names cannot be registered as trademarks because they are incapable to indicate source. Words are classified along the scale generic – descriptive – suggestive – arbitrary – fanciful; the juridical classification is used to determine the quality of a word in terms of its capability to become a trademark. The term 'hotels' in isolation refers to services providing 'temporary lodging', which is the dictionary definition of 'hotel'. The name 'hotel' is clearly generic in the light of its lexicographic determination. Will a change occur, when it appears spelled with capital letters and is accompanied by the internet commerce indicator dot.com? The court concluded that the composite term HOTELS.COM, when viewed in its entirety, had the same meaning as its individual components 'hotels' and '.com' have by themselves. The court held that "…HOTELS.COM communicates no more than the common meanings of the individual components; that is, that the applicant operates a commercial website via internet, that provides information about hotels, but adds nothing as an indication of source." Therefore, the generic term 'hotels' "did not lose its generic character by placement in the domain name HOTELS.COM" and it

did not produce "a new meaning in combination".[17] As so often, the court refers to dictionaries to justify its findings, yet finally the decision is based on linguistic intuition and on court's authority rather than knowledge. In the light of semiotic methodology, the justification of the court opinion is therefore deficient, as it cannot convincingly state the reasons for holding the failed trademark HOTELS.COM equivalent to the meaning of its components. This does not mean that the semiotic analysis of the domain name would necessarily have to contradict the findings of the court, yet it would probably make them more plausible and rational. The positivist approach to meaning includes in our case the standards of proof and review that are based on the burden of proof. The main semiotic problem in the positivist approach is that meaning is treated in it as a matter of fact that must be proven at trial. The court explained this approach: "Whether the particular term is generic, and therefore cannot be a trademark or a service mark, is a question of fact. The Patent and Trademark Office (PTO) bears the burden of establishing that a proposed mark is generic, and must demonstrate generic status by clear evidence." The semiotic problem is circumvented by the court with the help of the application of a procedural rule. Treating meaning as a question of fact (i.e. not a question of law) is a trick with words, and not a solution to a problem that concerns meaning. Today, the legal-linguistic method is apt at tracing such specific features in legal argumentation that were perceived in the positivist legal science as a sign of legal professionalism. Legal linguists call them 'deficiencies' as they display lacunae in the language of the rational justification of court decisions. This finding is one of numerous examples that prove that legal linguistics progressed in the past decades. Meanwhile, it also clearly indicates its failure to impose new justification standards upon legal science. In this sense, legal linguistics is itself deficient as an area of knowledge.

Mainly, however, the interrelation of verbal and non-verbal communication in law is the explicit domain of legal semiotics. For instance, in Rochis v. California (342 U.S. 162, 1952) the U.S. Supreme Court dealt with a situation that challenges the legal semiotician. One morning, Californian sheriffs, who suspected Rochin to sell narcotics, entered his house and went into his bedroom. On a nightstand beside the bed, they spied two capsules, which the half-clad Rochin immediately swallowed. Subsequently, the police officers took him to a hospital, where a medical doctor inserted a tube into his stomach and forced an emetic solution through the tube. Within the matter Rochin disgorged were two capsules containing morphine. Rochin was then tried and convicted. He opposed the way in which evidence was gathered in his case, claiming particularly that the methods applied violated the due process clause of the U.S. Constitution.[18] The court mentions: "Applying these

[17] In Reed Elsevier Properties, Inc. (482 F. 3d, 1376, 2007) the court held that LAWYERS.COM was generic for "providing an online interactive database featuring information exchange in the fields of law, legal news, and legal services," thus encompassing generic services provided by lawyers.

[18] The Fourteenth Amendment to the U.S. Constitution provides in the here interesting Section 1: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are

general considerations to the circumstances of the present case, we are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is a conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents – this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation," and furthermore, "Regard for the requirements of the Due Process Clause inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings (resulting in a conviction) in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses." The description of the way in which the evidence was obtained is clearly related to the conclusion of the court. Images, which the description of facts evokes, engender sentiments and the sentiments are the base for the legal decision. Furthermore, the debate of 2007 in Germany about the possibility to revoke Adolf Hitler's German citizenship is explicitly semiotic. During the presidential campaign of 1932 it was noticed that Hitler was either citizen of Austria or stateless, thus not fulfilling the requirements to run for the highest office in Germany. Therefore, in order to formalize his status, the town of Braunschweig, which at that time was already governed by the Nazis, appointed Hitler a governmental official, a Regierungsrat. At that time, according to the local law, a foreigner who joined the civil service in Germany became automatically German citizen. Semiotically relevantly, Hitler never arrived in Braunschweig, he got his certificate of service handed over in Berlin and two days later he requested the approval of his leave of absence due to his involvement in electoral

citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Besides, the definite article in 'the privileges and immunities' as well as 'the equal protection of laws' are additional legal-linguistic problems, as observed by Naderi (2012): "To consequentialists, the word "the" is a sign of abstraction. To originalists, it is a sign of definitiveness." Wherever a helpful example is identified in legal-linguistic research, it seems to initiate a chain of associated examples and provokes a slew of problems. This circumstance also proves that legal linguistics is a complex and profound area of studies. Due to the multitude of linguistic samples, which at the end equal the legal language, method is central to any legal-linguistic question. Therefore, also, legal linguistics as an area of studies is, first of all, a method. In this determination, it is closer to linguistics than to legal science as legal science presupposes also the positive knowledge of details of legislative regulation. Linguistics, in turn, requires the knowledge of and investigates the structure of language. A linguist does not need to be a fluent speaker of a language that he investigates. A jurist has to be a fluent speaker of legal regulation that he may investigate or neglect in terms of academic research.

campaigns. He regularly repeated his requests and finally, two days before being appointed Chancellor of Germany he gave up his position in Braunschweig. Many jurists, also in the actual time of the events, perceived Hitler's appointment and his subsequent naturalization as illegal. Others referred to the construct called 'legal second' that allows legal consequences to take effect even if their requirements of validity lasted only a second. Furthermore, reference was made in the discussion to a precedent where a person was appointed police officer in the town hall and had to cross the street to reach the police station where he was expected to work. Meanwhile, a truck speeding on the street drove over the freshly appointed police officer and put an end to his career in the civil service. His widow claimed widow pension in a lower court and failed because the court decided that the police officer did not work after his appointment. However, the higher court deciding the appeal held that the police officer worked already in the civil service as his first task has been to cross the street and to reach the police station that was his working place. Thus, he lost his life while on service. Meanwhile, at least one difference strikes when analyzing both cases. The police officer had the intention to join the civil service; Hitler clearly had no plans to work as a governmental official during the presidential campaign or later. Due to this reason, Hitler's naturalization could have been revoked as a circumvention of law. The second semiotically relevant circumstance is whether it would make sense to revoke Hitler's naturalization many decades after he passed over. Symbolic forms determine public life and our consciousness. Some elements of the case may appear comical today, while others may justify action.

Today, for instance, 'rubbernecking' cases display the potentialities of the classical semiotic analysis. In addition, the 'manada' rape cases in Spain evoke the issue of permission or agreement. The Council of Europe *Convention* on preventing and combating violence *against* women and *domestic violence*, also called Istanbul Convention (2011), strengthens the protection of victims of violence, their 'yes' has to be an unequivocal 'yes' (cf. the Spanish slogan used during the protests against the 'manada' court decisions 'solamente el sí es sí'). In many European countries, the necessity of explicit consent was stressed in the reformed penal legislation concerning sexual abuse. Semiotic analysis is omnipresent in legal-linguistic analysis. The most important point is the shift from the implicitly to the explicitly semiotic analysis that regularly renders better results. The legal language, and especially the rules for its emergence and understanding in all known linguistic forms such as terms, sentences, utterances, speech acts, arguments, texts and discourses are founded on semiotic principles and rules. A full understanding of the legal language necessitates the elucidation of semiotic principles and rules that prefigure the legal language.[19]

[19] M. T. Lizisowa (2016: 485-486) approached the full identification of semiotic rules and principles of the legal language. In her research, she gave numerous examples of semiotic prefiguration in the legal language, e.g.: "Tak więc interpretowanie znaku przez inny znak tworzy

Advanced legal-linguistic studies

Legal linguistics without advanced research centers – General and particular legal-linguistic knowledge – Fundamental research as advanced legal-linguistics – Strength of legal linguistics

In our area, there is no Center for Advanced Legal-Linguistic Studies. Research that is published reflects different levels of advancement in legal linguistics. As the state of the legal-linguistic art is undetermined, advanced legal-linguistic studies are a matter of personal choice. In every area of knowledge, there is hard-core knowledge and special knowledge that is the topic of particular research. The question whether it is already possible to distinguish general and particular knowledge in legal linguistics is difficult to answer. It seems at least that questions such as: what is legal linguistics, what is legal language, what role does legal terminology play in legal language, and problems of legal translation are best known and researched in studies that can be called legal-linguistic. Discourse analysis may be perceived as a special area of legal-linguistic studies, in approaches other than pragmatic. Meanwhile, also fundamental research can constitute advanced studies. Advanced studies presuppose that the state of the art is substantially transgressed by new research. In this sense, whatever legal-linguistic piece of research, general, particular, or methodical, may constitute advanced research. However, advanced research is facilitated by institutional settings and this finding holds true also in legal linguistics. Institutionalization is still weak in legal-linguistic studies. As a subject it is rarely taught, the number of professorships in this area is very limited (cf. also Goddard 2016). This finding may be revolting when for instance the number of professorships in legal history is compared with our area. The situation is characteristic of all non-technological pioneering work that necessitates a protracted procedure of awareness raising in society until it becomes an acknowledged academic activity with all attributes of institutional existence.

After all, the institutional weakness of legal linguistics can be also turned into its strength. Legal-linguistic research does not require much when intellectual efforts

system znaków…Formy znaków języka prawnego wyodrębniają się w stylu jako konstrukcja normatywna, w składni jako normatywność zdania, w semantyce jako pola semantyczne terminów prawnych, w morfologii jako jądra znaczeń i morfemy gramatyczne profilujące znaczenia wyrazów… Językowy świat przedstawień znaków językowych jest w tekście prawnym ukierunkowany na funkcję i cel ich użycia. Znaki językowe mają funkcję wskazywania i nazywania przedmiotów tylko domniemanych oraz intencję komunikacyjną. Przekazują informację niepełną. Liczne presupozycje wymagają w odbiorze przypisania słowom tekstu nie tylko denotatywnych obrazów językowych, którym z kolei odpowiadają obrazy myślowe, czyli pojęcia i sądy normatywne, lecz także wymagają przypisania słowom odpowiednich desygnatów w realnej rzeczywistości prawnej." I am confident that the full reconstruction of semiotic presuppositions in the legal language in M. T. Lizisowa's *Komunikacyjna teoria języka prawnego* (2016) would systematize and elucidate the semiotic foundations of the legal language as the first methodological step to a fully-fledged and methodically justified legal linguistics.

are perceived as obvious. Beyond abstract knowledge of some areas of knowledge, such as linguistics, law, and probably some others, no further, especially technical requirements need to be provided to deal with it. Access to most legal texts is easy, court proceedings are public and until now free of charge for observers. Therefore, the legal linguist is a privileged researcher, as economical or institutional obstacles cannot prevent the progress of his research. Unlike most natural scientists, who by the very nature of their disciplines are bound to methodically and technically advanced research centers, the legal linguist is free from such limits. This is a real chance that makes the emergence of a new autonomous and critical science of legal linguistic possible.

Advanced methodological conceptions of legal linguistics

Systematic legal-linguistic research – Holistic approaches – Diversity of legal-linguistic approaches

Most contributions to legal linguistics do not mention any broader research interests that could represent a research program. In many cases, contributions to legal linguistics are ephemeral and are not followed by other works of the concerned author. This does not mean that they are not valuable, yet legal linguistics develops within broader conceptions that integrate problems and methods. Therefore, method means in our context also continuity in research. Sometimes research programs are implicit in the published contributions and they must be reconstructed. Fully-fledged and documented research programs are rare in legal linguistics. A research program can be created on the basis of the existing research, called traditionally the state of the art. Existing research that is reflected within the specific approach, which is adapted by the researcher, constitutes the basis for further steps.

Methodically particularly valuable are holistic approaches to legal linguistics. Some scholars developed research programs and visions of the subject in their provisional entirety. Others researched particularly one issue that became mandatory in terms of form and content to whatever legal-linguistic research. Fundamental to the development of the contemporary legal-linguistic methodology are: Chaïm Perelman's *Traité de l'argumentation – la nouvelle rhétorique* (1958), written with Lucie Olbrechts-Tyteca, G. H. von Wright's *An Essay in Modal Logic* (1951), Alf Ross's *Om ret og retfærdighed* (1953), H. L. A. Hart's *The Concept of Law* (1961), Stephen Toulmin's *The Use of Argument* (1971), Ronald Dworkin's *Taking Rights Seriously* (1991) and *Law's Empire* (1977), Michel Foucault's *L'archéologie du savoir* (1969), Aulis Aarnio's *Laintulkinnan teoria* (1989), Jürgen Habermas's *Theorie des kommunikativen Handelns* (1981), Bernard S. Jackson's *Semiotics and Legal Theory* (1985), John Searle's *The Construction of Social Reality* (1995),

Heikki E.S. Mattila's *Comparative Legal Linguistics* (1st ed. 2006), and Maria Teresa Lizisowa's *Komunikacyjna teoria języka prawnego* (2016). Some of them will be analyzed in the paragraphs that follow.

Aulis Aarnio analyzed in his *Laintulkinnan teoria* (1989) the legal interpretation as a discourse understood by him as practical reasoning (cf. Aarnio 1989: 306). The discourse theory discovers the principles of rational reasoning that form the model of rational decision making in law.[20] Any result of interpretation depends upon these principles as well as upon other social facts and value choices made by the interpreter. The goal of this sort of rational interpretation of law is a just decision. Language use is a decisive element of the search for rationality as rationality in legal decisions can be measured exclusively with the help of the analysis of the language used in law in relation to its known circumstances of use. Law is therefore a linguistic practice. The model of legal interpretation cannot be applied directly to cases, as it is a model. However, the principles discovered with help of the discourse theory help the interpreter to check whether he is searching for a rational decision. When this is not the case and the decision is made spontaneously, it will not advance legal certainty and general rationality of social action, even if it might be perceived as just or, at least, as appropriate (cf. Aarnio 1989: 309). The main feature of the discursive model of legal interpretation is that it enables a better understanding of the process in which laws are interpreted and applied. Interpretation that is exercised with the aim to meet social expectations will be better accepted than interpretation that strictly follows interpreter's particular

[20] A. Aarnio (1989: 306) characterised his approach to legal-linguistic problems: "Laintulkinta on tässä teoksessa esitelty lukijalle käytännöllisenä harkintana, *diskurssina*. Sen kulkua ohjaavat yhtäältä yleiset rationaalisen harkinnan periaatteet, toisaalta erityiset juridisen tulkinnan standardit. Lopputulos riippuu paitsi näiden suuntaviittojen noudattamisesta myös käytetyistä perusteluista, yhtä hyvin oikeudellisista kuin ei-oikeudellisista. Tärkeimpiä viimeksi mainituista ovat sosiaaliset tosiasiat sekä arvot ja arvostukset…Rationaalisen harkinnan teoriaa eli lyhyesti (diskurssiteoriaa) vastaan – näin ollen myös tässä teoksessa tarjottuja ajatuksia vastaan – on esitetty ja voidaan esittää monia väitteitä." A. Aarnio (1989: 162) determined the relation of the legal text and the legal norm in relation to legal interpretation: "Lakiteksti kielellisenä ilmauksena on näin ollen tulkinnalla purettavissa merkityssisällöiksi, jotka viestittävät meille, millaisia sääntöjä tai periaatteita oikeusjärjestys (voi) sisältää. Sen jälkeen, kun tulkinta on suoritettu, on valittu esimerkiksi merkitys T1, voidaan kirjoittaa näkyviin se normi, jota lakitekstin katsotaan tarkoittavan…Täsmällisessä kielenkäytössä tulkinnasta pitäisi siis todellakin puhua vain oikeudellisten *tekstien* merkityksen antamisen yhteydessä. Normit eivät varsinaisesti ole tulkinnan kohteita, ne ovat sen tuloksia.Tulkinnan avulla selvitetään normien, so. oikeusjärjestyksen sisältöä eli johdetaan normiformuloinnista yksilöity normi." A. Aarnio (1989: 382) also characterised the interrelation of language, power, and law in legal interpretation: "Epätietoisuus oikeusjärjestyksen sisällöstä on useimmiten oikeusnormeista informaatiota antavan välittävän tekijän, kielen, aiheuttama…Tuomioistuin on osa oikeusjärjestystä ylläpitävää pakko-organisaatiota. Tässä roolissa tuomarilla on päätettäväksi tuleviin asioihin nähden ratkaisuvalta…Jos pakko-organisaatio monopolisoi itselleen täysin lain käyttämän kielen tulkinnan, tulee vallankäytöstä uhka oikeusturvallisuudelle.Vallankäyttö on yksisuuntaista ja kontrolloimatonta. Se vääristää yhteiskunnassa tapahtuvaa kommunikaatiota."

preferences to the detriment of general utility. One may also assume that serious efforts in the application of the discursive-interpretive method may improve the quality of legal decisions and further the goals of just legislation.

Gérard Cornu (1926-2007) authored a fundamental and methodically uniform *Linguistique juridique*. The final version of his book is the third edition of 2005. It represents a full-fledged, integrative and coherent conception of the topic. It supports the view that legal linguistics is a subject of study and teaching and not a collection of issues for the occasional, interdisciplinary dialogue between jurists and linguists. Cornu introduces a structured domain of studies that can be researched and studied as such. More specifically, legal linguistics is for Cornu the study of the language of the law.[21] The language of the law appears in his conception in two forms, the restricted language of the law that comprises legal terminology and the broad, that consists of discursive aspects of law (cf. Cornu 2005: V "D'un côté des mots, de l'autre des enoncés."). Both areas are combined by the idea that the legal terminology nurtures the legal discourse, that it is the tool of the legal discourse. Legal terminology organizes the legal discourse that is approached by the elucidation of the specific meaning attributed to the words of law. This underlying structure of legal language influenced many legal linguists, for instance Heikki E.S. Mattila, and it is productive even today. Cornu profoundly believed in the sense of the research into isolated words, which he called the vocabulary of law. Today, this view appears problematic to many researchers, most prominently in the pragmatic and discourse-oriented legal linguistics. His book also reveals a major topic that is which role does the linguistic theory play in legal linguistics. For Cornu, certain limits have to be respected because a strong anchorage of legal linguistics in the linguistic theory would render its findings unreadable for jurists who are his main readership.[22] The identified problem is pertinent in the discussion about the method of legal linguistics and it is treated in this book in the context of fundamental

[21] G. Cornu (2005: 25) wrote about his conception of *linguistique juridique*: "La linguistique juridique n'est pas une branche, parmi d'autres, de la linguistique générale. Ce par quoi elle s'oppose le plus à la linguistique générale n'est pas la spécialité, pourtant indéniable, de son objet (le langage spécial du droit), relativement à l'objet universel de la linguistique générale (l'étude de toute langue et de tout langage). C'est le caractère fondamental de celle-ci, reconnue come source des concepts et des méthodes, qui ordonne les rapports. La linguistique juridique est l'application particulière au langage du droit de la science fondamentale de la linguistique générale. G. Cornu (2005: 34) determined also the practical goals of legal linguistics stressing its role as facilitator of legal communication: "La linguistique juridique est d'abord au service direct de l'expression du droit. Elle est présente à tous les stades et sous tout les modes de cette expression, lors de la création et de l'application du droit… La linguistique juridique n'intervient pas seulement sur un acte à faire, mais sur un acte à interpréter."

[22] G. Cornu (2005 : V) wrote about the legal-linguistic terminology: "J'ai cherché à être clair. Il m'a semblé qu'un discours sur les discours du droit risquerait de trahir son dessein s'il aggravait de ses obscurités l'opacité de la matière. C'est pourquoi j'appelle un mot un mot. Les linguistes savent combien ce langage est réducteur. Mais nous avons tous lu trop de déménagements terminologiques pour que la probité de la transparence ne demande à reprendre ses droits."

choices that the researcher has to exercise. The word will, after such choices are made, appear as a lexeme, a term, or a concept, it will be formative of a speech act, etc. The legal-linguistic balancing act consists in finding the appropriate dose of linguistics to form legal linguistics that avoids excesses yet also prohibits over-simplifications. This is the contemporary answer to Cornu's concerns about over-burdening legal linguistics with the jargon of linguists. Cornu's methodical concerns help uncover yet another issue relevant to the legal-linguistic methodological inquiry that is jurists' conception of language. This is a sociological rather than a linguistic problem, yet research that is rare in this area helps understand the legal language and the application of law as a reflection of jurists' inherent or explicit views about language that frequently differ from linguistic conceptions of language (cf. Aleksin 2018, Reinhardt 2003). Cornu also paves the way to communicational conceptions of the legal language in that he stresses that law in its linguistic expression is explicitly made for communication and that it has no other linguistic purpose than the communicational (cf. Cornu 2005: 3), which is not always the case with other situations of the use of language. Finally, Cornu's discourse is elegant. This aesthetic value of his intellectual contribution comes, however, at a price of limited criticism and his book makes part of the affirmative rather than of critical discourse (cf. Cornu 2005: 5 "mérite même respect" while referring to the 'spirit of the common law' or (Cornu 2005: V) "la langue est vivante dans la création du droit, jusqu'à le faire aimer"). Politeness in scholarly publications has sometimes this unfortunate consequence. [23]Another weakness of the conception connected to this phenomenon is the lack of awareness for the power aspects of law. Cornu's conception remains enslaved in a political neutrality to law that is either a sign of opportunism or naiveté. Moreover, this characteristic feature has been petrified later by numerous researchers who, deliberately or naively, avoided any relation to the exercise of power in their writings about the language of law.

Bernard S. Jackson explored in his *Semiotics and Legal Theory* (1985) the interrelation of both named areas of knowledge in order to "lay some foundations

[23] Methodically, politeness and civility in academic debates are not neutral to research results. Formal politeness may prevent criticism that is necessary for the development of knowledge. In turn, the lack of basic decency in academic debates puts in question the very existence of science as a cultural phenomenon. In the academic practice, it is necessary to strike the right balance between the two extremes. In the standard setting *Report of the Committee on Freedom of Expression* (2014) its authors, professors at the University of Chicago, write about priorities in academic debates: "Of course, the ideas of different members of the University community will often and quite naturally conflict. However, it is not the proper role of the University to attempt to shield individuals from ideas and opinions they find unwelcome, disagreeable, or even deeply offensive. Although the University greatly values civility, and although all members of the University community share in the responsibility for maintaining a climate of mutual respect, concerns about civility and mutual respect can never be used as a justification for closing off discussions of ideas, however offensive or disagreeable those ideas may be to some members of our community." This circumstance is relevant not only methodically, but also strategically. I will return to strategical issues in this book at a later stage.

for a semiotically sensitive theory of law" (cf. Jackson 1985: ix). He concentrated mainly on structural semiotics that he contrasted with the positivist legal theory to test their conceptual affinity.[24] Jackson committed himself to interdisciplinarity that he explores in his scrutiny of conceptual frames of reference of semiotics and of legal theory within previously mentioned limits. Jackson's work uncovers the conceptual presupposition of legal semiotics that may be characterized as the broadest approach to law in terms of method. Every intellectual undertaking is semiotic by necessity; we understand the world only through the operations on signs, mainly through their interpretation. Therefore, semiotic approaches are fundamental to an inquiry into the possibility of legal linguistics as a branch of knowledge. Its method can always be determined in the semiotic perspective. Legal linguistics starts always as legal semiotics. All this means that the first legal-linguistic steps are determined by semiotic choices. These choices should be exercised consciously and the semiotic frame of reference made explicit in the research or, at least, in the researcher's preparatory conceptualization of his task.

Heikki E.S. Mattila became internationally renowned as a legal linguist mainly due to the pioneering editions of his *Comparative Legal Linguistics* that are studied in international academia in their English and French language versions (cf. Mattila 2012a and 2013). Meanwhile, the editions in English and French go back to the Finnish original of his book *Vertaileva oikeuslingvistiikka* that appeared in print for the first time 2002 in Helsinki. Over the years, Mattila expanded and updated his account of the legal language and refined the theoretical foundations of his conception of comparative legal linguistics.[25] The author himself remarks that all

[24] Bernard S. Jackson (1975: 3) writes about methodological choices in his project of legal semiotics: "The analysis of law involves the taking of positions on the range of legal and semiotic theories. Law may be regarded as a dual semiotic system, the language in which it is expressed and the discursive system expressed by that language. If so, choices still need to be made as to the type of semiotic analysis to be applied to the discursive system. The effect of differences between Peircian (pragmatic) and Saussurian (structuralist) semiotics are sketched in respect of the structure of semiosis (binary or triadic, representing different views of the status of the 'referent'), the classification of signs ('signals' or 'signs'), their process (interpretation or decoding) and functions (communication, signification, connotation and the role of communicative intent)."

[25] Heikki E.S. Mattila (2017: 14, 28) described his general conception of legal linguistics: "Tässä teoksessa oikeuslingvistiikan käsite ymmärretään…laajasti…Näin oikeuslingvistiikassa tulkitaan monipuolisesti oikeuskielen kehitystä, ominaispiirteitä ja oikeudellista kielenkäyttöä. Tieteenalan selvitykset voivat kohdistua niin sanojen ja ilmausten tasolle, virkkeiden tasolle kuin kokonaisten tekstien tasolle. Sanojen ja ilmausten tasolla tutkimukset saattavat koskea joko oikeuskielen sanastoa (erityisesti termistöä), syntaksia (suhteita sanojen välillä) tai semantiikkaa (sanojen merkitystä)…Näin ymmärretty oikeuslingvistiikka ei ole kielitieteen haara sanan varsinaisessa mielessä. Toisaalta voidaan sanoa, että oikeuslingvistit hyödyntävät laajalti kielitieteen menetelmiä juridisen kielenkäytön tarkastelussa. Oikeuslingvistiikka onkin luonnehdittu oikeus- ja kielitieteen, erityisesti sovelletun kielitieteen synteesiksi…Oikeuslingvistiikka eroaa tutkimuskohteensa osalta oikeustieteestä. Jälkimmäisessä tieteessä tutkijan mielenkiinto kohdistuu ensi sijassa niihin abstrakteihin hahmoihin, käsitteisiin, jotka ovat termien taustal-

versions of his *Comparative Legal Linguistics* bear witness to the development of one and the same work (cf. Mattila 2017: xi). In Mattila's conception of comparative legal linguistics that I analyzed more systematically in my *Lectures on Legal Linguistics* (cf. Galdia 2017a: 84-85) the most salient characteristic feature is the approach to legal language that oscillates between the analysis of its general structural patterns and particularities of legal languages such as English, French, German, and many others.[26] The choice of the comparative approach paves the way toward generalization of data that refers to particular legal languages. The anchorage of the conception of comparative legal linguistics in comparative law enabled its reception in many works authored by legal comparatists (cf. Lundmark 2012, Husa 2015). This circumstance is not surprising because Mattila's conception of comparative legal linguistics was mainly structured around legal-comparative paradigms. In Mattila's book, comparative perspectives dominate over contrastive views mainly due to the underlying rigorous conception that he set up for describing particular legal languages.

Maria Teresa Lizisowa (1937-2019) authored 2016 a monograph *Komunikacyjna teoria języka prawnego* (further KTJP). M. T. Lizisowa's KTJP is a comprehensive and thought-inspiring work on legal-linguistic fundamentals. It sketches the theoretical background of law that is communicated with linguistic means. The work also shows the structure of legal-linguistically relevant methodological approaches that pave the way toward establishing a fully-fledged legal linguistics in the future. Methodological analyses that include, on the one side, aspects of the philosophy of law and legal theory and linguistics as well as philosophy and theory of language on the other side provide a solid framework for the discussion of contemporary legal-linguistic problems.[27] This combination of material and

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la, ts. termien merkityssisältöihin. Oikeustieteilija jäsentää oikeusjärjestystä käsitteiden kautta. Termit ovat käsitteiden nimiä, joita oikeustiede välttämättä tarvitsee. Oikeustieteen ensisijajnen huomio ei kuitenkaan kohdistuu termeihin vaan itse käsitteisiin. Sitä vastoin oikeuslingvistiikassa termit sinänsä ovat tutkimuksen keskeinen kohde."

[26] Heikki E.S. Mattila (2017: 3) stressed as typical of the legal language the interrelation of some of its characteristic features, namely the dependence of legal language upon the ordinary language, its nature as special language, and the problems of citizens at large to understand it: "Oikeuskielen perustana on yleiskieli…Siten oikeuskielen kielioppi ja pääosin myös sanasto ovat lähtökohtaisesti samat kuin yleiskielessä. Oikeuskieli on kuitenkin luonteeltaan erikoiskieli…Tämä tarkoittaa ensisijaisesti sitä, että oikeuskielelle ovat tyypillisiä erityiset termit, joiden lukumäärä ja laatu määräytyvät oikeusaloittain…Näistä syistä oikeuskieli ei aina ole suuren yleisön kannalta ymmärrettävää."

[27] M. T. Lizisowa (2016: 15, 17) wrote about her method: "Perspektywa badań lingwistycznych zmierza do ustalenia komunikacyjnej teorii języka prawnego. Obejmuje wzorce i praktyki dyskursywne stanowienia oraz funkcjonowania prawa, a więc znaczenie i syntaktyczne użycie znaków języka, ich aspect pragmatyczny, także wartościowanie treści prawnych w tekstach aktów ustawodawczych. Dotyczy opisu typu tekstu o utrwalonych cechach systemowych języka specjalistycznego...Teorię komunikacyjną języka prawnego postuluję opracować metodami lingwistyki w przestrzeni doświadczenia tak ustawodawcy, jak i odbiorcy przekazu ustawodawczego, z uwzględnieniem wiedzy filozoficznej o istocie prawa i wiedzy prawniczej o pra-

methodological issues in M. T. Lizisowa's book is, like her previous writings, truly a treasure among the mass of legal-linguistic research that mostly focuses on particular legal-linguistic issues in respect to the legal language and that avoids methodological debates. Thus, KTJP is unique in the sense that it combines solid knowledge of legal issues and of theoretical fundamentals of humanities and social sciences. It manifests an in-depth analysis of the subject matter toward the background of the Polish linguistic and legilinguistic research. Lizisowa's work is monolingual in terms of research perspective as it concerns the Polish language almost exclusively, if some minor Hebrew analyses are set apart. It is rooted in the Polish legilinguistic tradition that starts with Bronisław Wróblewski's *Język prawny i prawniczy* (1948).

Particularly, Chapter I of KTJP on methodological and structural legal-linguistic problems provides a valuable introduction into legal linguistics (legilinguistics). Fundamentals of legal-linguistic methods and concepts are sketched there toward the background of philosophy and theory of law. The strength of this chapter lies in the author's capacity to introduce and to combine many complex methodological concepts belonging to different areas of knowledge. Chapter II on the legal language and the way how law is communicated in it provides the description of fundamental concepts to be used later in the monograph. Legal language is defined according to the concept developed by B. Wróblewski that is adapted for this work with amplifications provided by contemporary researchers, such as T. Gizbert-Studnicki and some others. M. T. Lizisowa introduces also the notion of legal interpretation construed as decoding in line with the legal doctrine that she perceives as authoritative. Chapter III on legal signs defines them convincingly and describes semantic processes in their relation to epistemological processes. It then concentrates upon typology of sentences in the language of law, especially upon the normative sentence. Based on statutory language, M.T. Lizisowa develops the phenomenology of the normative sentence and concentrates later upon modality from legal and linguistic perspectives. The function of legal signs in operations of coding and decoding and a subchapter six summarize the overview of signs constituting legal (normative) sentences and their role in meaning constitution. The chapter renders aptly the classical views upon legal signs and the normative sentence, especially in the Polish perspective. Chapter IV aims at setting up a textual model of the legal act. Due to its complexity, the legal act is characterized as supersign and this supersign is then analyzed. M. T. Lizisowa uses descriptive instruments of text theory in her profound insights into the epistemology of legal

wie jako systemie norm postępowania regulujących stosunki społeczne w dziedzinie prawa… Zakładam, że w wyniku badań zostanie przedstawiona komunikacyjna teoria języka prawnego w ujęciu systemowym. W programowaniu analiz lingwistycznych języka prawnego prezentuję niejednorodne postawy badawcze. W wyborze metod językoznawczych uwzględniam takie aspekty filozofii prawa i prawoznawstwa, które zmierzają do stwierdzenia prawidłowości ogólnych, jakimi charakteryzują się wypowiedzi formułowane w języku prawnym."

texts. Chapter V is a very valuable analysis of fundamental conceptual problems of legal pragmatics. Pragmatic concepts are functionalized within the analysis of statutory provisions. This analysis characterizes the pragmatic dimension in written texts that is often underestimated, as pragmatics is by many associated with spoken word and immediate action, e.g. in court trials. In this chapter, M. T. Lizisowa continues a very important, yet neglected current in legal semiotics. Chapter VI, the final part of the enquiry, is devoted to axiological elements of the legal language. It makes clear that previous positivist attempts at developing a pure law deprived of ethic cannot work. Legal language is value-laden and values cannot be thought away from it, and finally, why should they?

As an alternative to the approach in KTJP one could imagine the description of the legal language based on institutional speech acts and not upon the analysis of sentences and on interpretation as a creative and constructive activity of judges. Legal language would be determined institutionally as use in legally relevant social contexts. This would simplify the issue of what it actually is. In addition, in such an alternative approach the interest would shift from the language of statutes to aspects of their application by courts. Law becomes interesting, yet also dangerous, when it is applied. Statutory law as a text printed on paper is sterile and largely unproblematic from the perspective of society. After all, the main problem of the legal science is the application of law. Finally, the interest in the legal regulation would shift from the statement of law in the legal doctrine toward sociologically founded description of the reality of law. This approach is not new and it has been initiated by Eugen Ehrlich and developed in the sociology of law that has been always suspicious of the doctrinal statement of law as a law in books and as a literary fiction. As a matter of fact, legal doctrine develops a fictitious narrative about law and is therefore, in my view, not well adapted as a source of reference for legal-linguistic research that aims at the understanding of the application (or communication) of law as part of social reality and not as a literary fiction. Legal doctrine tends also toward developing a fiction of judges using or practicing linguistic research when they apply law. Law, in fact, is power exercised by means of language and not a philological activity. Legal linguists are easily trapped by the attempts, especially of higher courts, to conceal and to deny any assumptions coming from scholars that they actually engage in the exercise of power. KTPJ follows, and very coherently indeed, the contrary track. Meanwhile, KTPJ covers with admirable clarity the structure of statutory legislation as text and as linguistic communication. It also shows the limits of approaches based upon law in the books instead of law in action.

The inquiry into the method used by classics of legal linguistics is primarily directed toward the understanding of contemporary methodological problems and only in a very limited way tends to cover their approaches in historical perspective. Future legal linguistics depends to a large extent upon our understanding of methodological problems of the past.

Comparative legal-linguistic approaches

Comparing and contrasting – Monolingual research – Multilingual research – Comparative study of law – Tertium comparationis – Comparative element in legal-linguistic studies

The systematic study of comparative aspects of a phenomenon presupposes the elucidation of the concept of comparability. Already ancient Greek mathematicians insisted upon the condition to compare only the comparable. Furthermore, to compare is not to contrast. Contrasting raises the level of problem awareness, yet does not engender comparison. Methodically, in order to compare a tertium comparationis is needed. In fact, every comparison has its zone of validity with reference to the determined tertium comparationis.

Also in comparative law there was a dispute about comparability. Some legal comparatists claimed that legal systems would have to be rather close to each other to be comparable. Therefore, there was no doubt about the comparability of common law and civil law, yet not about the comparability of socialist law with other laws. It is also possible to construe law of another type than the one now existing. Comparability standards might constitute a challenge to such innovative law. Meanwhile, comparative linguistics differs in this sense from comparable law because all natural languages are comparable as they are the instantiations of one human language. It seems that a natural language that would be structurally totally different from known linguistic structures cannot emerge. The abstract structure of language can always be traced in whatever language and expressed in linguistic terms. It is the basis for linguistic description. The only challenge for the linguistic comparatist is to set up an appropriate comparative frame of reference as the multiple and diverse approaches to language in linguistics propose different structures or matrices for the meaningful comparison of languages that is always determined by the approach to language adapted by the researcher. Comparative studies show language in a comparative perspective. Contrastive studies show differences on the surface of languages. Such differences among languages are linguistically uninteresting, as their existence cannot seriously surprise any linguist.[28]

In fact, a level for the unification of linguistic data can always be found; it is needed to unite different languages.[29] Would it not be possible to unite languages

[28] One may notice the use of different propositions in Germanic languages, e.g. 'professor *of* law' and 'professor *i* rättsvetenskap' (Swedish). Here, the use of pronouns, which correspond to English *of*, *in*, *for*, is as conventional as it is accidental. Some coherence of their use is definitely explicable from the inner structure of the use of pronouns in the involved languages. Consequences from this different use of pronouns are important for legal translators. Otherwise, not much follows for legal linguistics from this sort of findings.

[29] J. Bańczerowski (1996: 14) wrote about unavoidable limits of linguistic models: "A linguist wanting to construct a general theory of language attempts to identify the fundamental entities shared by all languages, and the relevant properties of these entities…Each linguist is exposed

on a certain level of abstraction, no general theory of language could come about. In fact, comparative approaches in law are more productive than are purely contrastive approaches. When comparing, it is necessary to determine what is actually compared (e.g. linguistic structures or language use) and to determine the perspective upon the object of studies. One can compare terminology in the contrastive perspective to show terminological incongruences (cf. Husa 2015: 72 who speaks about 'contradictive research interest' in this context) or to stress conceptual affinities or 'integrative research interest' in Husa's methodological taxonomy (cf. Husa 2015: 71). For comparative law, Jaakko Husa stressed also another difference that is relevant to the methodology of legal linguistics consisting in the choice between comparison and parallel description of legal phenomena. In the area of comparative law the researcher's interest determines the particular comparative method as there is no one method of legal comparison (cf. Husa 2015: 71).

Comparative legal linguistics represents a strong current within legal-linguistic studies that comes next only to monolingual legal-linguistic analyses. For legal linguistics, the comparative study of law was essential to its development. Legal linguistics benefited from the comparative research into laws and also from the research into foreign law. In the pragmalinguistic approach to law, which is represented in this book, the comparative study of law coincides with the comparative study of legal-linguistic operations such as legal argumentation, legal interpretation and many others. This research is undertaken mainly in order to elucidate the fundamental legal-linguistic question as to whether these operations are actually ubiquitous because the available linguistic samples seem to indicate this result. Legal-linguistic comparison may also concern one language, for instance the legal Latin and the way in which Latin terminology is reflected in other legal languages (cf. Mattila 2002: 181).[30] The comparative approach has been explicitly developed by Heikki E.S. Mattila and his comparative legal-linguistic approach proved very influential in legal-linguistic studies. Mattila anchored his conception of legal linguistics in comparative law (cf. Galdia 2006: 271, cf. also Lundmark 2012: 51). In his fundamental work *Vertaileva oikeuslingvistiikka* (2002b) as well as in the English (cf. Mattila 2006, 2013a, 2017) and the French editions (2012a) of the Finnish original he provided first of all an overview of existing issues within legal linguistics perceived as a product of crossing legal and linguistic systems. His comparative approach is distinct from the monolingual perspective adapted by other researchers, such as G. Cornu or P. Tiersma, who usually focused on the relation

directly solely to a small fragment of the language universe…Thus, it seems that there is no other way for linguists but to rely upon their own language experience, linguistic knowledge, and intuition, although none of them is completely reliable reality." Cf. about the issue of methodological constraints in modelling reality also T. Kotarbiński, quoted in footnote 1.

30 Cf. La Constitución Española de 1978, Art. 17 (4) La ley regulará un procedimiento de "habeas corpus" para producir la inmediata puesta a disposición judicial de toda persona detenida ilegalmente. Asimismo, por ley se determinará el plazo máximo de duración de la prisión provisional.

between the ordinary language and the legal language perceived as special register. Mattila prepared the ground, both in terms of diachronic and synchronic research, for the mapping of the conceptual landscape in legal linguistics. He identified the method for comparative research into legal terminology and legal translation. In his research published mainly in the Finnish language Mattila pondered over the systematic frame of reference for the comparative-linguistic approach that he now follows (cf. Mattila 2008, 2010c, 2017). Mattila started with general features of the legal language that he had distilled through the analysis of particular legal languages. He focused particularly on problems of legal terminology that he also synthesized in his chapters published in collective works (cf. Mattila 2012b, 2018). Legal-linguistic comparison emerged in his conception of legal linguistics between rivalry and complementarity of legal languages. Consequently, Mattila can justly claim that some languages play a formatting role in this process while others mostly follow paths beaten by the dominant legal languages. This result justifies the choice of languages that are analyzed in his works. His survey of languages starts with legal Latin, continues over German, French, and Spanish up to the English legal language. Mattila stressed, unlike many other writers dealing with Law and Language, the shaping role that the Latin language has had for the emergence of the legal language and engaged in detailed, also quantitative analyses in this largely abandoned area. In his approach he revigorated the research into legal Latin, which may have consequences for the processes in which the language of the global law is coming into being. Finally, his research facilitates the broadening of the perspective in legal linguistics, particularly concerning speech acts in law, toward pragmatic issues, which are stressed in this book. Mattila's approach is not only developed along the lines of comparative law, it can be made operative in comparative law as well. Meanwhile, comparative law is closest to legal linguistics in the research directed toward contrasting or comparing legal-linguistic operations such as legal argumentation and legal justification. On the other side, legal comparative research that focuses upon legal regulation is rather remote from the objectives pursued by legal linguists as is the research into foreign law, i.e. a law of a foreign country (cf. Husa 2015a: 32).

Also P. Kozanecka, A. Matulewska, and P. Trzaskawka (2017: 14) commited themselves explicitly to methodological reflection upon comparative issues in legal linguistics.[31] Their project that is rooted in the parametrical approach to legilinguis-

[31] A. Matulewska (2017: 12) wrote about the methodological presuppositions of the project: "An indispensable component of the theory proposed here for consideration is the *parametrization* of translational reality. In order to characterize legal translation reality and translational *objects and relations functioning in such reality* relevant *dimensions* (also called *parameters*) are used. The dimensions specify a *space* for an examination of the translation reality. They also ensure a systematic examination of the translation reality and *processes* taking place in that reality." (italics added) A. Matulewska (2017: 16) further specified the mechanism of parametrization in the approach to legal translation: "The *parametrization* will be achieved by associating properties from translationally relevant *dimensions* to the *objects* under scrutiny. Each group of

tic translation relies on connections to comparative linguistic and comparative legal studies. They dealt with two main hypotheses: 1) the more distant two languages are in respect of their belonging to a legal family, the greater will be the risk of loss of information in translation, 2) the more distant are two legal systems in respect to their belonging to a legal family, the more problems will appear in translation with finding equivalent terms (2017: 15). Particular legilinguistic translatology may include further constellations and thus expand the theory proposed to date. This concerns especially the constellation of bi- or multilingual legal systems that are expressed in genetically distant languages (cf. Dievoet 1987). In this context, G. R. de Groot (1987: 18) stressed the specific case of translation in bi- or multilingual legal systems.[32]

While comparative and contrastive methods in contemporary linguistics are relatively clearly defined[33], comparative law, which influences comparative legal-linguistic studies, questions its methods regularly and persistently (cf. Husa 2018a, Pargendler 2012, Siems 2016, Örücü 2004a and 2004b). In the recent debate, main concepts such as legal family, legal tradition, and legal culture were scrutinized critically as much too superficial and unadapted to the reality of the globalizing

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dimensions is comprised of a number of dimensions and each dimension consists of comparable but mutually exclusive *properties*. Distinguishing *components* of linguistic *structures* in connection with their semantic and pragmatic *features* on one hand, and *comparison* of their legal meanings within different legal systems and cultures on the other…" (italics added) Furthermore, A. Matulewska (2017: 15) mentioned the prerequisites of the axiomatic approach to legal translation: "The method of making the legal linguistic reality *axiomatic* comprises establishing the list of *primitive terms*, which are used to define other terms and all of them are used in the formulation of laws and their consequences (hereinafter called *postulates*) of the theory. The method diverges to some extent from *strict axiomatization* due to the nature and complexity of translation and especially legal translation, which is extremely *interdisciplinary*." (italics added) The Poznań parametrization project of legal translation consists today of several volumes (cf. Matulewska 2017: 17). It seems to be the broadest contemporary legal-linguistic project based on explicitly stated methodological commitments.

[32] G. R. de Groot (1987: 18, 25) writes: "Zulke vertalingen zullen weer betrekkelijk gemakkelijk moeten zijn. De juridische connotaties van termen kunnen parallel lopen. De rechtsvergelijkende problemen vallen in principe weg…Centraal staan weer de linguistische en algemeen sociaal-economische dimensies, die woorden in een taal hebben," stressing that the linguistic analysis has also revealed that aspects important for comparative lawyers are not necessarily crucial from the perspective of translators and that the reception of law in many cases occurs in a different way than the development of languages themselves and that is why the global structure of legal systems in the world cannot be omitted in such a situation.

[33] Particularly instructive in terms of contrastive methodology is the approach developed by J. Fisiak, M. Lipińska-Grzegorek, and T. Zabrocki in *An Introductory English – Polish Contrastive Grammar* (1978). The researchers write: "our *Grammar* …forms the necessary input to any applied contrastive study by providing an objective confrontation of two language structures. Such a confrontation, among other things, will make the reader aware that despite numerous differences between the languages in the surface, there are more similarities the further one departs from the concrete manifestations of languages towards their conceptual structures." (cf. J. Fisiak et al. 1978: 7).

world. The crisis of comparative law understood as comparative study of law is deeply rooted in its conceptual frame of reference (cf. Husa 2018a: 411). Under such circumstances, it is necessary to inquire whether legal comparison today is apt to uncover other than linguistically relevant features of law and reach beyond comparative legal linguistics. Moreover, if this is the case, is the understanding of law by legal linguists not exhaustive? As comparative legal linguistics cannot cope solely with linguistic comparison of legal systems and especially their terminology, one might ask what consequences the discussion in comparative law could have for the development of comparative legal-linguistic studies. The most relevant consequence seems to be the split in conceptual and terminological perspectives upon the language of law that results from the methodical understanding of legal comparatists. This is the more relevant as many researchers claim that legal translation is largely legal comparison. Meanwhile, the mentioned split allows also different levels of professional knowledge to emerge that finally enables legal translations by non-jurists. Therefore, the legal and the linguistic approaches to comparison in law are complementary, and not necessarily contradictory. They represent different modes of understanding law and constitute different layers in the legal discourse. Meanwhile, the legal-linguistic perspective upon law enables a full understanding of the research object 'law'.

Comparative law or more precisely the comparative study of law (cf. Husa 2018a: 411) emerged probably due to differences that were identified between the civil law and the common law (cf. Stanzione 1973: 877, Lundmark 2012). Other, more general goals such as understanding the phenomenon law more fully, especially beyond the limits of domestic legal systems and against the rigidity of the legal doctrine followed suit.[34] A global vision of law was adapted by the comparative research that finally comprised all laws that are or were applicable in the world. This moment in time marks also the emergence of the research into foreign law that is frequently confused with the comparative study of law. Meanwhile, the beginning of the comparative study of law coincides with the still ongoing debate about its nature, goals, and methods. Until today, it is unclear whether the comparative study

[34] J. Husa (2015: 19) wrote: "It is possible on the general level to present a blueprint definition and say that comparative research of law aims at lining up different legal systems in order to generate information." More general information about legal systems is possible when all aspects of law rendered in the legal culture are considered. J. Husa (2013: 18) wrote about the concept of legal culture and the specifics of the legal-cultural approach to law: "Oikeuskulttuurissa on kyse asioista, jotka eivät ole oikeusnormeja/säädöksiä mutta liittyvät läheisesti oikeusjärjestelmän toimintaan. Kyse on siitä, että oikeus asetetaan konteksteihinsa eli asiayhteyksiinsä. Kyse on erityisesti juristien (sisäinen oikeuskulttuuri) sekä laajemminkin yhteiskunnan sisään syntyneistä vakiintuneista oikeutta koskevista pysyväisluonteisista asenteista ja arvoista (ulkoinen oikeuskulttuuri). Oikeuskulttuuri viittaa siihen erityiseen järjestelmäkohtaiseen tapaan, jolla arvot ja käytännöt sekä juridiset käsitteet integroituvat osaksi oikeusjärjestelmän tosiasiallista toimintaa…Oikeuskulttuurinen hahmotustapa eroaa lähestymistavaltaan oikeusdogmaattisesta viralisiin oikeuslähteisiin sitoutuneesta hahmotuksesta, koska oikeutta ei hahmoteta autonomisena, vaan inhimilliseen ympäristöönsä kytkeytyvänä ja toiminnallisena…"

of law is actually a method or an autonomous academic discipline that liberated itself from bonds imposed by the traditional rigid and compartmental reasoning in the legal doctrine (cf. Stanzione 1973: 874, Sacco 2008). One may also assume that for some jurists the attractiveness of the comparative study of law was rooted in its manifested liberty and openness to broader deliberation of legal problems that the traditional, positivist or neo-positivist legal doctrine viewed skeptically. However, this openness to new contents and liberty of thought proved also problematic in the sense of the comparative undertaking as an academic activity. The question as to what actually is the comparison of laws imposed itself as an inevitable prerequisite for whatever comparative study of laws. Traditionally, in the history of thought a tool for comparison was present in form of tertium comparationis, a criterion or benchmark to confront two or more related phenomena. It was known from the practical comparison in anatomy exercised by Georges de Cuvier (1769-1832) and from numerous traditional philological works that dealt with the comparison of languages as well as from comparative religious studies (cf. Foucart 1912: xviii, Glasenapp 1963). It would suffice, so it seemed, to define precisely the tertium comparationis and the comparison of laws would follow more or less automatically. Meanwhile, this issue caused interminable debates in the comparative research and every step in the comparative activity was questioned, sometimes vehemently. Unlike languages, laws may differ quite significantly and in many respects. Especially in the twentieth century, the comparative method was exposed to criticism due to the emergence of the socialist law. Comparatists asked themselves whether traditional law, civil and common, can be compared with the socialist law that stressed its transitory nature and its otherness both in form and in content (cf. Stanzione 1973: 875, David 1978: 170, 215-216). Is contrasting both types of law actually comparison? Is meaningful comparison possible only between largely homogeneous laws such as civil and common law that in one way or another refer to their Roman roots? Is the goal the method? A problem-oriented approach was proposed as central to whatever scholarly reasoning to alleviate this methodological intricacy. This approach is definitely right, yet it is also very general, as whatever intellectual activity can be labeled problem-oriented. Additionally, functional and systemic, casuistic versus dynamic approaches followed in comparative studies (cf. Stanzione 1973: 884). The available research into the fundamental question of comparison or comparability of laws enabled in the view of many comparatists to speak about the comparative study of law as an autonomous legal discipline, even if it to a large extent dealt with itself and much less with its object, especially when voluminous works on foreign law are deducted from the corpus of the comparative study of law. Within the traditional comparative paradigm legal families were composed and legal traditions analyzed by comparatists. Later on, legal culture was proposed as one more concept to balance the deficits in the traditional comparison. The traditional way of comparison was embedded in the research paradigm that focused on the laws of the world that were neatly divided in legal

families. This systematics allowed for exchanges in form of legal implants between different domestic laws, which were perceived as basically independent. It remains open what this research actually accomplished, when the image of plurality in unity in the laws of the world is set apart. In fact, the traditional comparative study of law showed that notwithstanding many particular features in terms of form and content, the laws of the world remain anchored in the conceptual framework of the Roman law, notwithstanding numerous updates to this conceptual base. Domestic laws emerged in this comparison as composed of legal substrates, superstrates, and adstrates like whatever language that is the result of contacts among groups of speakers. It also showed that laws evolve, but this dynamic feature they share with all other social phenomena, language most expressly included. This conclusion holds true even if some comparatists engaged in their research with the opposite goal in mind and alleged that fundamental structural differences would exist between the traditional dominant and the dominated legal systems of the world. While some universalist comparatists scrutinized legal morphology to identify the elementary particles of law, for instance *offer* and *acceptance* as elements of *contract*, they did not accomplish any legal grammar composed of such elements that would make clear the contemporary structure of law and enable its more systematic development worldwide. However, in its problem-oriented studies comparatists identified ways of interrelation of legal systems such as unification, approximation, harmonization, and coordination of laws. Finally, the issue of globalization of law that has its intellectual origin in the comparatists' idea of *ius unum* began to dominate the work of numerous comparatists (cf. Domingo 2010, Husa 2018b). This is an understandable concern as the disappearance or the falling into desuetude of traditional laws of Asia and Africa, the approximation of civil law and common law that for some researchers comes close to their merger (cf. Mattila 2017: 458), the dismantlement of most socialist states as well as the subsequent disappearance of the divide into Eastern and Western jurists, the presence of numerous elements borrowed from civil and common law in the Islamic law renders differentialist perspectives upon laws less attractive.[35] More and more the impression emerged that macrocomparative approaches to laws do not offer any deeper insights as laws nowadays, for instance the Finnish and the Indonesian private laws, are much too close to each other to enable any substantial conclusions to be drawn from their comparison (cf. Mattila 2014). It remains, as always the microcomparative approach that sometimes

[35] Jaakko Husa (2015: 15) wrote about this problem: "National legal cultures, in spite of their harmonisation, are still in existence. Convergence is a fact, but profound unification is still a utopia: the decrease in differences has not resulted in the similarity of systems and disappearance of all differences…In comparative methodology a matter is merely a technical problem very rarely. The mental challenge of comparison comes from the difference in legal cultures – diversity and hybridity present their own challenges." However, one would also have to admit that laws emerge in the body politic and are therefore largely a matter of politics, i.e. in our contemporary social reality, the matter of the political class. Comparative methodology would have to integrate better the political element into its interpretive framework.

provides details that may be useful for governments when they prepare drafts of legislation, which are often based on foreign solutions to legal problems. What is more, international law offices, financial institutions and multinational enterprises took their own measures to coin international or global law in areas where academic research was negligently reluctant to become active mainly due to its involvement in internal methodological disputes.[36] In the newer discussion, the decomposition and recomposition of the conceptual frame of reference in form of a reload was proposed in order to reshape the comparative study of law in times of the ongoing, although sluggish, legal globalization (cf. Husa 2018a: 412). This is a procedure that proved worthwhile in critical times in any area of knowledge (cf. Kaag 2009). It is probable that in the main current of contemporary comparative studies the focus upon legal culture in times of legal globalization will reshape the comparatists' understanding of legal families and other traditional concepts. Jaakko Husa proposed to "accept commensurable overlapping conceptualizations" on the macrocomparative level (cf. Husa 2018a: 410). He also readjusted the concepts of legal family, legal tradition, and legal culture that he treated within a multivalent thinking where "everything is a matter of degree" and not of strict taxonomy (cf. Husa 2018a: 440). For instance, the domestic law of Hong Kong can be perceived as simultaneously belonging to the common law legal family, yet in terms of legal culture "it bears clear Asian legal cultural characteristics"(cf. Husa 2018a: 446). Next to it, differentialist comparative perspectives will continue to play a role only in ideologically strongly profiled research and the sociologist and anthropologist perspectives upon the globalization of law will definitely gain momentum in the future. Yet, the biggest problem of the comparative study of law is its weak anchorage in the methods of social sciences as many comparatists continue to cherish the idea of an autonomous, and apparently inherent rather than explicit comparative method, that they are ready to enrich with conceptual puzzles from other social sciences that are borrowed rather inconsistently. It seems that the crisis will not be overcome without a step toward full integration of the study of law into social sciences. Finally, it can be maintained as a standing truth of legal comparison that

[36] Blaise Pascal (1623-1662) wrote in his *Pensées* (fragment 294) about the necessity to establish a 'universal law': "Men admit that justice does not consist in these customs, but that it resides in natural laws, common to every country. They would certainly maintain it obstinately, if reckless chance which has distributed human laws had encountered even one which was universal; but the farce is that the caprice of men has so many vagaries that there is no such law." (Transl. W. F. Trotter) Pascal grounded his idea of universal law on natural law and he largely neglected parallels in statutory laws that were numerous also in his time. Today, many legal comparatists who try to structure such law, called mostly global law, abandoned the connection to natural law as an outdated intellectual construct. Yet, the basic idea remains unchanged in all projects of universal or global law. Pascal's concept of 'universal law' has religious roots. The theologian Adolphe Tanquerey (1854-1932) stated in his *Synopsis Theologiae Dogmaticae Fundamentalis* (1909: 507) the logical presuppositions of 'universal law' (related to the Catholic Church): "Jure universalis est, seu aptitudine gaudet ad universalem inter omnes gentes extensionem; nam, sua doctrina et constitutione omnem individualismum et nationalismum excludit."

comparing legal-linguistic operations is a reliable approach that should be used primarily in order to elucidate the question whether legal-linguistic operations such as legal interpretation or legal argumentation are actually ubiquitous.[37]

Traditional legal comparison teaches a lesson on contrasting legal languages and on limits of comparison. For instance, a jurist interested in comparative law may proceed while using the traditional comparative method. She may in her research focus on eligibility conditions for the U.S. President and for the President of Latvia. First, she will determine the relevant provisions in the legal acts of both countries. These will be Art. II of the U.S. Constitution and Art. 3 of the Latvian Constitution (*Satversme*). The mentioned constitutional provisions say:

> No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of the President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States. (U.S. Constitution, Art. II, Sec.1.)

The Latvian provision says in its original version and in the English translation:

> Par Valsts Prezidentu var ievēlēt pilntiesīgu Latvijas pilsoni, kurš sasniedzis četrdesmit gadu vecumu. Par Valsts Prezidentu nevar ievēlēt pilsoni ar dubultpilsonību. (Constitution of Latvia/LR Satversme 3/37) (Trans. A major citizen of Latvia who has accomplished forty years of age can be elected President of the State. A citizen with double citizenship cannot be elected President of the State.)

Second, the comparison of elements relevant to eligibility shows differences in the age limit, residency, naturalization and double citizenship. Based on these textual elements, the comparatist can develop an argument concerning the eligibility conditions in both constitutions. The legal linguist would be additionally interested in the way the U.S. and the Latvian legislators state the eligibility conditions and in the legal argumentation in texts that apply these provisions. Full understanding of law comprises both the functional-comparative and the legal-linguistic analysis. Meanwhile, the traditional approach is formal, if not formalistic, as the roles of the President in the U.S. and in the Latvian constitutional law differ. What remains is the commonality of terms, as *president* equals *presidents* in the Latvian language. Not much knowledge follows from this sort of comparison of the incomparable.[38]

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[37] Interestingly, also M. T. Lizisowa (2016: 16) stressed this characteristic feature of the legal language, when analyzed as *langue* in contradistinction to *parole* in the structuralist sense of both terms: "…język prawny na poziomie *langue* ma charakter statyczny i jest kodem semiotycznym o charakterze uniwersalnym."

[38] Cf. also Art. 127 of the Polish Constitution: (1) Prezydent jest wybierany przez Naród w wyborach powszechnych, równych, bezpośrednich i w głosowaniu tajnym. (2) Prezydent Rzeczy-

Comparative and contrastive methods, which raise awareness rather than really compare, are complementary. In comparative legal linguistics one may also ask which mechanisms are not used in law. Structures of the civil law and of the common law contract differ as far as the element of *consideration* is concerned. This statement is contrastive, and not really comparative. Pragmatically important is that the same meaning may be constituted differently. One may compare different possibilities to express ownership in English and in Finnish *Minulla on auto* and in English *I have (got) a car* and ask whether they lead to differences in the drafting of law.

I will explain the above argument more precisely on the example of *property* and *intellectual property*. In comparative law, the comparison of basic concepts such as *property* has been perceived as problematic (cf. de Groot 1987: 16 regarding the Dutch terms *zaak* and *goed*). The same concerns the Spanish terms *cosas* and *bienes*.[39] Linguistic comparison within multilingual legal systems shows that this concept is structured identically in all multilingual texts of law, so for example in Switzerland that has four official languages and one concept of *property*. Otherwise, property displays a multitude of structural problems that complicate the cognitive process rather than facilitate it.[40] In the common law, property is classified as *personal* or *real property*. Personal property is *movable*, while real property is *immovable* in terms of civil law, yet also in terms of common law's conflict of laws. It comprises the land itself as well as buildings, trees, soil, minerals, timber, plants, ad other things permanently affixed to the land. A person's ownership right in real property is called *estate in land*. The *fee simple absolute* is the highest form of ownership of real property; it grants the owner the full rights to the property. Common law also distinguishes between *freehold estates*: *fee simple absolute*, *fee simple defeasible* and *life estate*. The most important operation in property is the transfer of ownership, accomplished mainly by sale contracts. For real property, it requires a real estate sales contract; in most U.S. states, the Statute of Frauds requires that this contract be in writing. The seller has to deliver a deed to the buyer and the buyer pays the price at the closing. Every U.S. state has a *recording statute* which provides that copies of deeds and other documents concerning interest in real property (e.g. *mortgages*, *easements*) may be filed in a government office,

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pospolitej jest wybierany na pięcioletnią kadencję i może być ponownie wybrany tylko raz. (3) Na Prezydenta Rzeczypospolitej może być wybrany obywatel polski, który najpóźniej w dniu wyborów kończy 35 lat i korzysta z pełni praw wyborczych do Sejmu. Kandydata zgłasza co najmniej 100 000 obywateli mających prawo wybierania do Sejmu.

[39] For instance in Art. 333 of the Spanish civil code: Todas las cosas que son o pueden ser objeto de la apropiación se consideran como bienes muebles o inmuebeles.

[40] A. Matulewska (2017: 34) writes about this problem from the perspective of a legal linguist: "The terminology related to property has turned out to be extremely difficult to parametrize due to the differences between legal systems. …It must be stressed that property-related terminology encompasses numerous terminological units which are non-equivalent and do not have sufficiently equivalent potential counterparts in many legal systems."

where they become public records open to viewing by the public. Documents are usually filed in the county recorder's office of the county in which the property is located. Interested buyers have to check these records. *Nonpossessory interest* is a situation in which a person holds an interest in another person's property without actually owning any part of the property, for instance an *easement.* The easement is a right to make limited use of someone else's land without owning or leasing it. *Easement* in this case called *implied easement*. An *easement* is a *servitude* in French law and in related civil law systems. In civil law, property is classified as *movable* and *immovable*. Immovable property (e.g. land) is usually transferred in civil law countries with the help of public notaries who certify the transaction. This procedure does not exist in the U.S.

By contrast, the concept of *intellectual property* is largely the same in both systems. Intellectual property is a neologism in the doctrine of law. As intellectual property law is largely a homogenous area, comparative or contrastive studies have there limits there. Meanwhile, intellectual property is, first of all, structured notionally by jurists as 'property'.[41] Therefore, also the four traditional questions of the legal doctrine must be addressed by a theory of intellectual property law by jurists: 1.What can be privately owned?; 2. How are ownership rights established?; 3. What may owners do with their property?; and 4. What are the remedies for the violation of property rights? Meanwhile, the concept of 'intellectual property' cannot cope without 'information', defined in terms of law.[42] Hence, coining terms may be accidental to the application of law, as is the case with the common law *real property* and the civil law *immovable property*. Comparatively, both terms are

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41 According to Cooter/Ullen (2003: 119) "Property law creates a bundle of rights that the owners of property are free to exercise as they see fit, without the interference by the state or private persons. Consistent with this freedom is a system of allocation by voluntary exchange. Property law fosters voluntary exchange by removing the obstacles to bargaining. When the obstacles to bargaining are low, resources will be allocated efficiently…We distinguished between private and public goods and we claimed that the former can be privately owned. Private ownership is appropriate when there is rivalry and exclusion in the use of goods…. Property law can be applied to information, which has some features of a public good. Four principal areas of law create property in information and are called intellectual property law (they are patents, copyrights, trademark, and trade secrets)." As can be seen, property is a strictly doctrinal construct in law. Property in the ordinary language use is construed much easier.

42 Cooter/Ullen (2003: 120) write: "Information has two characteristics that make transactions in information different from transactions in ordinary private goods. The first characteristic feature is credibility, the second nonappropriability. Information is generally costly to produce and cheap to transmit. …The fact that producers have difficulty selling information for more than a fraction of its value is called the problem of nonappropriability…Consumers try to free ride by paying no more than the costs of transmission….Consider the connection between nonappropriability and public goods. Information contains ideas. One person's use of an idea does not diminish its availability for others to use. Thus, information is non-rivalrous. Excluding some people from learning about a new idea can be expensive, because the transmission of ideas is cheap. Thus information is non-excludable..." In this example, the modern concept of *information* opposes its doctrinal treatment.

unproblematic; the difference between them plays a role in contrastive, especially in contrastive translational studies. However, already an *implied easement* of the common law may cause problems that are more serious in comparative law and in legal translation. Full understanding of *freehold estates* in comparative law and for purposes of translation is an intellectual challenge for professionals involved in such undertakings. Unproblematic are finally global terms such as *intellectual property rights*, yet only when their use is rooted in international law.

Comparative legal-linguistic approaches share the fate of comparison in law, where comparison is the domain of comparative law, and in linguistics proper, where comparative linguistics can be perceived as a special area or a method. Methodologically, comparison requires a tertium comparationis, i.e. a set of categories or parameters that form the background of the comparative activity. In linguistics, the role of comparative approaches is largely undetermined. From the perspective of general linguistics, comparative efforts may appear circular as they finally prove that linguistic diversity that is their point of departure uncovers general linguistic patterns, which the diversity of languages masks for an unprepared observer. In linguistics, comparative methods gained momentum also in relation to translation; the conventional character of language becomes better visible in comparison.[43] In comparative law, the result is no different. There, the multitude of legal systems can be combined to form several groups and these, finally, can form a system of fundamental legal elements that constitutes the law, and not the multitude of legal systems.

Practically, comparative efforts in linguistics help uncover universal structures. It goes without saying that the same structures could have been uncovered also in monolingual research, yet most linguists have their pains with such a procedure. We distinguish linguistic or textual parallelism and comparison, for instance in the Polish and in the German criminal codes:

Polish Criminal code (Kodeks karny):

> Art. 148. § 1. *Kto zabija człowieka*, podlega karze pozbawienia wolności na czas nie krótszy od lat 8, karze 25 lat pozbawienia wolności albo karze dożywotniego pozbawienia wolności. (italics added)

German Criminal code (Strafgesetzbuch):

> § 212 Totschlag. (1) *Wer einen Menschen tötet*, ohne Mörder zu sein, wird als Totschläger mit Freiheitsstrafe nicht unter fünf Jahren bestraft. (2) In besonders schweren Fällen ist auf lebenslange Freiheitsstrafe zu erkennen. (italics added)

[43] Mario Wandruszka (1969: 10) wrote about differences among languages: "Die tausendfältigen Unterschiede der Formen und Strukturen von Sprache zu Sprache entsprechen keineswegs immer geistigen Notwendigkeiten. In unseren Sprachen ist geistige Notwendigkeit und geschichtlicher Zufall. Es fällt uns schwer, einzusehen und zuzugeben, dass in unseren Sprachen so viel geschichtlicher Zufall ist."

In the above examples, the italicized parts of the provisions are literaly identical. Textual parallelism is the first characteristic feature of legal texts that was identified in the comparative legal-linguistic research.[44] Textual parallelism of this type is one more example of intertextuality that is operative in legal texts.

Legal constructs are of utmost importance for this area. For instance, the Finnish *Laki oikeuskäynnin julkisuudesta* (21.12. 1984/945) says:

> Art. 5: Tuomioistuin voi asianosaisen vaatimuksesta tai erityisestä syystä muutenkin päättää, että suullinen käsittely toimitetaan kokonaan tai osaksi yleisön läsnä olematta,…3) kun alle 18-vuotias henkilö on *syytteessä rikoksesta*. (italics added)

The German translation of the above provision says:

> Das Gericht kann auf Antrag des Beteiligten oder beim Vorliegen besonderer Gründe beschießen, dass die mündliche Verhandlung teilweise oder gänzlich unter Ausschluss der Öffentlichkeit stattfindet, wenn…3) eine Person unter 18 Jahren wegen einer Straftat *angeklagt wird*. (italics added)

The regimen of Finnish *syyttää* and German *anklagen* differs.[45] The Finnish verb *syyttää* takes the object obligatorily; in German as in English *anklagen* and *to accuse* have a facultative object. As in the source text the object appears in the form *accused of a crime*, its complete translation into German seems unavoidable, although *is accused* would be correct in German as in English. Meanwhile, as the Finnish criminal law abandoned the differentiation of crimes that were previously divided in *rikomus* and *rikos*, unlike the German criminal law that still knows *Verbrechen* and *Vergehen* (cf. also *crimes* and *misdemeanors* in the common law), *rikos* kann be translated by the general term *Straftat*. It however

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[44] Textual parallelism is frequent in statutory texts. Art. 1156 of the French Code civil says: On doit dans les conventions rechercher quelle a été la commune intention des parties contractantes, plutôt que de s'arrêter au sens littéral des termes. Art. 1362 Italian Codice civile stipulates: Nell'interpretare il contratto si deve indagare quale sia stata la comuna intenzione delle parti e non limitarsi al senso letterale delle parole. Both articles are that close as to their content and linguistic form that one may assume that the one is the translation of the other. Furthermore, the formulation of the Art. 1161 French Code civil: Toutes les clauses des conventions *s'interprètent les unes par les autres*, en donnant à chacune le sens qui résulte de l'act entier corresponds with Art. 1363 Italian Codice civile: Le clausole del contratto *si interpretano le une per mezzo delle altre*, attribuendo a ciascuna il senso che risulta dal complesso dell'atto (emphasis added). As this resemblance cannot be coincidental because it even comprises set phrases, it can be posited that both provisions stand to each other in a relation of intertextuality, i.e. that the one has been developed because the other existed already. As the French Code civil dates from 1804 and the Italian Codice civile entered into force only 1942, one can claim that the Italian provision is the translation of the French.

[45] Cf. the Finnish dictionary *Kielitomiston sanakirja* (2012), vol. 3, p. 209: Nostaa jtkt syyte, vaatia jklle rangaistusta jstak. *Syyttää jkta murhasta*, *lahjonnan ottamisesta*. *Joutui oikeuteen kavalluksesta syytettynä*.

causes problems in the application of the provision as the question could come up as to the necessity to differentiate in degree of the crime committed in the application of the provision. Terms are unproblematic in this case, yet the translation requires a conceptual analysis. This analysis is anchored in comparative criminal law. Contrastive analyses, such as the above one, signal translation problems that cannot be solved without legal knowledge.

In sum, comparative and contrastive approaches to legal language are productive in legal linguistics because they help us to identify legal-linguistic problems that remain concealed in monolingual studies. Their methods are largely dependent on the proceedings in their parent disciplines, comparative law and comparative linguistics. Meanwhile, applying these methods is cumbersome because of ongoing methodological debates (on different levels of complexity and abstraction) in the parent disciplines. Monolingual legal-linguistic research engenders epistemically equivalent results, yet it risks to miss certain central problems of the legal discourse due to linguistic (i.e. also legal) limits of its area of studies. A striking example of such limitation of research perspective is the focus on statutes as the source of law in civil law related legal-linguistic research, for instance in Poland and in France, where court opinions, which in many areas of common law are the decisive source of law, are neglected as samples of legal discourse. At this point, at least, comparative and contrastive legal-linguistic studies adjust our perspective upon the language of law.

Multilingual legal texts

Sense of multilingualism in legal texts – Multilingual intertextuality – Horizontal and vertical intertextuality

Another case of practically relevant comparative legal linguistics is the drafting and the interpreting of bilingual or multilingual legal texts. Multilingualism in legal texts usually concerns drafting complex texts, yet it may be also represented by singular foreign terms. The legislator introduces foreign terms apparently to facilitate the understanding of the text as well as its systematic positioning within the given legal system. It is however unclear whether this drafting and interpretive method contributes to the better understanding of provisions. The example below is illustrative of the problem:

> Art. 21 VO (EG) 593/2008 Öffentliche Ordnung im Staat des angerufenen Gerichts: Die Anwendung einer Vorschrift des nach dieser Verordnung bezeichneten Rechts kann nur versagt werden, wenn ihre Anwendung mit der öffentlichen Ordnung (*ordre public*) des Staates des angerufenen Gerichts offensichtlich unvereinbar ist. (italics added)

Such texts are examples of intertextuality in law. Multilingual intertextuality is frequent in legal texts as legislative institutions are in daily contact with each other and governments study legal acts of other countries permanently. They seek better law or good practices in them and also copy, sometimes even literally, statutes of other countries. This practice, which represents international co-operation, is further supported by the lack of legal protection for legislative texts that are situated in the unprotected public domain. Legal-linguistically, multilingual intertextuality represents horizontal intertextuality in relation to texts positioned on the same level of legal hierarchy. In addition, supreme courts have the tendency to follow patterns in lexicalization and in argumentative orientation of other courts (cf. for a more nuanced discussion Cunillera/Rey 2010 and Goźdź-Roszkowski 2017). Monolingual intertextuality that reflects the verticality of sources of law in one legal system is another related linguistic phenomenon that will be discussed later in this book.

Ethics and legal linguistics

Ethical element in interdisciplinary research – Danger from affirmative discourse – Danger from self-censorship – Other dangers – Ethics is the chance of every academic discipline

Interdisciplinarity comprises also the attempt to reflect upon ethical fundamentals of academic research in particular areas of knowledge, and legal linguistics is not an exception in this sense.[46] Usually, ethical fundamentals of an area of knowledge are concealed in academic works or only inherently present in scholarly activities. Fundamental research stresses therefore the necessity to reflect upon these otherwise neglected or covered problems. It introduces the element of explicit reflection upon the origins and the goals of the discipline.[47] Such a reflection cannot be underestimated as it steers research programs in particular disciplines. Scholars, who work in paradigmatically strictly defined disciplines, for instance in chemistry, may tend to neglect such fundamentals. In legal linguistics, ideas of social justice

[46] F. Wolff (2019: 278) wrote: "Un humanisme de l'égalité et de la réciprocité qui transcende les continents, les «races», les religions, les nations, les Etats, les classes, les sexes est aujourd'hui possible …Un humanisme effectif, donc cosmopolitique, est possible à condition qu'il intègre l'idée que les êtres humains se pensent, concrètement, à partir de leurs différences…Car le vrai humanisme, celui qui pourrait naître de cette cosmopolitisation, repose à la fois sur une éthique de l'égalité et une politique des différences."

[47] M. T. Lizisowa (2016: 490) wrote about the axiological fundamentals of law: "Teoria komunikacyjna języka prawnego ma uzasadnienie aksjologiczne. Wszak używając języka prawnego, ustawodawca tworzy porządek normatywny postępowania człowieka w relacjach społecznych. Akcenty moralne i etyczne w prawie przedstawia mediacja retoryczna o charakterze interpersonalnym oraz współczesne rozumienie prawa jako zespołu norm i reguł prawnych…"

and of better law direct the critical research and they function as a corrective in situations where the affirmative discourse, which in some regions is also the dominant social and legal discourse, threatens to paralyse the free academic discourse and favors pseudo-research. Pseudo-research is often formally correct, yet it does not advance our knowledge, as its main role is to legitimize established power structures and not to critically question them. Another form of pseudo-research emerges in projects financed by public bodies where researchers tailor down their papers to real or presupposed expectations of the financing institutions. By so doing, they voluntarily exercise self-censorship. In the postmodern and postdemocratic society, legal concepts such as state of law, social justice, equality and some other traditional topics of the philosophy of law gain a particular hue as they become seemingly peripheral while some basic legal texts such as constitutions still focus mainly on them (cf. Crouch 2003).The postmodern state has the tendency to follow the raison d'état that it defines according to the circumstances and courts in such a social formation follow the arguments used by the government and display legal elasticity in dealing with fundamental legal concepts.

Legal linguistics is a social science that furthers certain social goals. It is not a study of words that exist in an ethical vacuum but a social project that is anchored in the responsibility for society and the planet. Nowadays, responsibility is understood as global responsibility (cf. Beck 2016) because the interconnected and interdependent societies influence each other in increasing degree, also in the area of law. Some goals are well defined already: better law, just and fair society, evolution of human rights standards and global law (cf. Beitz et al. 2009, Brock (ed.) 2013, Husa 2018b). Legal futurology deals with the development of these tendencies and the countervailing tendencies in the global society (cf. Galdia 2017a: 428-430).

Conclusions

Legal linguistics can be approached and characterized by its method. The legal-linguistic method is neither legal nor linguistic, it is legal-linguistic. The description of the legal-linguistic method enables a more precise characterization of legal linguistics, its range and its objectives. Meanwhile, the legal-linguistic method is a tool that tolerates diversity of views about the researched subject matter. Monolingual and comparative approaches, strictly and implicitly semiotic analyses, views upon the legal language that are closely or loosely connected with contemporary legal theory, approaches that are grounded in different linguistic schools (poststructuralism, cognitive linguistics, pragmalinguistics, critical and affirmative discourse analysis, etc.) coexist in it due to the elasticity of the legal-linguistic method. It also includes ethical determinations that force the legal

linguist to work not only as a brilliant researcher but also as a responsible citizen. The legal-linguistic methodology has to teach a lesson that fundamental choices among concepts of law and of language are unavoidable as the first step toward legal linguistics. These fundamental choices also determine what contemporary legal linguistics is and what it will be in the future.

PART II. LAW AS DISCURSIVE PRACTICE

The findings of the previous chapter strengthen the assumption that it is worthwhile to approach law methodically through the lens of the discourse theory. Law emerges and is applied within multiple discourses that are more or less professional and therefore it necessitates a broad conceptual framework in order to be described and understood properly. Central to all explorative activities is the meaning of law that may be grasped differently by the participants in the discourse. Laypersons have the tendency to use broad and even over-broad arguments, jurists are linguistically strict in their professional argumentation and they follow institutional patterns that they perceive as binding. Many laypersons do not accept any institutional constraints when they speak about law. They also frequently lack the knowledge of law and replace it with the reference to beliefs and commitments to values. In society, law emerges and evolves in the focus of all participants. Needless to say that not all views are effective, i.e. represent valid law. The reason for this intricacy is that valid law is finally determined institutionally, mainly by the supreme courts that have the final say and can also enforce the law that they perceive as valid. This does not mean that other assumptions about the valid law would be meaningless or unreasonable. They may even convince the citizens at large more than the opinions of supreme courts. Yet, they lack the most distinctive feature of law as a social mechanism, i.e. enforceability. This specific discursive feature is institutional. Institutionality and enforceability are among the most fundamental notions that constitute the legal discourse. Legal discourse covers the totality of inputs into the debate about the past, the valid, and the future law. In legal linguistics, the awareness about its central issues emerged gradually, in historical processes of formation of critical thought. Therefore, before discussing the conceptual foundations of the legal discourse, a glimpse of past attempts to come to terms methodically with the language of law may be useful.

Development of problem awareness in legal linguistics

Conceptual origins of legal linguistics – Attempts in legal science to overcome ambiguity and their failure – Text and discourse as central notions of legal linguistics – Methodological problems

Legal linguistics emerged as a result of distress felt by certain jurists, linguists and other scholars confronted with legal language. The common denominator in their approaches to the legal language is the observation that this language all too often does not immediately mean anything clearly defined and that it is sometimes difficult to grasp. Some people thought that the style used by jurists, called

in French *stile du palais*, caused this sort of a rather annoying perception. Some referred to cryptic terminology. Others discovered problems of legal translation as the consequence of incompatible legal terms used in different legal systems. With the research into legal translation started also the expansion of legal linguistics. However, very soon it has been discovered that translation as a legal-linguistic operation is only one example of numerous other legal-linguistic operations. Among them are complex operations such as legal argumentation and legal interpretation or less complex structures such as description of facts or justification of court opinions. All of them steer the legal discourse.

Historically, jurists tried to alleviate the pain felt mostly by judges but also by those concerned by their decisions already in the nineteenth century in that they tried to define strictly the language of law, i.e. its doctrinal concepts, in order to solve the problem of polysemy. They assumed that strictly defined legal concepts would lead to more or less mechanical application of law in judicial institutions. Today, we can mildly smile at these efforts as they were from the beginning condemned to failure. No language can be semantically fully defined in advance, and the legal language is definitely not an exception to this rule. Like all languages, the legal language has to adapt itself to changing social and ethical beliefs and commitments in society and to display policies that emerge under these circumstances of constant and profound change.

Broader, overarching concepts such as *discourse* or *text* emerged gradually and provided the matrix for our conceptual work in legal linguistics.[48] Common to all newer approaches in legal linguistics is the assumption that the understanding of law and of the legal language can be achieved solely by adapting broader conceptual frames of reference that are rooted in social sciences and not exclusively in the legal science. The main weakness of the legal science is its methodical rigidity that makes approaches such as the legal-linguistic necessary because otherwise the understanding of law would be incomplete. One could therefore pretend that the methodical deficiency of the legal science propelled the development of legal linguistics in times of advanced inquiry into the rationality of human action that the legal science was unable to satisfy. Next to these tendencies, the attempt to understand legal language and law with the help of natural sciences has proven some usefulness in legal linguistics. It does not constitute a topic of this book, however.[49]

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[48] M. T. Lizisowa (2016: 40) clarified the relation between *discourse* and *text* in the context of legal-linguistic research: "…akt komunikacyjny w języku prawnym obejmuje dyskurs prawny, który jest pojęciem nadrzędnym w stosunku do pojęcia tekstu prawnego, ponieważ poza tekstem obejmuje także czynniki pozajęzykowe, takie jak sytuację użycia wyrażeń językowych i uczestników użycia języka."

[49] Some of the relevant issues were mentioned by M. T. Lizisowa (2016: 39): "Uwzględnia się także psychologiczne warunki funkcjonowania języka, przyjmując, że istnieją zintegrowane w mózgach struktury ludzkiego myślenia o rzeczywistości świata pozajęzykowego, poznawalnego poprzez obserwację reguł językowych, którymi faktycznie ludzie się ze sobą komunikują. Różnorodność paradygmatów naukowych w badaniach nad językiem prawnym zmienia jednostronne podejście do lingwistycznego statusu zjawiska języka."

The development of legal linguistics provoked new methodological problems because the initially very restricted area of discussed issues was expanded considerably. The initial legal-linguistic method focused upon legal style and it was rooted in the history of language, mainly in etymology. Later, translation studies provided the necessary and yet insufficient framework of methodological reference. The awareness that legal linguistics embraces basically all linguistic operations in law became a real challenge for the research. In all areas of social sciences that deal with selected legal-linguistic operations, such as argumentation, problems of method are far from being elucidated. Therefore, legal linguistics can benefit from the methodological input of other social sciences, yet this input has limits. The solution to this dilemma that is proposed in this book is the two-prong research, which combines material and methodological issues. In this type of research, the description of legal-linguistic issues develops as an interplay of material problems and the method necessary to cope with them.[50]

Discursiveness as conceptual basis of legal linguistics

Concept of discursiveness – Non-discursive action – Speaking about law – Legal discourse integrates language and power – Meaning of law emerges in legal discourses

Every discipline abounds in concepts, yet some concepts are more fundamental than others. In linguistics, the expressiveness of language, i.e. the fact that language can be used to express complex mental contents is fundamental. Without grasping this most general characteristic feature of language there is no understanding of language and no systematic linguistics. In legal linguistics, the corresponding concept is discursiveness, i.e. the capacity of a speech act to exist as a part of discourse and not as something else. Discursiveness is the main notion that clarifies the concept of law and of the legal language. Law, and language can be excluded from our analysis for a moment, as it is known to be quintessentially discursive, has also to be perceived as such.[51] What is more, we discover law as a linguistic mechanism that steers society, not through a linguistic approach to law.

[50] Also M. T. Lizisowa (2016) developed her communicational theory of legal language in the focus of material and methodological issues. Another example of legal-linguistic research that reflects the necessity to coin an appropriate method in order to deal with legal-linguistic issues is my book *Lectures on Legal Linguistics* (2017a).

[51] M. T. Lizisowa (2016: 31) wrote about the linguistic approach to law: "Lingwistyczne badanie prawa sprowadza się do analizy języka prawnego ze względu na normy prawne wyrażone znakami językowymi. Metody lingwistyczne zmierzają do odpowiedzi na pytanie o to, czym jest prawo jako zjawisko językowe, czym są akty tworzące prawo stanowione, jakie są struktury języka wyrażające akty prawne, co jest przedmiotem stanowienia oraz jaka jest relacja przedmiotu stanowienia do rzeczywistości prawnej w stosowaniu prawa."

Law is language, and therefore it is not possible to separate both, unless only for administrative purposes. There is nothing more in law than language. Therefore, equaling law and legal language is justified in a theoretical perspective, at least in legal linguistics.

Generally speaking, this something else that might exist next to discursive action is an essentially non-discursive action, such as e.g. the construction of a bridge or a ship. Language is definitely also involved in such social practices at a stage, yet it is not essential to their existence (with exception of fictitious, purely discursive societies where governmental statistics manifests steady increase in industrial output of bridges and ships that does not correspond to extra-discursive facts). The artifact that is the final output, the bridge or the ship, which are constructed, matters more than language used in the process of its fabrication. The same concerns surgical operations. Some scholars speak about 'wordless operations', while others stress the omnipresence of the word in all conscious acts (cf. Paterman 1989: 205).

Legal language is a vehicle that transports our socially relevant speaking about law. Legal discourse represents the totality of our speaking about law. In terms of the legal discourse, law is power expressed with linguistic means. Legal discourse integrates the most significant ingredients of law: language and power. Therefore, the language of law cannot be reduced to dictionary entries. Lexicological approaches to legal language can at best show the contrary of the envisaged goal, namely that finally words do not matter much in law. To put it short: cats may occasionally be dogs in some legal settings. Meaning of law emerges in legal discourses and these cannot be anticipated or determined in advance.

Let us look at some American examples, which will illustrate the process of meaning constitution in law: In the court opinion Massachusetts v. Environmental Protection Agency (EPA) the U.S. Supreme Court dealt next to the main question, which is discussed later in this section, also with the way in which EPA makes its decisions (cf. 127 S. Ct. 1438, 2007). The Clear Air Act in its sec. 202(a)(1) mentions that EPA Administrator regulates substances 'which in his judgment cause… air pollution'. EPA seemed to construe the 'judgment' as based on its interest to act or to deal with the subject matter. The court defined 'judgment' differently. It held: "While the statute does condition the exercise of EPA's authority on its formation of a 'judgment,' that judgment must relate to whether an air pollutant "cause(s), or contribute(s) to, air pollution which may reasonably be anticipated to endanger public health or welfare." Put another way, the use of the word 'judgment' is not a roving license to ignore the statutory text. It is but a direction to exercise discretion within defined statutory limits." The term 'judgment' is here largely a legal term and means apparently exercise of a discretionary decision. Understanding 'judgment' purely as having an opinion is definitely not the meaning alternative, which would advance processes of decision making in legal institutions. Therefore, also in this case, considerations of policy largely contribute to the proposal of a more adequate understanding of 'judgment'.

In the above court opinion Massachusetts v. Environmental Protection Agency (EPA), also the question had to be decided as to whether the EPA was obliged under the Clean Air Act to set greenhouse gas emission standards. The provision of the statute in question (Sec. 202 (a) (1)) says:

> The (EPA) Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare…

The most salient substance in this context would be carbon dioxide, yet EPA contended that carbon dioxide is not an 'air pollutant' within the meaning of the provision. The court held: "Because greenhouse gases fit well within the Clean Air Act's capacious definition of 'air pollutant,' we hold that EPA has the statutory authority to regulate the emission of such gases from new motor vehicles." Meanwhile, Justice Scalia said in his dissenting opinion: "We need look no further than the dictionary for confirmation that this interpretation of 'air pollution' is eminently reasonable. The definition of 'pollute,' of course, is "(t)o make or render impure or unclean." Webster's *New International Dictionary* 1910 (2nd ed. 1949). And the first three definitions of 'air' are as follows: (1) "(t)he invisible, odorless, and tasteless mixture of gases which surrounds the earth"; (2) "(t)he body of the earth's atmosphere: esp. the part of it near the earth, as distinguished from the upper rarefied part"; (3) "(a) portion of air considered with respect to physical characteristics or as affecting the senses." ... EPA's conception of 'air pollution' – focusing on impurities in the "ambient air" "at the ground level or near the surface of the earth" – is perfectly consistent with the natural meaning of that term."

Furthermore, in the court decision Coomer v. Kansas City Royals Baseball Corp. (437 S.W. 3d 184, 2014) a court in Missouri dealt with the legal problem of the implied primary assumption of risk. The problem is best explained with the help of the 'baseball rule' that exculpates sport clubs from liability for injuries suffered by spectators when, for instance, during a game the ball or the bat enter the stands. In the case, a spectator was injured by hotdogs tossed upon the spectators during the baseball match by the mascot of one of the baseball clubs. The court distinguished between risk inherent in watching a game that is covered by the baseball rule and other risks that are not covered by it. It assumed that tossing hotdogs upon the spectators is not a risk inherent in the game, even if most spectators may expect such gestures from the part of the organizers. The court referred to lexicographers for its interpretation: "Inherent means 'structural or involved in the constitution or essential character of something: belonging by nature or settled habit, *Webster's Third New International Dictionary* (1966)'." The court argued: "The rationale for barring recovery for injuries from risks that are inherent in watching a par-

ticular sport under implied primary assumption of the risk is that the defendant team owner cannot remove such risks without materially altering either the sport that the spectators come to see or the spectators' enjoyment of it…Millions of fans have watched the Royals… before (the mascot) began tossing hotdogs, and millions more people watch professional baseball every year in stadiums all across the country without the benefit of such antics."

Previously, I also analyzed the court opinions U.S. v. Haggar Apparel Com. (222 F. 3d 1337 Fed Cir., 2000), where the American court asked whether permapressing as technology can be perceived as *incidental to* an assembly when manufacturing cloths, as well as Rollerblade v. U.S. (282 F. 3d 1349 Fed. Cir., 2002) (cf. Galdia 2017a: 220-223). In the second case, the American court asked whether protective gear is an accessory to roller skates. Answers to above questions cannot be found in dictionaries, although both involved courts refer to them rather unconvincingly in order to justify their decisions. Contracts are even more intricate. The Norwegian word 'haakhjöring' means objectively 'shark meat'; non-Norwegian parties understood it as 'whale meat'. The German court that decided this litigation approved their understanding of the Norwegian word (RGZ 99, 148) (cf. Galdia 2017a: 248). This approval of private meaning in law took place under circumstances that indicate that the parties might have been lying. In this context, L. Wittgenstein referred to impossibility of private language, and rightly so. Yet, a glimpse of an entry in a dictionary will not solve semantic problems in law. Were it the case, legal linguistics would not be really necessary.

Also legal definitions are problematic in terms of the legal-linguistic method. Until now, the research focused on how definitions are coined. Defining as a legal-linguistic operation is connected to the task of imposing meaning or setting up conditions for acceptance of this newly defined meaning. In the area of law, definitions are more than conventions as they impose language use, often, possibly even always, against semantic standards of ordinary language.[52] Therefore, investigating the pragmatics of legal defining is essential to legal linguistics. We can use for our purposes two definitions of negligence:

1. Negligence – the omission to do something that a reasonable person, guided by those considerations that ordinarily regulate human affairs, would do, or doing something that a prudent and reasonable person would not do.
2. Negligence – absence of care (according to the circumstances)

[52] In philosophy, Georg Henrik von Wright (1975: 128) spoke about the same problem: "Jos kerran looginen analyysi on määrittelemistä ja jos kaikki määritelmät ovat nominaalisia, seuraa, että filosofian tehtävänä on laatia sopimusehdotuksia siitä, kuinka edellä mainittujen tapaisia sanoja olisi käytettävä. Sopimusten ei tarvitse olla mielivaltaisia; niitä voidaan eri tavoin perustella. Sittenkin tuntuu oudolta, että loogisen analyysin tehtävänä olisi pelkkien kielenkäyttöä koskevien nominaalisten määritelmiän antaminen." G. H. von Wright's remark can be used for developing the mentioned problem to the level of theory.

Such definitions do not help the judge to decide whether a person actually acted negligently. The answer will be found in the legal-linguistic speech act of application of law, i.e. in legal interpretation, and it has to be found along rules imposing institutional constraints. For instance, nowadays a judge cannot say that he does not know the answer; the non liquet rule does not apply any more in most countries. Yet he can acquit the accused or dismiss the civil suit. Thus, the definition functions as a rule of first orientation. It is a discursive device that steers and structures discourses around negligence. Defining, like terming, is not only a matter of words.[53]

In the application of law, 'negligence' is instrumentalized in tests. For instance, in the court opinion Gold v. Deloitte & Touche, LLP (411 B.R. 542 E.D. Mich., 2009) the court had to find out whether an act was negligent. It started with explaining the construction used for the test: "In Michigan, to establish a prima facie case of negligence, a plaintiff must be able to prove four elements: 1) a duty owed by the defendant to the plaintiff, 2) a breach of the duty, 3) causation, and 4) damages." The court differentiated further certain elements, for instance 'causation', by saying: "Proof of causation requires both cause in fact, and legal, or proximate, cause." It developed this requirement even further: "On the other hand, legal cause or proximate cause normally involves examining the foreseeability of consequences, and whether the defendant should be held legally responsible for such consequences." Hence, legal concepts and legal definitions as legal constructs are transformed into conceptual skeletons that enable and stabilize legal argumentation. It is finally the legal argumentation developed around such conceptual skeletons that is decisive for the decision of the court, and not the concept or definition as such. The traditional positivist legal doctrine overestimated concepts and definitions to the detriment of the most relevant legal speech act that is the legal argument. Negligence is also an issue in penal law. Recent decisions of German courts show how slippery the determination whether the accused acted deliberately or negligently actually is. For instance, in traffic accidents, which involved the loss of human life, charges of negligent homicide were the rule, unless special circumstances were given. Meanwhile, decisions against excessive speeders make clear that excesses in traffic may be characterized as deliberate action where a possible loss of life of other drivers or their passengers is accepted by the perpetrators. The German Supreme Court decided 2019 a case where an excessive speeder who drove with a stolen taxi one hundred and thirty km per hour and collided frontally with another car on the oncoming carriage-way and caused the death of the other driver. The court decided that the accused could be charged with murder under the given circumstances (Cf. BGHSt 4 StR 345/18). The court approved the judgment of a lower court sentencing the speeder to life-long imprisonment. Tests are also regularly based on legal

[53] Cf. T. Kotarbiński (1955: 33, 35) about defining and terming: "Metodą słowotwórczą trzeba przeto operować bardzo ostrożnie…częstokroć nie potrzeba silić się na definicje analityczne, lecz wystarczy poczynić pewne stwierdzenia dotyczące sensu używanych słów."

provisions. For instance, an invention has to pass the test of patentability to be patented. To pass the test, the invention must be *novel*, *useful*, and *non-obvious*. The requirements in the test are borrowed from 35 U.S. Code § 101, which says:

> Inventions patentable. Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

In this case, singular topoi create the argumentative field, a discourse about patentability. Meaning emerges in this discourse. Not lexicological analysis, but an approach based on discursiveness enables the description and the understanding of such legal-linguistic problems.

Fundamentally, i.e. in terms of the fundamental research, legal interpretation can be contrasted with the philological inquiry into the semantics of texts. Differences between the two approaches to the elucidation of semantic problems are striking. An example from classical English literature is quite illustrative in this respect. In Geoffrey Chaucer's *The Canterbury Tales* (ca. 1386) we read:

> This ilke worthy Knight hadde been also
> Sometime with the Lord of Palatye
> Again another heathen in Turkye

The contemporary reader may be confused by the use of 'again' in the third line of the sample. A dictionary of medieval English will inform us that 'again' meant 'against' in Middle English.[54] In this example, the philologist deciphers the meaning encoded in the medieval text. Jurists cannot work in this way; sometimes the impression comes up that judges try in their decision making processes to find out this encoded meaning, which they subsequently can apply to cases more or less mechanically. This is of course an illusion as judges in their opinions try to

[54] In the Polish language, the examples of *zajazd* in the poem *Pan Tadeusz* as well as *jurgield* present analogous problems. Adam Mickiewicz wrote about *zajazd* in the afterword to his poem *Pan Tadeusz*: "Za czasów Rzeczypospolitej Polskiej egzekwowanie wyroków sądowych było bardzo trudne w kraju, gdzie władza wykonawcza nie miała prawie żadnej policji pod swoimi rozkazami…żałujący więc, uzyskawszy dekret, musiał po egzekucją udawać się do stanu rycerskiego…Taka egzekucja zbrojna dekretu nazywała się *zajazdem*." Aleksander Brückner wrote in his fascinating *Słownik etymologiczny języka polskiego* (1926-1927) about *jurgielt*: "*jurgielt*, *jurgieltnik*, z niem. *Jahrgeld*; inaczej niż *jarmark*: oba z pierwotnego *jor*-, co w *jurgielt* 'zgrubiało' w *jur*-." Furthermore, when Adam Mickiewicz writes in his drama *Konrad Wallenrod*: 'Wielkość! I znowu wielkość moj aniele!/Dla której jęczymy w niedoli', '*dla*' represents an older use of the preposition and means '*z powodu'* in contemporary Polish. As can be noted, etymology and historical semantics of most isolated words can be relatively easily determined. The above examples make clear that the determination of meaning in law differs considerably from the purely linguistic or etymological approach. In fact, jurists are looking for the best or most appropriate meaning of terms (legal concepts) in social contexts.

appear as linguists and to avoid any affiliation to power structures because they fear criticism as to their impartiality. The world of legal positivism and the world of laypersons both rely on a discursive fiction that the exercise of law (adjudication and enforcement of law) could be separated from the exercise of power. Legal essentialism is rooted in this conviction: it pretends that judges apply law and nothing more than that; they interpret it in that they attempt at decoding the encoded legislative message in (mostly written) legal texts. Meanwhile, as could be seen in the above legal examples, meaning in law is constructed, not decoded. The most fundamental concept in the analysis of the way in which meaning emerges in law is discursiveness.

From legal discursiveness to legal discourse

M. Foucault's understanding of discursiveness – Legal discourse and legal discourses

Michel Foucault's understanding of discursiveness is fundamental to the understanding of the concept and its role in legal linguistics. M. Foucault wrote in *Les mots et les choses* (1966: 102):

> "Ce que nous laissent les civilisations et les peuples comme monuments de leur pensée, ce ne sont pas tellement les textes, que les vocabulaires et les syntaxes, les sons de leurs langues plutôt que les paroles qu'ils ont prononcées, moins leurs discours que ce qui les rendit possible : la discursivité de leur langage."

In a social practice such as law, its application means that discursiveness is fundamental to the social phenomenon law and that law is meaningfully researched as a linguistic phenomenon. It also means that certain social discourses can be meaningfully researched only as discursive practices and not as something else.

Legal discourse or legal text is the daily bread of the legal linguist. *Discourse* may be perceived as more advanced that text (written or spoken). *Text* is sometimes defined in its immediate context, while discursive contexts have no predetermined limits (abstraction being made from limits of our language). Researchers decide themselves where to draw the borderline for the context when they need to analyze a textual sample representing for them the legal discourse. I do not insist upon this difference in legal linguistics as the history of emergence of both terms and of approaches to social and linguistic reality shows parallels that can be explained historically. Discourse is a double-edge sword in law because law as a social practice that is connected to the exercise of power can easily mislead us as it tends not to explain but to establish, to perpetuate, and to justify power structures and their actions. It, however, appears regularly in a dress of an academic treatise or an ex-

planatory text that praises the court opinions, especially those of supreme courts or quotes them uncritically. Discourses of this sort are affirmative discourses and legal positivism is the realm where they dwell. They are not productive in terms of epistemology of the legal language. Essential to the investigation of law is therefore the critical discourse and its analysis, in brief critical discourse analysis.

In Michel Foucault's *Archéologie du savoir* 'discourse' is perceived as an entity that combines knowledge and power. This combination emerges in institutionalized patterns of knowledge that become manifest in discourse studies focusing upon knowledge and power. For legal discourse, this connection is central as law is an institutionalized social practice and it is power exercised with the help of language. In social sciences, mainly due to the influence of Foucault's *Archéologie du savoir*, formal linguistic aspects of discourse stepped back behind conceptions stressing social construction of reality (cf. Berger/Luckmann 1966). M. Foucault mentioned in his *L'ordre du discours* (1971) the controlled emergence of discourse in any society. It can be proven by the fact that censorship is exercised to critical discourses perceived as socially subversive and that affirmative discourse is praised:

> Je suppose que dans toute société la production du discours est à la fois contrôlée, sélectionné, organisée et redistribuée par un certain nombre de procédures qui ont pour rôle d'en conjurer les pouvoirs et les dangers, d'en maîtriser l'événement aléatoire, d'en esquiver la lourde, la redoutable matérialité.

Deep analysis of the legal discourse also enables to determine the role of language in juridical institutions. Jurists do not deal with language because they are interested in language. They deal with language because they exercise power with the help of language. Linguistic nuances are not the characteristic feature of the legal discourse. Frequently, however, the opposite view is expressed that underscores the linguistic finesse of the law. Meanwhile, it seems that exactly the contrary is the case in law. Law is not a matter of linguistic refinement or aesthetic sophistication; it is a matter of ideology. Legal discourses display and uncover the struggle for law, i.e. for its meaning. This struggle is led in its most visible form with linguistic means. This is also the reason why influential and successful jurists have, as a rule, a very good command of language. Yet, this does not turn the legal discourse into a matter of language. Legal discourse is and remains deeply political. Legal linguistics is truly operational and effective when it is able to trace and to analyze this basic structural element of the legal discourse, i.e. the exercise of power in society that is expressed with the means of language. Viewing the work of jurists, and mostly of judges, as a work done by good uncles who care exclusively about linguistic correctness is either naïve or wicked. Regretfully, many legal-linguistic works neglect or omit purposefully this aspect as problematic. However, when law is scrutinized from a perspective that might be called the view of a language teacher because it is reduced to the actual choice of linguistic

expressions and their appropriateness or correctness, it loses its importance and even becomes counter-productive because it intentionally or naïvely supports the affirmative legal discourse.

Legal discourse is a general term.[55] In social reality, it is represented by a multitude of legal discourses upon different levels of abstraction and legal validity. I characterized these discourses in my *Legal Discourses* (2014). Most striking among them are the professional and the non-professional discourses about law. All of them contribute to the emergence of the legal discourse in society. This discourse displays a clear structure in legal-linguistic terms, although it includes very different, frequently also mutually exclusive propositions about valid or future law.

Discourse in other social sciences and in humanities

Multiplicity of definitions and approaches – Pragmatic approach to discourse

The notion of discourse is used in philosophy, in social sciences and in linguistics in different contexts with broader or narrower meaning that comes close to *text* or *utterance*. Methodically, it is fundamental to choose the appropriate concept of discourse that would satisfy the epistemic interests of the researcher. Christian Baylon (1991: 235-236) has identified some of the characteristic features of 'discourse':

> "Le mot discours est:
> synonyme de la parole saussurienne dans la linguistique structurale;
> une unité linguistique de dimension supérieure à la phrase (transphrastique), un message pris globalement, un énoncé;
> l'ensemble des règles d'enchaînement des suites de phrases composant l'énoncé;
> ce qui s'oppose à l'énoncé : « L'énoncé, c'est la suite des phrases émises entre deux blancs sémantiques, deux arrêts de la communication; le discours, c'est l'énoncé considéré du point de vue du mécanisme discursif qui le conditionne;
> toute énonciation supposant un locuteur et un auditeur, et chez le premier l'intention d'influencer l'autre en quelque manière;
> ce qui s'oppose à la langue. La langue s'oppose alors, comme ensemble fini, relativement stable d'éléments, au discours entendu comme lieu où s'exerce la créativité, lieu de la contextualisation imprévisible qui confère de nouvelles valeurs aux unités de la langue.''

[55] M. T. Lizisowa (2016: 398-399, 432) wrote about the multitude of legal discourses: "Dyskurs prawniczy nie jest przedmiotem badań w niniejszej książce. Przedmiotem analizy jest dyskurs o prawie, który wyznacza kierunki dyskursu prawniczego, oceny tożsamości prawa lub ochrony społecznego porządku prawnego…Dyskurs o prawie jest budowany nad dyskursem prawnym obecnym w tekście prawnym, jak również nad dyskursem prawniczym w praktyce stosowania prawa…Dyskurs o prawie to opis zewnętrzny dyskursów w dziedzinie stanowienia, obowiązywania i stosowania prawa z różnych punktów widzenia."

Swiss authors A. Linke, M. Nussbaumer, and P.R. Portmann mention in their *Studienbuch Linguistik* (5th ed. Niemeyer, Tübingen 2004: 290) the broader version of the concept of discourse that I follow in this book:

Unter dem Terminus Diskurs wird…, oft in Anlehnung an den französischen Philosophen Michel Foucault, das Netz aller in einer Gesellschaft möglichen Aussagen zu einem bestimmten Thema verstanden. Der Diskurs widerspiegelt so das Wissen über ein Thema einschließlich der gesellschaftlichen Perspektiven, Normen, Interessen und Machtverhältnisse. Dabei weist der Diskurs historisch und sozial bedingte, inhaltliche und formale Strukturen auf, bestimmte Muster der kommunikativen Praxis, welche sich in den einzelnen Texten, die ihm zugeordnet werden können, niederschlagen. Zur Eruierung dieser Muster wird in der Diskursanalyse aus der Gesamtheit aller Texte, die zu einem Diskurs gehören, eine Auswahl zusammengestellt, das Diskurskorpus.

Following the Saussurian concept of *langue* as a limited domain of the linguistic science and *parole* as a residue of a speaker's liberty, the discourse analysis in pragmatic sense concerns rather the parole. It concentrates on elaborating constraints or regularities of such a discourse and envisages the way in which things are said rather than what is said (cf. Baylon 1991: 237). They can be found in the language itself, in history, ideology, habitus, mentality, and since M. Foucault's works, also in our knowledge. Foucault's discourse is more than 'language beyond the sentence'. This broader conception of discourse, especially in the sense introduced by Foucault, combines linguistic and extra-linguistic elements. Therefore, Foucault (1966: 102) stresses discursiveness rather than discourse. When applied to law, the broader conception of discourse provides for an overarching analytic concept apt at integrating the two most significant ingredients of law, i.e. power and language.

Discourse and communication

Communication in law – Rationality of social action – Legal certainty – Legal probability

The above reflections clarify the requirements for the application of discursive approaches to law. The appropriate method has to be integrative enough to encompass all linguistically relevant aspects of the use of language in the area of law. Next to the issue of intertwined power and language in law, it has to cope with different forms of discourse that appear in written and spoken texts. This methodological requirement is more important in law than in other discursive spheres because law imposes authoritatively the use of the spoken or the written form. Combinations of both forms of discursive appearance of law, for instance in accusation acts that are first written and subsequently read aloud at trial, are

rare in our area. Meanwhile, discourse does not mean that people speak or write; this is communication. Communication occurs in acts that involve intention and agency. Again, an approach is needed to integrate both elements into the theory of discourse. However, the traditional scheme based on the sender – receiver relation is problematic as it neglects the specifics of communication in law, e.g. the fact that agency is not necessarily voluntary. Furthermore, it is not clear to whom legislative acts are actually communicated. Legislative acts do not determine the group of receivers. Formally, one could assert that legislative acts have at least one receiver that is the judge. Other thinkable receivers remain unclear. Communication in law takes place in power structures. Its aim is to perpetuate power and to strengthen it. Clarification of language is not its task. As a rule, judges avoid stressing the point that they exercise power. This is marked in texts with formulae such as *In the Name of the People!* Judges regularly underline that they only apply law and that they are not responsible for its content. What is more, legislators avoid explicit language. All these structural features of law make a communicational theory of law cumbersome. A method that could come to terms with all the named intricacies of communication in law should be based upon interpretive rather than upon material approaches. For most of the named problems, there is no evidence that could be presented in a court with the help of witness testimony. This specific feature of the discursive method is regular, i.e. not limited to the area of law. As a rule, it provides sufficient certainty for results obtained in its application also in other social sciences.

All discursive and formal approaches to social reality, which include legal relations, are complementary, with dominance of discursive features. Their primary concern is rationality. The rationality of social action can be approached from both starting points, even simultaneously, yet the social discourse does not regulate the formal, i.e. logical and broadly mathematical, possible features of the discourse. These discursive dimensions remain therefore auxiliary, at least for the moment. They enable a clearer description of social reality, which include in the area of legal linguistics legal argumentation and legal interpretation. It means that an incoherent basis of an argument can be fully acceptable and effective in social discourses because social discourses, such as the legal discourse, are based on fundamentals that are valid, not true. And they are valid because they are accepted or legitimized in a democratic procedure. They cannot be an outcome of algorithmic operations that would warrant their rationality and coherence. For instance, the concept ‘state of law’ as a basis for democratic rule may be perceived as central or as illusory in the legal system, depending on the view that might be doctrinal or sociological. The ‘presumption of innocence’ shares the same fate as in the penal law accused persons are, as a rule, convicted in courts. Therefore, the presumption of innocence remains a formal requirement bound on the principle of the state of law, yet sociologically it is much less operative in legal institutions. Legal certainty is one more such misconstrued notion that does not correspond

to the reality of law where probability and not certainty prevails (cf. Klami et al. 1991). Legal probability is based on social tendencies. As a result of such social tendencies, an argumentative turning point may be reached that forces courts to change their interpretation of certain provisions.

Theoretical approaches to legal discourse

Linguistic approaches – Approaches broader than linguistic approaches – Dialogism – Social constructivism – Reductive theories of discourse – Spoken discourse – Media discourse

Overall, legal discourse is a discourse like whatever other type of discourse. Discourse is a body of statements that are organized in a regular and systematic way. Therefore, a discursive corpus of materials, also in the case of the legal discourse, has to be defined for the purpose of analysis. The discourse analysis has to identify: 1. how these statements come about, 2. what can be said or written and what cannot, and 3. how spaces in which new statements are made can be created making practices material and discursive at the same time (cf. Kendall, Wickham 1999). Purely linguistic approaches become problematic at this point, as they need to integrate the element of juridicity (which includes language and power, spoken and written texts, specifics of legal interpretation and legal argumentation, and some other requirements to be mentioned later). Broader approaches to legal discourse, which come from legal theory or sociology cope better with the element of juridicity in their methods, yet they neglect the materiality of language, which is the strength of the linguistic approach to discourse, legal discourse included. Today no one doubts that the traditional structuralist linguistic terminology is not sufficient to anchor speech in its social context. Therefore, the concept of discourse was proposed to describe broader, social implications of speech as speech does not take place in a vacuum. Speech is socially determined, and speech in legal contexts is the best example of such determined use. Therefore, speech can be also perceived as a synonym of discourse. The problem was originally shown by many scholars such as Mikhail Bakhtin (1981) in his independent approach to speech that always in one way or another requires an interlocutor. Mikhail Bakhtin's dialogism is important for law, because the other is always latently present, especially in statutory texts (cf. Géa 2009). Bakhtin's approach is apt to clarify the question who is the recipient of statutory texts. And this is a particular question in legal linguistics. Other scholars expanded the discursive matrix substantially. Discursive fundamentals were scrutinized by Algirdas Greimas in a more traditional structural and semiotic terms, by Michel Foucault, whose concept of discourse is fundamental to this essay, and by Jürgen Habermas who based his concept of discourse upon linguistic and philosophical pragmatics, especially upon the speech act theory of

J. L. Austin and J. Searle. Furthermore, in John Searle's social constructivism, the effort is undertaken to understand how society is shaped by language that reflects various power relations. It was aptly combined with his theory of speech acts. Methodically, speech acts are constitutive of discourse. They are combined in discursive strategies to bigger units such as discourses.

Reductive theories of discourse are all theories or research approaches that deal with a selected aspect of discourse, e.g. textual coherence or turn-taking in linguistic approaches. Also all theories that deal with formal linguistic aspects of discourse can be perceived as reductive theories.

As mentioned, legal discourse can be approached with the help of several conceptions, for instance, with the help of Jürgen Habermas's theory of communicative action. This theory is based upon the communicative situation in which the rational discourse about the content of law would take place. Rational discourse is power-free and interest-neutral. In the area of legal linguistics, this eminent philosophical and normative theory is problematic because legal linguistics treats speech in its institutional settings where power is omnipresent and where particular interests dominate communication. For Jürgen Habermas, the discourse is a communicational structure that enables to settle conflicts in a rational way. His approach emerged within the theory of truth and the critical theory of ethical values. Central to it is rationality that can be achieved under the circumstances of a non-dominant ('herrschaftsfrei' in Habermas's terminology) communicative situation. Understanding as the basic function of discourse is also its most salient linguistic feature as language is used as a tool to reach understanding. For this use of language, Habermas prefers the structure of communication as the best frame of reference to describe the rational search for understanding. It presupposes that the actors, who are speakers, acknowledge that they stand on equal footing as autonomous subjects. Legal discourse definitely differs from this presupposition in that it procedurally imposes a hierarchy of participants, the order of their communicative interaction, and it does not require consensus as a result of the communicative situation, for instance in a trial. Therefore, Habermas's philosophical concept of discourse does not match up to social reality, yet it makes clear the difference between the rational use of discursive practices to cope with legal problems and the judicial reality directed at the same goal. In this sense, it transgresses the social reality as a normative concept. Criticism on Habermas's theory stressed the asymmetric features of political communication (cf. Honneth 1985: 141). In the view of Habermas's critics, it would be preferable to take into account this specific feature of communication that applies particularly to legal discourses. However, Habermas's prominent normative theory is an interesting model for the philosophy of law because it shows debating about the content of law in a rational way. Yet, today it is difficult to apply, as no society exists where legal discourse would be free from power constraints and particular interests. Law is power applied with the help of language, at least for the time being. There is no

reason to assume that this state of affairs would change in near future. Yet, Habermas's approach paves the way toward legal futurology also in the area of legal linguistics. In addition, John Rawls in his *Theory of Justice* (1971) showed how such a normative procedure could work. According to Rawls, people would have for a moment to imagine that they are someone else, even better not define their social positions and economical goals. Under such circumstances, they might be able to discuss open social issues purely rationally. As said, the problem with such proposals is that it seems almost impossible to convince people to abandon their interest-oriented reasoning even for a while. Meanwhile, also Rawls's theory is of utmost importance for legal futurology. The legal discourse is also specific in the sense that meaning is constituted in it institutionally, in the hierarchy of courts with supreme courts on top. The supreme courts determine at the end of the day which interpretive proposal is valid in law. Other legal discourses that take place outside the institutional hierarchy of courts are socially equally valid and often even more rational or convincing than opinions of courts. Yet, they do not acquire legal validity. Meanwhile, legal validity is temporary and non-institutional legal discourses may become very influential over time to the effect that they may change the valid legal discourse. Therefore, limiting legal discourse to the discourse of courts and jurists is counter-productive in legal linguistics as the whole process of meaning emergence in law includes many factors, of which institutionalized processes, decisive as they are, are not the sole frame of reference for the research.[56] Closely related to Habermas's and Rawls's approaches are theories of legal interpretation and legal argumentation by Aulis Aarnio and Ronald Dworkin that are applied in this research in other methodically equally important contexts.

Discourse can also be defined as the use of (written or spoken) language in social contexts. Research into spoken word is represented mainly in analyses of court trial transcripts and other recordings, in analyses of contract negotiations as well as interactions between administrative clerks and the public, for instance in asylum seekers cases and border control or customs dialogue, as well as in police interrogation (cf. Galdia 2014: 235). For instance, the court opinion Jacobson v. Stern (90 Nev. 113, 1974) gives rise to this sort of discourse analysis. Martin Stern was an architect who worked in Nevada. Nathan Jacobson asked Stern to draw plans for Jacobson's new hotel and casino. Stern agreed to take on the project and immediately began to work. At this time, Stern dealt directly with Jacobson, who referred to the project as 'my hotel'. Two months later, Stern wrote to Jacobson, detailing, among other things, the architect's services and fees. Stern's plans were subsequently discussed by the two men, and Stern's fee was set at $ 250,000. Two months later, Jacobson formed Lake Enterprises, Inc., a Nevada corporation of

[56] M. T. Lizisowa (2016: 17) mentions in this context the interrelation of interpretive approaches and different types of legal discourse: "Wszak odmienne punkty widzenia interpretacyjne w każdej z tych dziedzin dotyczą sposobu użycia języka, a perspektywa komunikacyjna obejmuje różne odmiany dyskursu prawnego jako dyskursu kulturowego."

which Jacobson was the sole shareholder and president. Lake Enterprises was formed for the purpose of owning the new hotel and casino. During this period, Stern was paid monthly by checks drawn on an account belonging to another corporation controlled by Jacobson. Stern never agreed to contract with any of these corporations and always dealt exclusively with Jacobson. When Stern was not paid to full amount of his architectural fee, he sued Jacobson to recover. Jacobson claimed that he was not personally liable for any of Stern's fee because his corporation was liable. In this case, the use of spoken language that represents ordinary language is decisive for the legal analysis of the case. Contracting the architect to work on a structure that Jacobson called 'my hotel' clearly indicated that he also becomes personally liable for the debt. Methodically, one would have to distinguish between strict reference ('my hotel' meaning strictly 'my' and casual reference ('my hotel' meaning possibly the hotel that my corporation, once established would own independently of my involvement with you). Identification of speech acts may be even more problematic. In Ultraframe (UK) Ltd. v. Fielding, a British court had to decide whether a bank manager became a shadow director at the client company that he supervised and advised.[57] When the element of juridicity is taken seriously in the discursive approach to texts, the task of identification of speech acts, for instance in the above two examples, becomes easier as speakers in legal contexts can be expected to be aware of possible liabilities that might emerge due to their choice of words.

In addition, media discourse that refers to legal issues is researched, partly also with the mentioned interest in the spoken word in mind (cf. Dubrovskaya et al. 2017). Media discourse is a fascinating area of research for legal linguists because it expresses legal contents differently than other types of the legal discourse, especially the professional legal discourse.[58] Media influence upon courts is sociologically and legal-linguistically relevant, especially within a discourse-oriented approach. Particularly, in the recent debate around 'me-too' accusations of sexual harassment, the notion of 'justice mediatique' and 'tribunal mediatique' came up in the French discourse. These phenomena, where persons concerned

[57] Iris H.-Y. Chiu and Joanna Wilson commented upon this problem in their *Banking Law and Regulation* (Oxford University Press, 2019: 165) saying: "There may, however, be some circumstances where it is more difficult to draw the line between a lender that is simply advising the borrower how to act, and a lender that is instructing or directing the borrower, thereby constituting themselves a shadow director. For example, where a lending bank commissions a report on the borrowing customer's affairs, which the borrower then implements, it could be argued that this amounts to taking direction from a shadow director."

[58] M. T. Lizisowa (2016: 20) characterized this specific discourse in terms of differences in the expression of legal contents: "Konfrontacja tekstu prawnego z tekstami prawniczymi i dziennikarskimi tekstami komunikującymi prawo przedstawia zasadnicze różnice w sposobach wyrażania treści prawnych." Furthermore, M. T. Lizisowa (2016: 119) observed: "Problematyka prawna jest prezentowana i dyskutowana poprzez konstruowanie obrazów rzecywistości prawnej, przez reprodukcję faktów oraz jako dziennikarskie kreacje i fikcje tworzące rzeczywistość medialną."

prefer to accuse the possible perpetrators in the media and not within procedures foreseen by law for such purposes is illustrative of tendencies in the post-modern society where borderlines between social institutions become blurred. The traditional understanding of democracy suffers under such conditions, which, however, seem to represent social reality better than the judicial institutions. For instance, the UK Supreme Court framed the question of constitutionality of the British Prime Minister's prorogation move as the question "about the limits of the power to advise Her Majesty to prorogue Parliament." (cf. decision from September 24, 2019, R (on the application of Miller) (Appellant) v. The Prime Minister (Respondent), Cherry and others (Respondents) v. Advocate General for Scotland (Appellant), UKSC 41, 2019). The court held that "the decision to advise Her Majesty to prorogue Parliament was unlawful because it had the effect of frustration or preventing the ability of Parliament to carry out its constitutional functions without reasonable justification." Sociologically and legally, the conflict about the application of the fundamental principles of the British constitutional law would rather focus upon the question whether the Prime Minister had the right to declare the prorogation of the Parliament. In the media, it has been described in more emotional terms: "If the court finds against the government then Mr Johnson will have to answer the charge that he misled the Queen" (cf. Financial Times, Sept 18, 2019). 'Misleading' comes close to 'lying' as noticed by Financial Times (Sept 20, 2019): "UK premier…will find out early next week if the UK's Supreme Court believes the extraordinary claim that he lied to the Queen and unlawfully suspended parliament…" The legal-linguistic framing of the question depends upon the formal structure of the argument in this case because formally it is the British Monarch and not the Prime Minister who signs the order in council and the document bears the Queen's and not the Prime Minister's signature. Legal constructs such as the above framing of a constitutional right are fictions that steer legal argumentation. Yet, they make it often also intransparent.[59]

[59] Some arguments in the printed press supported the decision of the lower court stating that the prorogation should not be considered by the court because it was a political decision. Some tried to ridicule the court decision referring to irrelevant circumstances, e.g. "Lady Hale, the President of the Supreme Court, read out the judgment wearing a large spider brooch." (cf. *The Spectator*, September 28, 2019, p. 6). *The Spectator* commented further on p. 9: "Is that enormous silver spider that Lady Hale wore her badge of office? If so, it is appropriate. The Supreme Court has decided to tie up the government in a web of legal reasoning so tight that it can no longer govern… In these words, the court leaps from rightly policing the borders of the prerogative to deciding whether some exercise of the prerogative is reasonably justified. The word 'prerogative' thus becomes meaningless…In doing so, they (i.e. the judges) are turning themselves into our constitutional court, which they aren't." Regularly, media reports include a mixture of professional and non-professional arguments and represent the broader discourse about law. *The Spectator* wrote in its editorial: "So what are we to make of a Supreme Court granting itself power over the government? The courts used to refuse to adjudicate political squabbles, so why have they started now? There are two answers. One is the rise of a new

Context in legal linguistics

Contexts in law – Discourse and communicative situation – Burden of proof – Idiosyncratic language use

The notion of context is no less ambiguous than the one of discourse. It can mean interpersonal or social context, in the French terminology *contexte interpersonnel* or *contexte social*. Context may also extend to the physical environment and it can encompass general knowledge. The classic of analytical philosophy, Gottlob Frege introduced in his *Grundgesetze der Arithmetik* the principle of context in the understanding of meaning.[60] More recently, Christian Baylon (1991: 236-237) stressed that the research in the English speaking countries favors the interpersonal context, whereas the French linguistic research, represented mainly by D. Maingueneau and O. Ducrot relies more on social contexts in the tradition initiated in the writings of Mikhail Bakhtin. Some scholars argued that the context should not be specified in advance but rather discovered in the pragmatic analysis (cf. Levinson 1983: 22). Yan Huang defines in his *Pragmatics* (2007: 13) the context as follows: "From a relatively theory-neutral point of view, […], context may in a broader sense be defined as referring to any relevant features of the dynamic setting or environment in which a linguistic unit is systematically used." For legal linguistics, a broad notion of context is needed due to the involvement of institutionalized and non-institutionalized elements that compete or coexist in legal discourses. Inferring the context from the text is a challenging undertaking;

breed of activist judges, who aspire to an American-style system where politicians make judicial appointments in an overtly political system. The other is two decades of constitutional reforms, which have steadily weakened the system." Meanwhile, the editor of *The Spectator* neglected the long-standing finding of social sciences that law is a political practice. The media discourse represented in *The Spectator* underestimates law. This circumstance was stressed also in a letter by Prof. Raymond Wacks to the magazine: "The spectacle of judges questioning essentially political decisions is not an edifying one. However, we should be slow to dismiss the importance of the role of judicial review...First, it is the proper responsibility of the judiciary to determine the moral principles which underpin our law and to apply them as they do the law itself. Secondly, judicial review is a powerful check on the tyranny of the majority. And, thirdly, it is fundamental to the protection of individual rights and the defence of the integrity of our law and legal system." Next comes the argument that politicians, unlike judges, are democratically elected: "…while parliament enjoys democratic legitimacy, unelected judges do not." This position suggests that judges lack democratic legitimation, which is a simplistic and rather naïve view. Judges neither inherit their positions nor appoint themselves to their office. They can avail themselves of a systemic democratic legitimation within institutions under the rule of law. In our political reality, this may not be much, yet it is far from nothing.

60 M. Marion (2000: 143) writes about Frege's principle of context: "… Frege se devait de fournir une nouvelle explication de cette connaissance arithmétique. C'est alors qu'il invoque au § 62 des Fondements de l'arithmétique son fameux principe du contexte, en vertu duquel le sens d'une expression telle que « quatre » ne peut être déterminé que par l'intermédiaire du sens des propositions, telles que « Jupiter a quatre lunes », dans lesquelles elle apparaît."

meanwhile the theory of relevance in its initial form published by Dan Sperber and Deirde Wilson as *Relevance* (1986) indicates such a possibility (cf. Paterman 1989).

Discourse can be approached in the research purely formally and it can be characterized in terms of its structure. In such an approach it will appear however as a conceptual skeleton and it will appeal only to researchers who are not interested in the function of discourses in society. Every discourse, in fact, takes place under certain circumstances of language use, i.e. in a specific communicative situation. This communicative situation can be further approached as being linguistic, as a cotext or as a context, i.e. an amalgam of all verbal and non-verbal features present in the communicative act. The broad context, i.e. context that includes cotext, is inherent in social discourse and it is responsible for the emergence and the determination of the discursive meaning. Therefore, the determination of the concept of context used in the legal-linguistic research is fundamental to any attempt to accomplish a piece of research that can be perceived as belonging methodically to legal linguistics.

Context is fundamental to the determination of meaning in law. The easiest device for establishing meaning known in legal linguistics in the *burden of proof* in trials. It concerns language used by private parties, i.e. language used in legal settings or legally relevant language, yet not legal terminology equaled sometimes to legal language. In other settings, e.g. in the interpretation of statutory provisions, the method is not easy to apply. The *burden of proof* is therefore a legal-linguistic mechanism, as it reaches beyond purely linguistic methods.

Let us analyze the following example: The testator bequeathed his library to one of his friends, the beneficiary, in a hand-written last will. After he passed away, the administrator of the estate proposed the beneficiary to take over the library consisting of three well-thumbed detective pockets. The beneficiary opposed this proposal pretending that not the pockets but the valuable wine collection stored in the testator's cellar was actually bequeathed. In the case, the proof has been provided by the beneficiary that the testator having a particular sense of humor meant with 'library' the collection of excellent wines in his cellar. Witnesses testified that whenever he received friends he used to mention that he would fetch something special from his library, and then went down to his cellar and brought a bottle of superb wine. It was also generally known that the testator loathed books, with exception of detective stories and that reading books was for him wasting time. This was the reason why he actually did not own any library (when a collection of books is meant with it) unless the three pockets would be formalistically qualified as representing a library. Witnesses convinced the judge that the testator used the word 'library' in a specific sense and the beneficiary could take possession of the wines worth several thousand pounds.

Idiosyncratic language use was regularly discussed in legal linguistics. The question emerged as to which methods are best suited to address its particularities in legal linguistics. It seems that corpus linguistics is not the right place to deal

with the problem.[61] Yet, linguistic pragmatics seems to be the appropriate place to address it. Meaning is established in the above case through a simple discursive device of asking back what was meant. In legal linguistics and in law, one needs of course also other parameters. Among them, the most important is the procedure to find out this specific meaning and to decide who actually is in charge of providing evidence (in casu it is the plaintiff). Additionally, the rule that allowes asking for parties' intent is necessary as one could also imagine that law would prohibit such questioning and limit the work of the judge to objective (conventional) meaning of a word. Hence, the easiest constellation of finding out meaning is already quite cumbersome. Yet, discursiveness cannot be eliminated from the procedure.

[61] In their brief for amici curiae in Gerald Lynn Bostock v. Clayton County (Georgia) prominent U.S. legal linguists, Professors Brian Slocum, Stephan Th. Gries, and Lawrence Solan, insisted upon the importance of corpus linguistics and wrote to the court: "Corpus linguistics is a study of words in their context. It provides reliable evidence of what particular words and phrases meant at certain times and places in history. Corpus linguistics is more rigorous and therefore more reliable than other modes of interpretation, such as an individual jurist's intuition or even a dictionary. That is because corpus linguistics analyzes how words were actually used in everyday settings. Here, Amici's corpus-linguistics analysis shows that "sex" did not have the limited meaning that the employers and some of the judges below ascribe to it." In their analysis of the meaning of 'sex' and 'gender' they used the legal-linguistic interpretive device of ordinary meaning doctrine. The linguists wrote: "The ordinary-meaning canon dictates that an undefined statutory term – such as the word "sex" used in Title VII – be given its ordinary, everyday meaning. Statutory interpretation involves a quest for the meaning a reasonable person would understand the author to be conveying by using a given term in a given context. The question is not what the drafter subjectively meant to convey through the words chosen, but rather, "what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used." The three linguists also explained the importance of corpus linguistics to the court: "Corpus linguistics offers a highly and uniquely effective tool for divining the ordinary meaning of statutory words. That is because corpus linguistics provides the interpreter with context that is wholly missing when a term is read in isolation. A corpus linguistics analysis determines the context in which a term was actually used in the relevant place at the relevant time, and thereby more precisely informs the meaning of a term than other methods of statutory interpretation… Corpus linguistics is a scientific discipline at the intersection of linguistics, digital humanities, computer science, statistics and information theory. It is a branch of linguistics based on the statistical analysis of data from a corpus. A corpus is a compilation of written and transcribed spoken language used in authentic communicative contexts, such as in newspapers or novels, that is placed into a machine-readable database. The basic premise of using corpus linguistics as a tool of interpretation is that by analyzing real examples of language as it was actually used at a specific point in time in a particular location, the researcher can reveal facts about how a certain term was ordinarily used and understood in everyday settings." However, in the legal language, discursive mechanisms of the application of law may oppose the application of the plain meaning canon, even in its modernized version based on corpus linguistics. The interrelation between language and law in situations of the application of law, which in terms of the critical discourse analysis displays power exercised with linguistic means, becomes particularly challenging to all linguistic approaches related to the use of the ordinary language by their speakers. Critical discourse analysis as a methodological tool in legal linguistics enables the explanation of this tension in the relation between law and language (cf. also Hessick 2017).

Discursive identification of rights

Interpretive methods – Use of arguments in court opinions – Legal and extra-legal arguments

The procedure used by courts to find out whether the plaintiff has a valid claim against the defendant is of discursive nature. Interpretive methods are appropriate to identify this characteristic feature of law in terms of its discursiveness. For instance, common law courts had to decide whether torts such as *infliction of emotional distress* or *first- and third party spoliation of evidence* existed in their respective jurisdictions (cf. Roach v. Stern 675 N.Y.S. 2d 133, 1998). Furthermore, in Obergefell v. Hodges (35 S.Ct. 2584, 2015) the U.S. Supreme Court had to decide the question of constitutionality of the right to *same-sex marriage*. It decided the question within the argumentative framework of the Fourteenth Amendment to the U.S. Constitution that guarantees the equal protection of laws to all citizens. Today, there is a large collection of case law that strengthens the Supreme Court's tendency to support same-sex marriages in the U.S. as a constitutional right. The court, therefore, after evoking the general principle of constitutional liberty refers mainly to the precedents to justify the result.[62] Otherwise, the decision is based on standard arguments used in political discourse in Occidental liberal societies. Particularly, the court had to decide whether the Fourteenth Amendment requires the U.S. states to issue a marriage license to two persons of the same sex and whether it also requires that every U.S. state would recognize same-sex marriages concluded in other U.S. states. The arguments used by the court in its long opinion are standard textual samples of the debate about same-sex marriage in Occidental societies.[63] Therefore, the question could be asked as to why the

[62] Justice Kennedy wrote for the court: "The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons...to define and express their identity. The petitioners seek to find that liberty by marrying someone of the same sex and having their marriages deemed lawful on the same terms and conditions as marriages between persons of the opposite sex." The judge, however, also recognizes the inherent epistemological problems of identifying the equals as always equals were treated equally in the history of humankind. He writes: "Indeed, changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations, often through perspectives that begin in pleas or protests and then are considered in the political sphere and the judicial process."

[63] Justice Kennedy mentions most of such recurrent arguments, especially: "(T)he petitioners seek (the right to marry) because of their respect – and need – for its privileges and responsibilities. And their immutable nature dictates that same-sex marriage is theoretically only real path to this profound commitment."…"In addition, these liberties extend to certain personal choices that define personal identity and beliefs." "Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing the families as somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life. The marriage laws at issue here thus harm and humiliate the children of same-sex couples." Some arguments may be specific to the understanding of marriage cherished in some segments of the American society: "Under the laws of the

court actually quotes this impressive list of generally known arguments in favor of the same-sex marriage. One could also think about the possibility to decide the issue of constitutionality under the Fourteenth Amendments without the litany of well-intentioned opinions. This argumentative strategy might, at the end, weaken the main argument of the court that is the issue of constitutionality of the claim to conclude the same-sex marriage or to have such marriage recognized in one's own state. Doubts might come up because by listing well-intentioned reasons the court actually did not prove convincingly the constitutionality of the same-sex marriage within the argumentative framework that it itself set up (cf. also Zylan 2011). Meanwhile, in order to reach its goals discursively the Supreme Court had first to overrule its decision Baker v. Nelson from 1972, where the court held that the exclusion of same-sex couples from marriage 'did not present a substantial federal question,' and then adopted a 'cautious approach to recognizing and protecting fundamental rights' as it in 2019 still does not recognize explicitly the sexual orientation or the transgender status as issues qualifying for the equal protection under the Fourteenth Amendment (cf. so-called *suspect classes*).[64] Furthermore, in the Spanish constitutional case, J. J. González et al. v. Consejo de Ministros (No. 5790-2019), the Spanish Constitutional Court had to decide whether the decision of the Spanish Government to exhume from the mausoleum at Valle de los Caídos and to bury at another cemetery the mortal remains of the former Spanish dictator, Francisco Franco Bahamonde, violated constitutional rights. The plaintiffs, members of the Franco family, claimed that the decision of the government violated fundamental rights stated in the Spanish constitution such as the principle of the equal application of laws (Art. 14), right to privacy (Art. 18.1) in connection with the right to religious freedom (Art. 16.1), and the right to effective judicial protection (Art.24).[65] Specifically, the right to decide

several States, some of the marriage's protection for children and families are material. However, marriage also confers more profound benefits. By giving recognition and legal structure to their parents' relationship, marriage allows children to understand the integrity and closeness of their own family and its concord with their families with other families in their community and in their daily lives." Yet, no argument used by the court is really novel. Emotive aspects of language use in this decision were analyzed by S. Goźdź-Roszkowski (2019).

64 Concerning Baker v. Nelson (409 U.S. 810, 1972) the court writes: "The Court now holds that same-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them. Baker v. Nelson must be and now is overruled, and the State laws challenged by Petitioners in these cases are now held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couple."

65 The relevant provisions of the Spanish Constitution have the following wording: Art. 14 Los españoles son iguales ante la ley, sin que pueda prevalecer discriminación alguna por razón de nacimiento, raza, sexo, religion, opinion o cualquier otra condición o circunstancia personal o social. Art. 16 (1) Se garantiza la liberdad ideológica, religiosa y de culto de los individuos y las comunidades sin más limitación, en sus manifestaciones, que la necesaria para el mantenimiento del orden público protegido por la ley. Art.18 (1) Se garantiza el derecho al honor, a la intimidad personal y a la propia imagen.

about the place of one's inhumation, to dispose of a decent tomb, and to be buried according to rites of one's religion were invoked by the Franco family members, next to other procedural problems. The court examined whether the governmental decision could have violated the constitutional laws. It referred to the text of the decision where, with reference to the law (Ley 52/2007) that regulates matters of persons exposed to persecution under the former fascist dictatorship in Spain, the measures that apparently aimed at avoiding the violation of constitutional rights were stated. The government, while deciding to exhume Franco's remains, left to the family fifteen days to decide about another place of inhumation, excluding, however, the Cathedral of Almudena in Madrid. The government stressed in its decision of March 15, 2019: "…Segundo. – Ordenar que los actos que resulten necesarios para la exhumación, traslado e inhumación se realicen garantizando, en todo caso, la dignidad y respeto en el tratamiento de los restos mortales; la intimidad y la libertad religiosa de los afectados; la seguridad tanto de los restos mortales como del orden público; …" Therefore, the court denies violations of fundamental rights in this case and concludes "no nos parece ni injustificada, ni arbitraria, ni en suma contraria al principio general de igualdad, la decisión de exhumación adoptada por los acuerdos del Consejo de Ministros en cumplimiento de la previsión establecida en la Ley 52/2007." In addition, the final formula is unambiguous in this respect: "Los razonamientos anteriores a la conclusión de la inadmisión del recurso por inexistencia de la vulneración denunciada con fundamento en el art. 43 de la LOTC, y hacen innecesario un pronunciamiento expreso sobre la medida cautelarísima de suspensión interesada por la parte recurrente, con apoyo en el art. 56 de la LOTC." While the court decision is textually framed within the procedural structure of the examination of legal claims of the plaintiffs, it, nevertheless, does not deny the particularity of the case, which clearly is not a legal case like many others. It lacks, as the court mentions, a precedent.[66] Meanwhile, and typically of a juridical institution, a false pretence of neutrality is also present in the court opinion, where Franco, head of a fascist regime, is described

[66] Concerning this issue the court frankly says: "La particularidad del recurso de amparo que nos ocupa, y que justifica el pronunciamiento mediante Auto, radica en que, más allá de la concreta decisión que se adopte, suscita una cuestión no exenta de generar consecuencias con repercusión social y política. La significación histórica y política de don Francisco Franco Bahamonde, cabeza del régimen político establecido tras la guerra civíl y en el que asumió la condición de Jefe de Estado, hace que cualquier decisión que afecte al tratamiento y localización de sus restos mortales trascienda del caso concreto. Este conjunto de circunstancias que rodean al presente recurso de amparo determina que reúna la especial trascendencia constitucional exigida por el artículo 50.1 b) LOTC, por su encaje en el supuesto definido en el apartado g) del fundamento jurídico 2 de nuestra STC 155/2009, de 25 de junio, referido a los casos en que 'el asunto suscitado, sin estar incluido en ninguno de los supuestos anteriores, trascienda del caso concreto porque plantee una cuestión jurídica de relevante y general repercusión social o económica o tenga unas consecuencias políticas generales'. Estas mismas circunstancias concurrentes son las que justifican que este pronunciamiento revista la forma de Auto, promitiéndose así a este Tribunal explicar y hacer públicas las razones que conducen a la presente decisión."

as 'the Head of the State, who acquired power due to events linked to the civil war'.[67] However, without taking into consideration the moment of particularity of the subjudicial matter, the opinion of the court would not be convincing, as it is justified and understandable only within the broad socio-political context. In the legal discourse, for instance in the above court opinions, legal arguments are often listed without any further explanation of their use. Full understanding of the legal discourse necessitates this sort of explanation that questions the use of arguments.

Use of arguments in discourses

Research into argumentation – Legal argumentation and legal interpretation – Element of juridicity in legal argumentation

Methodically, research into argumentation presupposes the clarification of the concept of argument (cf. Wohlrapp 2014). Harald Wohlrapp defines the primary goal of argumentation as assessing the validity of theses in a perspective "that is more abstract than the usual way of addressing argument as a specific way of persuasive communication" (cf. Wohlrapp 2017: 162).[68] Previously, Jürgen Habermas (1981) and Wohlrapp's predecessors such as Wilhelm Kamlah, Paul Lorenzen, and colleagues such as Frans H. van Eemeren (1996) developed fundamental research into this area. In addition, Ronald Dworkin coined related and relevant concepts within his theory of legal interpretation that are compatible with many of the findings of the general theory of argumentation, such as Wohlrapp's. Wohlrapp discusses 'theses' as "candidates for new orientations" in discursive practices where argumentation is central as the main role of "theory in practice is to provide orientation" (cf. Wohlrapp 2017: 163). His approach, therefore, stresses constructive aspects of argumentation in contradistinction to the inferential structure of argumentation that interests other researchers.[69] In fact, argumentation is valuable to society when it furthers its main

[67] Meanwhile, in the legal-linguistic literature there is a more explicit and linguistically precise reference to this period of Spanish history. Heikki E.S. Mattila (2017: 382) wrote unequivocally about Franco's military dictatorship: "Francisco Francon sotilasdiktatuurin aikana (1939-1975) alueellisiä kieliä koskeva lainsäädäntö kumottiin ja niiden julkinen käyttö kiellettiin. Diktatuurin romahtamisen jälkeen alueellisten kielten asema on vahvistunut uudelleen." Martín Caparrós in *The New York Times* remained ironically distanced to the question of titles: "On Oct. 24. Spain is to disinter the mortal remains of Gen. Francisco Franco – the caudillo of Spain 'by the grace of God' who ruled the country for 36 years…"

[68] M. T. Lizisowa (2016: 34) characterized research into argumentation: "Argumentacja polega na wyjaśnianiu sposobów oceny i porównywania różnych argumentów oraz na próbie szukania cech strukturalnych w tej dziedzinie."

[69] Some quotes from Harald Wohlrapp's work may at this point help us to position his approach within the legal-linguistic paradigm, which, however, is not his primary concern (cf. Wohlrapp 2017: 163-166): "While it is true that they (i.e. theses) are also sentences, propositions, speech acts, proposals for communication, etc., these qualities are taken as secondary… An orientation is 'new' if it exceeds previous orientations, especially if it compensates for existing gaps or de-

goals and helps shaping discursive processes that support progress in society and not only state the formal validity of logical conclusions. While Wohlrapp considers also non-rational arguments, a legal linguist is primarily interested in the quest for rationality in legal argumentation as irrational law is definitely not a progress. Meanwhile, it is evident that irrational and deliberately misleading argumentation is present in the practice of law. General theory of argumentation is therefore a valid starting point for studies in legal argumentation. Specifics of the legal discourse will have to be introduced into the general argumentative models, as philosophical or purely linguistic approaches do not integrate them.

How to trace the legal discourse

Formal and material approaches to discourse – Rationality in legal argumentation – Rationality and social reality

Research often defines discourse, also the legal discourse, rather formally. The most important question for the legal linguist who approaches law as a discursive practice is how to trace the boundaries and the operations that take place in the discourse. A preliminary questions, which is typical of fundamental research is, how to prove or convince those who are skeptical about the existence of legal discourse. Until now, I understood the legal discourse as a network of possible statements about a topic available in society. It displays knowledge, social attitudes, norms, interests, and power structures. These convictions and norms are displayed in communicative processes in form of written or oral texts. I also stressed that the legal discourse cannot be approached without taking account of its moment of power because power is inherent in law.

A regularly researched type of legal discourse are U.S. Supreme Court debates and decisions. Let us analyze the decision Kelo v. City of New London (545 U.S. 469, 2005) in the sense of above methodological findings. The U.S. Supreme Court dealt in this case with the question whether government's taking (i.e. expropriation) of private property for purposes of economic development satisfies the public use requirement of the Fifth Amendment to the U.S. Constitution. The Fifth Amendment stipulates in the part interesting here and called Takings Clause:

> …(nor) shall private property be taken for public use, without just compensation.

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ficiencies in orientation…Arguing is fundamentally dialogical, in the sense that its full performance requires critical attention…The practice of argumentation consists of numerous different verbal and non-verbal activities…Basically three types of operations are to be distinguished: asserting, justifying, and criticizing… Dialogical control has a second aspect, which is related to subjective contents… This view offers an understanding of why certain persons may have difficulties in understanding and/or accepting certain arguments, whereas others do not."

The city of New London (Connecticut) experienced economic decline for a considerable number of years. To counteract its decline the city set up a plan, which included the purchase of 115 parcels of real estate and in collaboration with private developers to set up a 'multifaceted zone' comprising commercial, residential, and recreational elements. Some of the owners of the concerned parcels did not agree to sell their land. The city therefore declared to use its eminent power domain and to exercise their right to taking, i.e. it expropriated the owners in public interest against payment of allegedly just compensation. The owners, among them Susette Kelo, resisted this act and argued that they were expropriated to the benefit of other private persons, a group of developers and investors. The owners pretended that such an expropriation is not covered by public interest but takes place in the private interest of the new owners. The city contended that it expected to increase tax revenue, create working places, and capitalize on the development as a major pharmaceutical company intended already to construct a large facility near the planned commercial center. Therefore, the city continued, the taking is in public interest notwithstanding the fact that the land will be used to develop a private enterprise that would also benefit its private owners. The majority of five Supreme Court justices supported the arguments developed by the city and decided that the takings are covered by the public use argument because the city sought to further a meaningful public purpose even if it would ultimately not retain any legal title to the acquired property. By so doing, the court contested the view exposed by the plaintiffs that property was taken from private persons to be given to other private persons. It stressed that the fact that private persons will finally own or control property taken by the government did not make the taking unconstitutional as long as there was an overriding public interest in the operation initiated by the city. The majority stressed furthermore that gains of public persons from the taking were not unconstitutional as long as public purpose supported the taking. Economic development was perceived as public purpose. Four justices dissented. For them economic development alone did not constitute automatically public use. They argued that the majority had erased the concept of public use from the Takings Clause.

On its surface, we have to deal here with the question whether the Takings Clause covers public use of real property when the expropriation takes place for purposes of economic development notwithstanding the ultimate ownership of the real property concerned. In terms of legal linguistics, the question could be reformulated as to the meaning of the Takings Clause. Meanwhile, the meaning emerges here toward the background of ideological commitments of judges who may or may not support the idea that economic development is the decisive point in question and that biographies of owners who spent their entire life on the land were second, a question of ethics rather than of law.

Rational discussion of legal arguments in the general discursive framework of reference set up by J. Habermas does not correspond to this situation. Other

general discursive approaches lead to analogous results. Nowhere controversial questions of law are decided within an interest- and power-free setting postulated by Habermas.They are dominated by ideological constraints. U.S. Supreme Court Judges, nominated by Democrats or Republicans, tend toward reflecting the interests of constituencies that brought them to office. A good method to analyze such constellations is to look first at the result of litigation (who wins) and then to argumentation brought in the court decision. More often than not, it will become clear that linguistic arguments were used by courts to support a result wishful to the government. Such arguments are not clearly legal or linguistic, but legal-linguistic. This type of decisions is called 'façade decision'.

The analysis of the Kelo-case in the light of the Foucauldian concept of discourse provides deeper insights than the above analysis, which is typical of jurists. In this juridical analysis, there is a divide in right and left, Republicans versus Democrats. Meaning is sought in the text, yet not in its context. Both groups of Supreme Court justices were trapped by positivist interpretation techniques. They tried to infer or pretended to infer the meaning of the Takings Clause from the printed text of the Fifth Amendment. Unsurprisingly, they arrived at two mutually exclusive interpretive proposals. Positivist interpretation techniques always render such results. To every question of law, they enable to develop more than one interpretive proposal. What is more, some of the positivist approaches to law pretend to have inferred the only right interpretation of the norm in question. Meanwhile, when we look for meaning in the context, then it will become clear that it depends in our case on the importance of economy in judges' commitments to social values. These commitments clearly differ in Occidental societies. Due to these differences, the judges arrived at different interpretive proposals. In addition, the view of the minority justices that the majority would erase the public use requirement from the Fifth Amendment appears fallacious. The background assumptions steer the majority toward the result that it achieved. Additionally, allegiances to those who appointed them to office matter, as a rule. The Foucauldian discourse structure does not mystify the application of law. It shows its connection to power and exercise of power through law. It perceives power as a natural element of law as it is today. Habermas's theory of communicative action would like us to forget this structural element of law. This is a noble proposal yet, as mentioned above, without modifications it will not work in legal linguistics because it does not work in society. As in the case of legal discursiveness, Foucault provides also a reliable working definition of discourse useful for a legal linguist. Meanwhile, Foucault is an elusive and occasionally also an ironical writer. Therefore, his writings must be first analyzed and a conceptual frame of reference inferred from his work before it is actually applied to linguistic material. Yet, in the legal-linguistic methodology, this circumstance is a rule rather than an exception.

The above approach enables to develop a legal-linguistic interpretation. This means that it is neither linguistic nor legal but combines both perspectives. It shows

that argumentative speech acts are rooted in different ideologies. For the majority justices, economy comes first in life, after all the U.S. was founded as a commercial republic: 'The business of America is business'. For the minority justices, life cannot be reduced to economy. For them, peoples' biographies matter because the human dimension is central to law. As one of the plaintiffs, Wihelmina Dery, spent her entire life in the house that the city wished to acquire, the economic argument would have to step behind. This interpretive background is intransparent in the above decision of the U.S. Supreme Court. In fact, intransparency is ubiquitous in court decisions. This may be one of the reasons why discourse analysis and legal linguistics actually came up.

Analyzing monolithic legal discourses

Textual samples of law – Monolithic discourse – Underlying semiotic prefigurations of law – Outer limits of discourse analysis

Legal linguists see law as law, jurists, in turn, see law as private or constitutional law, statutory or case law, procedure or substantive law. Law appears to legal linguists as an amalgam of texts that display some characteristic features. Jurists structure law following the rules of their trade. Legal linguists research the approach of jurists to the task of structuring legal texts, yet they are not bound by the methods applied by jurists. Until now, methodically, legal linguists often replicated the inner structure of law in the way jurists cultivate them.[70] It may be assumed that better results would have been achieved by following an independent or autonomous, legal-linguistic path. The view upon law as a textual entity and in its textual entirety is a challenging task. I call broader discourses, for instance, about the totality of law in a jurisdiction, monolithic discourse. The monolithic legal discourse makes transparent the underlying semiotic prefigurations of law in general and also specifically in a given jurisdiction.

In fact, stating the law of a jurisdiction discursively, i.e. not doctrinally, is a methodical prerequisite of any attempt to build up a legal linguistics that would fulfill the idea of the linguistic turn in law. Actually, the linguistic landscape filled with legal texts and legal discourses is enormous. This circumstance may explain why such undertaking was not attempted until now. Its methodological presuppositions

[70] Textually, the beginning of the holistic description of law of a jurisdiction could be seen in textbooks that describe the whole law of a country, for instance Peter Hay's (2010) *Law of the United States*. Yet, as of now, such books represent the doctrinal study of law rather than discursive approaches to law. Hay's text is labelled an 'overview'. The author himself critically mentions in the preface to the first edition of his book that "(d)espite good intentions, the treatment of some or many areas will strike some as unduly summary." Methodically, however, when the level of abstraction is established for an inquiry, nothing in it can appear 'unduly summary' as the description depends on its method. There is no description of law 'as such'.

are elucidated on the pages of this book and it seems to me that my reflections on the legal-linguistic methodology would facilitate such an attempt to describe or state the law. The distinction between law and legal regulation (i.e. particular content of legal provisions), which I constantly stress in my approach to the legal language further facilitates this task. As its consequence, the non-doctrinal description of law would not be exposed to permanent changes in details of legislation and it would be able to avoid provisos such as 'English law is stated in this book as of January 15, 2020'. Doubtless, investigating macro-texts is methodically a complex matter. Meanwhile, when conceptual hierarchies are respected and the 'view from nowhere' is methodically avoided, the legal discourse of a jurisdiction, possibly also in its connection to the global discourse about law, can be portrayed.

Misunderstanding logic

Legal logic and legal linguistics – Language of logic in legal language – Ordinary language as legal language

Theoretical aspects of legal and legal-linguistic methodology were frequently linked to logical analysis. Logic researches formal requirements of rationality that are best exemplified in the abstract language it produces. Natural languages display such features on another, lower level of abstraction and in multiple ways, mainly due to linguistic diversity. It is therefore a methodological fallacy to apply the rules of logic directly to a natural language or to infer such rules directly from a natural language. Natural languages may follow some of the main logical principles, especially the principle of avoiding contradictions, yet as a rule, convention prevails in them over logic. Equally, mathematics shows the conceptual prerequisites of certainty. Meanwhile, this sort of formal certainty is never achieved in life. The mathematical analysis is central to our understanding of the concept of certainty, yet, it remains without any binding force in law where certainty often corresponds with high probability. Again, probability is a domain of statistics, yet legal probability is of a soft nature as in it social engineering prevails over logic. Understanding law as a discursive practice prohibits many fallacies that have their origin in the unreflected application of formalized methods in the area of law.

Following examples may elucidate the above abstract statements. Mathematicians such as Vladimir Uspenskij have regularly problems with grasping the interrelation between logic and language. V. Uspenskij (2009: 138) ridiculed the American formula of swearing oath in courts: *I swear to tell the truth, the whole truth, and nothing but the truth, so help me God* as logically doubtful, at least as a partial pleonasm as *the whole truth* and *nothing but the truth* are definitely semantically equivalent. Meanwhile, pragmatically, the formula has its raison

d'être as it stresses the necessity to make true declarations and not only to remind the witness about his legal obligation to tell the truth in a court of law. One may concede Uspenskij that the formula appears mystical and even magical, i.e. outdated in modern society. Yet, its justification as a rational means of steering legal procedures cannot be questioned with reference to semantic redundancy alone. Truth that we are looking for in law is not mathematical. It does not need to work algorithmically, yet it can always be rendered also formally. Natural language functions differently than the language of logic. It appears regularly elliptical in relation to the outer world. To illustrate, when a medical doctor requires us during examination to lift the right leg and then to lift the left leg, he will cause an algorithmic catastrophe. In the algorithmic language, he should have ordered first, to lift the right leg, second, to put the right leg back and third, to lift the left leg. A computer program would abort under such instructions that are formally incomplete. When a programmer makes such a mistake while developing the algorithm, we used to say that there is a bug in the program. In the natural language, such orders are executed without problems as algorithmic completeness is implied in them and also anticipated by speakers. Speech acts imply action and are understood as such. We should therefore not be afraid to use mathematically or logically not valid language as it is, as a rule, pragmatically justified. Research that focuses on identifying logically or mathematically doubtful expressions in law has a limited importance as it basically uncovers a very well-known property of the natural language. Linguists are well aware that natural language can be structured differently on diverse levels of abstraction. Meanwhile, only the level displaying the use of the language can be perceived as binding the speaker when he wishes to speak meaningfully. All other levels of modeled linguistic abstraction are binding exclusively in theoretical approaches to language that they represent.[71] This finding is also binding on logicians.

In some countries, for instance in Poland, the use of certain expressions in legal texts is sometimes defined in terms of logic. This is, for instance, the case with the use of the word *lub* (i.e. or), which in view of some jurists, is to be construed in statutes as reflecting semantically the precisely defined *vel* of the classical logic. Meanwhile, avoidable problems emerge due to this overburdening of the legal language with additional semantic restrictions, for instance in case of Art. 280 (1) of the Polish criminal code, which says:

[71] Adam Schaff (1960: 51) aptly described the confusion that emerges when the researched language and the language, in which the researcher speaks about the researched language are not distinguished: "Zainteresowania językowe logiki wypływały więc z naturalnych potrzeb rozwojowych tej dyscypliny, podyktowane były koniecznością przezwyciężenia sprzeczności, które zagrażały jej podstawom. Jak się okazało, w wypadku paradoksów matematycznych szło o nieuprawnione używanie słówka 'każdy', co nieuchronnie narażało teorię mnogości i związane z nią teorie logiczne na niebezpieczeństwo sprzeczności; natomiast w wypadku paradoksów lingwistycznych – o pomieszanie języka, który się bada, z językiem, w którym się mówi o języku badanym."

> Kto kradnie, używając przemocy wobec osoby *lub* grożąc natychmiastowym jej użyciem *albo* doprowadzając człowieka do stanu nieprzytomności *lub* bezbronności podlega karze pozbawienia wolności od lat 2 do 12. (italics added)

Furthermore, Art. 61 (2) of the Polish Constitution says:

> Prawo do uzyskiwania informacji obejmuje dostęp do dokumentów oraz wstęp na posiedzenia kolegialnych organów władzy publicznej pochodzących z powszechnych wyborów, z możliwością rejestracji dźwięku *lub* obrazu. (italics added)

Do we need to hold in hand a textbook of logic while reading such statutes? (cf. Mokrzyńska 2007). It seems that this is not the case. The language of logic displays the deep structure of our language that often differs from the intuitively construed meaning of daily speech.[72] There is no reason to surrender our daily speaking to the requirements of logical analysis, which is often all but unequivocal. Both layers of speech have a well justified existence in our language. There is no need to abandon one of them and to favor linguistic orthodoxy of whatever sort. What cannot, however, be avoided is the awareness of the co-existence of the two layers of speech.[73] In the above examples, simpler formulations might prove valuable in legislative drafting. In the second case, unproblematic formulation would be: dźwięku *i* obrazu.[74] Once again, when *i* (i.e. and) is construed here like the logical *et*, additional problems emerge, like in the previous example with the logical *vel*. As

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[72] Cf. about the logical alternative *vel*, in Polish *lub*, in T. Kotarbiński (1955: 69): "Gdy domyślając się przyczyn nieprzybycia Jana na zebranie powiadamy sobie: "Zapomniał *lub* stał się jakiś wypadek", – domysł nasz będzie prawdziwy zarówno jeżeli Jan zapomniał o zebraniu, a nie było żadnego wypadku, jak też jeżeli stał się wypadek, ale Jan nie zapomniał, i uległ wypadkowi, a błędny będzie ów domysł tylko w tym razie, jeżeli ani Jan nie zapomniał, ani wypadkowi nie uległ." (italics added)

[73] The Polish logician Zdzisław Kraszewski (1975: 97) contrasted the logical *vel* with its equivalents in the ordinary Polish language: "W języku naturalnym, dla wyrażenia rozważanych tu związków międzyzdaniowych najczęściej używa się zwrotów: *lub*; *albo*; *bądź…bądź*; *względnie*; *albo…albo*; *może…może*." Kraszewski (id.), like many logicians, did not appreciate this diversity of linguistic forms and called it 'semantic chaos': "Wszystko to razem bardzo przyczynia się do utrzymywania się chaosu znaczeniowego panującego wokół zdań złożonych języka naturalnego." However, from the linguistic point of view, the diversity of forms and expressions, which corresponds with the logically strictly defined *vel*, rather enriches human communication as it enables rendering many semantic nuances. Linguists cannot, therefore, confirm Kraszewski's claim that the diversity of linguistic forms and their semantic under-determination would cause problems or 'chaos' in human communication. Meanwhile, it is understood that computer programs, which are developed along formal procedures set up by informaticians (who professionally represent applied logic) have their pains with this diversity. Yet, before we reform the ordinary language that we speak with some success and even with occasional pleasure, we might think about the possibility to adapt the language of logic used in computer science to our daily speech.

[74] Cf. also the preamble to the Polish Constitution: "…w poczuciu odpowiedzialności przed Bogiem *lub* przed własnym sumieniem,…" (italics added)

a rule, problems with the application of the reformulated provisions due to possible ambiguities could be solved with the means of legal-linguistic interpretation.[75]

Some logicians liberated themselves from the unnecessary methodological burden that was discussed above. T. Kotarbiński's primary views upon language came close to the position of the young Wittgenstein. L. Wittgenstein in times of his *Tractatus* aimed at cleansing language from illogical formulations; Kotarbiński (1955: 14-25) attempted to clean it from hypostases, yet later, like Wittgenstein, he adopted a more moderate position. Both Wittgenstein and Kotarbiński finally accepted the ordinary language with all its illogical turns and tilts as a tool of communication. Kotarbiński insisted however upon the necessity to avoid ambiguous formulations and unclear language; Wittgenstein declared the ordinary language to be perfect.

Misunderstanding language

Speaking in judicial institutions – Linguistic and legal-linguistic competence – Courageous interpretation

In institutional settings, the concept and the use of language are often misunderstood. In witness testimony, judges have the tendency to control the coherence of the statements that witnesses are providing and they may refuse to follow statements that appear inconsistent. Yet, a linguistically inconsistent or incoherent statement is factually not necessarily false. Foreigners may use the official language of their host country clumsily, yet make true statements of facts. Furthermore, the witness may have the habit to express himself chaotically, may have limited formal education and be overburdened by the necessity to make statements in the institutional setting of a court of law.[76] The witness may not be able to express herself explicitly

[75] For instance, in Lerro v. Quaker Oats (84 F. 3d 239, 1996) the determination of 'during' in Rule 14d-10(a)(2) of the Securities Exchange Act became pertinent. The rule says: "The consideration paid to any security holder pursuant to the tender offer is the highest consideration paid to any other security holder during such tender offer." The court held significantly: "Everyone who tenders receives the highest price paid 'during the tender offer' – not a price paid at some other time. Before the offer is not 'during' the offer. The difference between 'during' and 'before' (or 'after') is not just linguistic. It is essential to permit everyone to participate in the markets near the time of a tender offer. Bidders are forbidden to buy or sell on the open market or via negotiated transactions during an offer, but they are free to transact until an offer begins, or immediately after it ends." The meaning of 'during' was determined in this case on purely legal-linguistic grounds. No inquiry into the logical structure of a relation that 'during' represents was undertaken by the court, and rightly so.

[76] Cf. T. Kotarbiński (1955: 23) about witness testimonies: "Wystarczy zresztą posłuchać zeznań świadków i przemówień stron interesowanych przed sądem, aby zdobyć liczne przykłady wypowiedzi chaotycznych, w których trudno się dopatrzyć wątku głównego i które, gdyby je zapisać i potraktować literalnie, dałyby obraz nagromadzenia nonsensów."

and in detail, uses formulaic language especially in a context that is sensitive and linguistically underdeveloped as far as standard language is concerned. Coherence is a structural feature of an utterance, yet it is not its only characteristic feature. Our daily speech is frequently linguistically and logically inconsistent, yet not always false because of it. In addition, the contrary situation is occasionally underestimated in courts. Witnesses may be skilfully lying or manipulating the language of their statements to amplify the level of ambiguity in them, yet remain strictly coherent (cf. the U.S. Supreme Court opinion Bronston v. U.S., also commented in Galdia 2017a: 512). Judges who are unaware of this function of language may react inadequately in such challenging situations. Pragmatically relevant situations such as the judge asking both parties, whether they have something to add, after the statement of the first party, while taking notes and without raising his head to hear the answer of the other party, declares the session closed. The second party waited until the judge stops writing to address him. This is pragmatically a justified expectation under the given conditions of language use. Rarely other persons than judges misunderstand such communicational situations.

A special case in this context is the over-estimation of linguists' linguistic competence. As a rule, the linguist will not be able to answer the question whether a handicapped sportsman who used prostheses and competes with non-handicapped sportsmen is actually 'running' or 'jumping', a question that was asked in Part I of this book. Furthermore, the question whether someone who lives in his car that he perceives as his 'house' actually means that he is domiciled there and is living in a 'house', is not the domain of a linguist. It is a legal-linguistic question. The linguist can, however, assist the judge in finding out whether the assertion made by a group of German neo-Nazis *Auschwitz ist ein Mythos* ('Auschwitz is a myth') is actually a denial of the Holocaust of the Jews during the Nazi-rule in Europe that is a prohibited statement in most countries of the EU (cf. Amtsgericht Hamburg Az. 139-1590/94). In the case, the accused registered on the answering machine his statement about Steven Spielberg's film *Schindler's List* as 'keeping alive the Auschwitz-myth'. A linguist can inform the judge about the pragmatics of the use of the word 'myth' in colloquial language and prevent the judge's misunderstanding of the term that he perceived in the conceptual framework of his higher education. The judge did not understand that the term 'myth' used by neo-Nazi ruffians represents another discourse than the academic discourse about the 'myth' that starts with the ancient Greeks. He issued a judgment that is incorrect in terms of legal-linguistic insights.

Some judges follow a rather narrow conception of language. Governmental agencies and courts may misunderstand language also in situations when they support the honorable goal to protect the freedom of speech. In the U.S. Supreme Court decision Matal v. Tam (137 S. Ct. 1744, 2017) the disparagement clause of the Lanham Act was deemed unconstitutional. The clause prohibits the registration of trademarks by the Patent and Trademark Office (PTO) that may 'disparage…or bring…into

contempt or disrepute…any person living or dead." The Slants, a musical group, which consists of persons of Asian origin, wished to register its name as a trademark, spelled with capital letters. The PTO refused the registration with reference to the Lanham Act's disparagement clause. The group used for its name a word that is otherwise perceived as derogatory for persons of Asian descent, yet by reclaiming the term it aimed 'to drain its denigrating force'. The court, however, structured its argumentation within the opposition of governmental speech and commercial speech, finally deciding that the disparagement clause was unconstitutional under the First Amendment to the U.S. Constitution that guarantees the freedom of speech. Meanwhile, the court never reflected upon the specific communicational situation of use of the otherwise denigrating term by The Slants.[77] By so doing, it demonstrated the lack of linguistic competence in a situation that involves ironic speech and a level of communication that transgresses the literal. The result that could be obtained in a linguistically more appropriate analysis of the communicative situation would probably be the same, yet it would be in line with the legal-linguistic methodology. Furthermore, in Trentadue v. Gorton (738 N.W.2d 664, 2007) the Supreme Court of Michigan dealt with the problem of tolling of the statutory period of limitations. In this case, the plaintiff sued the murderer of her mother, Jeffrey Gorton, and some other persons deemed by her responsible for employing the prospective murderer on the estate where her mother had lived. The background to this civil litigation was a criminal case. In 1986, Margarette Eby was murdered, and her case remained unsolved until 2002 when new DNA evidence enabled to identify her murderer. The perpetrator of the crime was arrested and sentenced to lifelong imprisonment. After his trial, the plaintiff sued him and some other defendants for damages based on battery resulting in death, negligent hiring, monitoring of an employee, and the like. Meanwhile, the applicable statute of limitations for claims in wrongful death cases in Michigan Compiled Laws (MCL 600.5827) provides for the period of limitations to expire three years after the death or injury:

> The period of limitations is three years after the time of the death or injury for all other actions to recover damages for the death of a person, or for injury to a person or property.

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[77] The court wrote: "We must decide whether the disparagement clause violates the Free Speech Clause of the First Amendment. And at the outset, we must consider (an argument) that would eliminate any First Amendment protection. Specifically, the Government contends that trademarks are government speech, not private speech…Trademarks are private, not government, speech…Speech may not be banned on the ground that it expresses ideas that offend…(i)t is a fundamental principle of the First Amendment that the government may not punish or suppress speech based on disapproval of the ideas or perspectives that the speech conveys." Yet, the Slants' 'speech', the use of an otherwise derogatory term in an ironic meaning, does not convey any speech that might offend. Equally, the use of the word 'slants' in this footnote is not offensive as it is necessary for research purposes and readers/speakers can be expected to grasp this intention in my use of the word.

Moreover, MCL 600.5805 (10) says:

> Except as otherwise expressly provided, the period of limitations runs from the time the claim accrues.

The claim accrues at the time provided in sections 5829 to 5838, and in cases not covered by these sections the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results. Lower courts assumed that the period of limitations could be tolled in this case due to the fact that the plaintiff knew the identity of the criminal only sixteen years after the murder of her mother. The Supreme Court of Michigan did not share this view and refused to apply the common law tolling rule to this case as inconsistent with statutory law. In its interpretation of the MCL provisions the Supreme Court referred to the plain language of the provisions in question for the justification of its ruling: "Therefore, we conclude that courts may not employ an extra-statutory discovery rule to toll accrual in avoidance of the plain language of MCL 600.5827. Because the statutory scheme here is comprehensive, the legislature has undertaken the necessary task of balancing plaintiffs' and defendants' interests and has allowed for tolling only when it sees fit." In its decision, the court might have been trapped by the plain language perspective, as it seems to deal with it without taking into considerations the context of the case. The court says: "We reject this contention because the statutory scheme is exclusive and thus precludes this common law practice of tolling accrual based on discovery in cases where none of the statutory tolling provisions apply." However, the language of the provisions may be plain but it may display (as it definitely does) the deficient perception of possible case constellations under the MCL. None of the provisions of the MCL says in plain language that the period of limitations cannot be tolled in so-called discovery cases, i.e. in cases when the plaintiff discovers the identity of the defendant after the statute of limitations expired. Language is not just the wording of a legal provision. It functions in speech acts that have a background and a context. The court uses a formal systematic interpretation method instead of asking whether the legislator would have barred claims such as the one decided by it, had he been aware of such a case constellation. Did the legislator wish to favor or to protect criminals who remained undiscovered for a long time to the disadvantage of those criminals who are caught quickly and can be sued within the period stated in the statute of limitations? The Supreme Court was, while trying to improve its argumentation clearly losing ground under its feet: "The legislature has evinced its intent that, despite the tragedy, the defendants…may not face the threat of litigation sixteen years later, merely because the plaintiff alleges she could not reasonably discover the facts underlying their potential negligence until 2002." Yet, the contrary inference seems to be more convincing. As a matter of fact, the plaintiff could not sue the defendants within the period of three years because she did not know who

the perpetrator of the crime was as the police identified the murderer only sixteen years after the murder has been committed. The plaintiff was not simply alleging this circumstance; it is an obvious fact that does not need to be proven in a court of law. The court was trapped in the genre-specific argumentation where allegations of the parties are reported in court decisions. The fact that the criminal was identified many years after the crime has been committed is not an issue to be contested in this litigation and be proven beyond any reasonable doubt. The court suggests that the plaintiff might have had a choice to sue earlier, yet this is clearly not the case. Instead of using the argumentative devices typical of mechanical jurisprudence, which was criticized already by Roscoe Pound and Benjamin Cardozo, the court could have referred to a gap in the legislation and fill it. Yet it preferred to bend the language that it found in statutory provisions, as if language were limited to them. Understanding language means also understanding its deficiencies, and understanding laws means that sometimes, the plain language of written provisions notwithstanding, law that would have to be applied to a case appears deficient even if it is stated linguistically in a way that may appear clear or plain. Legal linguistics is able to trace such cases and to identify court decisions where the very notion of language has been simplified all too eagerly.

Understanding language in all its legal-linguistic complexity

Exhaustive understanding of language in law – Legal interpretation – Methodological problems of legal-linguistic analysis

Understanding language in all its complexity means understanding it in the context of an utterance and being able to draw legal conclusions from such linguistic findings. Such understanding of language illustrates the legal-linguistic approach that interests me most in this book. Many judges cope with this task without problems. In the U.S. court opinion O'Connor v. Oakhurst Dairy (851 F. 3d 69, 1st Cir. 2017) a court in Maine dealt, next to labor law, also with semantic intricacies related to the 'Oxford comma', i.e. optional comma. In the case, a group of delivery drivers pretended that they were entitled to payment of overtime wages. The employer designated the drivers as 'route salesmen'; the drivers insisted that they were exclusively deliverers. The Maine law provides in the context interesting here:

> (that) an employer may not require an employee to work more than forty hours in any one week unless 1 ½ times the regular hourly rate is paid for all hours actually worked in excess of forty hours in that week.

The exemption to the overtime law is stated in Exemption F that stipulates:

> The canning, processing, preserving, freezing, drying, marketing, storing, packing for shipment or distribution of (1) agricultural produce; (2) meat and fish products, and (3) perishable foods.

The drivers contended that the exemption finally referred to 'packing', whether for 'shipment' or for 'distribution', and that the Maine overtime law fully applied to their case. Their employer insisted that the words of the exemption applied to activities of 'packing for shipment' and to 'distribution'. In the view of the employees, as drivers engaged in the 'distribution of perishable foods' the exemption fully covered their activity. The ambiguity as to the meaning of the exemption rule occurs due to the lack of the comma before 'or distribution'. The ambiguity cannot be solved with purely linguistic means, as the court rightly assumed: "…we must interpret the ambiguity in Exemption F in the light of the remedial purpose of Maine's overtime statute. And, when we do, the ambiguity clearly favors the drivers' narrower reading of the exemption." Therefore, the court inferred from the aim of the provision that was drafted to protect workers the appropriate solution of the legal problem.[78] The method of legal interpretation coincides in this case

[78] Relevant to the legal-linguistic analysis of punctuation is also the Canadian decision Rogers Communications v. Bell Aliant (decision by the regulator, Canadian Radio-Television and Telecommunications Commission, 2007). The interpretive problem was caused by a contractual clause: *"This agreement shall be effective from the date it is made and shall continue in force for a period of five (5) years from the date it is made, and thereafter for successive five (5) year terms, unless and until terminated by one year prior notice in writing by either party."* The parties interpreted differently the comma after "five (5) year terms." In common law statutory interpretation, the last antecedent rule is frequently used to disambiguate such syntactic constructions (cf. also the U.S. court decisions Link, Inc. et al. v. City of Hays (1998), Commonwealth of Virginia v. NC Financial Solutions of Utah, LLC (2018)). The last antecedent rule says that referential and qualifying phrases, where no contrary intention appears, refer solely to the last antecedent. This formal, if not formalistic rule, is pragmatically of a rather restricted use. Furthermore, an ambiguous second semicolon was identified in the Art. IV. Sec. 3 of the U.S. Constitution: "New States may be admitted by the Congress into this Union; but no new States shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress." New states can actually be formed out of existing states, provided all involved parties, i.e. the existing state, the new state, and the Congress, agree. Several U.S. states were formed in this way. Furthermore, Art. II, para.7 of the UN Charter includes a surprising argumentative turn caused by a semicolon: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII." Also during the drafting of international instruments, punctuation has a role to play. In discussions about the wording of an early UN climate change convention the line: *"The Parties have a right to, and should, promote sustainable development," was later replaced by: "The Parties have a right to, and should promote, sustainable development." This reformulation was interpreted as being less strict on the parties' obligation to actually promote sustainable development (cf. Stokel – Walker, 2018).* A comma became also decisive in a British criminal case from 1916.

with principles of legal pragmatics that focuses on the use of the legal language. It argues that in an interpretive situation, such as the above court decision, meaning emerges in the use of language. When aspects of juridicity are considered in the methodical analysis of the case, as is advocated in this book, the process of meaning constitution in a legal text is exhaustively construed and described. However, this result is achieved solely if the discursive layers, in which legal arguments are embedded are aptly identified in the legal-linguistic analysis.

Constructs and truth

Formal and material truth – Pragmatism and interpretation – Lies in law and related behavior

The aim of all sciences is truth. Usually, however only formal and not material truth can be reached. Formal truth is inherent in whatever structure in mathematics. Truth is there defined in terms of coherence, i.e. avoidance of inner systemic contradictions. Truth in law is of different sort. Formal elements in it are present, for instance in legal constructs such as tests for the validity of claims under the doctrine of stare decisis in the common law. The role of the doctrine is to provide justice through stabilization of argumentative structures in legal decisions. Meanwhile, such 'just' decisions are only formally just as they are based on existing precedents that might be materially unjustified. Justice in court decisions is definitely not a formal issue, yet material approaches to justice are not particularly popular in legal sciences. From the legal-linguistic point of view, one could claim that interpretive mechanisms in law should accomplish the merger of formal and material truth in order to engender just decisions. Constructive innovation is needed in this area to come closer to the mentioned goal.

Roger Casement was sentenced to death under the 1351 Treason Act and hanged. The verdict in his case depended on the interpretation of the wording of the Treason Act stemming from the fourteenth century (cf. Stokel – Walker 2018). In Purina Mills, Inc. v. Security Bank & Trust (517. N. W. 2d 336, 1996) the court dealt with the question whether the virgule separating the names of two or more payees on a negotiable instrument indicates that the instrument is payable to all parties listed or to the parties in the alternative. The court mentioned that a virgule is defined as "an oblique stroke (/) used between two words to show that an appropriate one may be chosen to complete the sense of the text. The Random House Dictionary, Revised Edition (1975)" The court referred to the practice to construe this sort of writing as indicating that the instrument is payable in the alternative. *Different from above interpretive problems are simple printing mistakes. The 1872 United States Tariff Act allowed in its drafted wording from 1870, for exemption from import tariffs for "fruit plants, tropical and semi-tropical for the purpose of propagation and cultivation." In its version of 1872, a comma was misplaced in print and appeared between 'fruit' and 'plants' rendering tropical and semi-tropical fruits imports tax free. Such a technical mistake has to be distinguished from ambiguities in drafting that represent covert semantic dissent between the parties.*

One of the consequences of classical pragmatism and especially its theory of interpretation is the innovative step undertaken there toward the taking into account of consequences of an action rather than the isolated semantics of utterances (cf. Kaag 2009: 65). This approach is visible for instance in the above example that concerns Law and Economics. The appropriate meaning of an interpreted concept depends on the consequences of its use under given circumstances. In legal interpretation, this approach is rarely made explicit. Cases show how it could be made prolific in the analysis of legal notions. In a decision from 1992 by the Court of Appeal for Florida, Wells Fargo Credit Corporation v. Martin (650 So. 2d. 531, Web 1992 Fla. App. Lexis 9927) the notion of 'unilateral mistake' has been analyzed without considering its consequences. As to the particularities of the case, Wells Fargo Credit Corp. obtained a judgment of foreclosure on a house owned by Mr. and Mrs. Clevenger. The total indebtedness stated in the judgment was $ 207,141. During the foreclosure sale that followed Wells Fargo was represented by a paralegal, who had attended more than one thousand similar sales. Wells Fargo's handwritten instruction sheet informed the paralegal to make one bid at $ 115,000, the tax-appraised value of the property. Because the first "1" in the number was close to the dollar sign "$", the paralegal misread the bid instruction as $ 15,000 and opened the bidding at that amount. Mr. Martin, who was attending his first judicial sale, bid $ 20,000. The county clerk gave ample time for another bid and then announced: "$20,000 going once, $20,000 going twice, sold to Harley Martin…" The paralegal screamed: "Stop, sorry I made a mistake!" Meanwhile, the certificate of sale was issued to Mr. Martin. Wells Fargo requested the court to set aside the judicial sale based on its unilateral mistake. This has not been done as the court burdened upon Wells Fargo the risk of a situation that it had controlled and perceived the mistake as avoidable. In the consequence, Mr. Martin obtained valuable real property for a grossly inadequate price. One may furthermore assume that he was aware of the erroneous offer made by the paralegal. He profited from the formalistic approach that the court of appeals has taken to interpretation of action that in this case is based on the argument of avoidability. The court, however, did not analyze the possibility of an easy and convincing proof of the mistake by Wells Fargo and finally enriched the bidder in the name of a doubtful theory of interpretation. As a solution in terms of pragmatism, one could think about an approximation of the new price, which would take into account the specific situation and come more closely to the reality of the market price. More conservatively, the law permits also the rescission of some contracts concluded by mistake. Yet, such a decision could be deemed equally formalistic as the criticized. Misleading silence and half-truths that might be present in the above case introduce an element of social reality into the legal-linguistic perspective. Parties regularly misrepresent facts in trials, which means that they are lying. Critical legal linguistics cannot take at face value the legal samples that it analyzes because it would risk to miss some characteristic features of the legal language. Judges very

often have to accept the depositions of the parties, as they are bound by juridical requirements of evaluating truth in speech that are occasionally difficult to apply convincingly due to their formal character. Legal linguists are in a better position because they do not act under the conditions of the professional legal discourse. Therefore, they can approach problems like those discussed in this paragraph more openly. In this open interpretive approach lies the attractiveness of legal-linguistic evaluations of speech for legal sciences.

Eristic axiology

Linguistic manipulation – Axiology in law – Normative aspects in pragmatics

Legal linguistics did not set up any method for identifying manipulative speech. The main problem seems to be that whatever speech can be perceived as manipulative, as it aims argumentatively at reaching a goal. In antagonistic societies of the Occidental type, this goal will correspond with individual interests that will be advanced to the detriment of other individuals. However, even utilitarian arguments may not convince everyone and be perceived as manipulative. One could therefore think about the possibility to abandon this task in legal linguistics or to reframe it in accordance with dominant social practices. Meanwhile, 'manipulation' that emerged in the non-professional social discourse signals also attitudes and expectations of speakers toward legal institutions. Speakers distinguish discursively acceptable and unacceptable use of arguments in law, and this skill should not be underestimated in legal linguistics. In a pragmatically oriented legal linguistics issues such as linguistic manipulation, lies and whatever language use that is rooted in a practice of saying something that one does not hold for true in order to obtain an advantage by such an act are particularly important. Pragmatic legal linguistics aims at understanding the use of language in the area of law and not only its formal or normative aspects. This area is partly unpleasant, as it includes abominable practices and offhand methods (cf. Kotarbiński (1955: 184) who called them in Polish *metody bezceremonialne*).

Under-developed are in the research the linguistic aspects of axiology, i.e. matters concerning commitments to values in the area of law. Positivist approaches to law, which deny the necessity to deal with such issues because law in perceived there as a matter of fact are today discredited and are methodically not productive any more. Their legacy in legal linguistics is the claim that the legal language is value-neutral and that this alleged absence of emotional or other verbal commitments to values is the mark of professionalism in it. Legal linguistics would have to study more closely the claims to neutrality of legal language, which as a rule, marks emotional moments in court decisions and statutory language rather than a truly non-emotional speech. Controlled emotions are in no way a negative phe-

nomenon, even in the area of law. Legal linguists should therefore question rather than uncritically follow statements made by some jurists as to their professional, i.e. non-emotional attitude to law. Uncontrolled emotions are also present in legal discourses, especially in trials where individual interests dominate the stage. All too eagerly, the legal linguists adapted the attitude to the legal discourse that favors the promotion of socially progressive values. In fact, the legal discourse promotes very different social goals and social progress is by far not the main goal that can be identified in it (cf. Zylan 2011). It is the role of critical legal discourse to stress this element in the structure of the legal discourse.

Analyzing spoken legal discourse

Formal methods and their disadvantages – Involved observers and interpretation – Burden of proof in research

Discourse analysis has its own methodology, and consensus reigns among researchers about some formalities.[79] Formalities of research are convincing when they reflect method. Otherwise, they have the status of bibliographical reference, which regularly reaches orthodoxy, yet also evolves quicker than the area of knowledge that displays formal concerns. Observing language and legal institutions that use it seems to be possible also with less orthodox methods. Participative experience is valuable in legal linguistics, especially when it is connected to material analyses of language use in legal institutions. At such occasions, interpretation of the acquired knowledge will often prevail over issues of proof of the facticity of the analyzed material. In discourse studies, this practical element in research is viewed sceptically as the documentation of the analyzed material and the technicalities of research are one of the main methodical concerns in this area of study. However, legal-linguistic research is not part of the observed trial and procedural requirements such as the burden of proof do not apply to it. General methodical approaches to the interpretation of institutionalized speech seem in many cases sufficient to engender valuable results that comply with the rational quest to understand our social reality better.

[79] For instance, Qing Zhang (2019: 81-82) lists following symbols used in the analyzed corpora: "–" indicates pause "⊥" indicates self-correction in speaking "▼" indicates interrupting and "▲" indicates being interrupted "‖ ‖" indicates overlapping "Ns" indicates the second the speaker pauses, e.g. 4s, indicates the speaker pauses for 4 seconds. Sometimes, a small square bracket " [" is used to render simultaneous or overlapping speech.

Pragmatics of legal discourse

Understanding and discourse – Understanding daily practice – Understanding complex social structures

The requirement to identify discursive layers of embeddedness of legal arguments within the legal-linguistic analysis is burdensome, yet it is unavoidable. When only the use of the langue is displayed, the characterization of the legal discourse and its main function, i.e. the constitution of meaning, stops halfway. The cumbersome procedure of identification of the provenance of arguments is necessary to understand the linguistic action (legal speech acts, especially legal arguments) more fully. It is not without importance whether the linguistic sample that is analyzed actually represents affirmative or critical discourse, professional or non-professional discourse. Discursive areas may be more or less professional due to the level of institutionalization of the discourse, yet they can never be less legal than others can. Professional legal discourse is equally legal and relevant than non-professional discourses about law. The difference between both lies in the determination which discourse represents valid law. As a rule, courts will favor professional discourse, yet exceptionally non-professionals' discourse about law may provide guidelines for judges when they overrule existing law. Legal discourse comprises the understanding of language as the understanding of the world. As shown in the above examples, problems with legal interpretation are often grounded in the misunderstanding of the world, which leads to the misunderstanding of language. The French informative board saying *Jeux interdits* (i.e. Games prohibited) concerns the prohibition to get involved in games at a square, it does not stipulate that the square is a place where prohibited games may be played. In this case, the understanding of the world, in case social world, guarantees the understanding of language. Methodically, this example helps us to understand many legal texts, and especially the legal constructs, that frequently do not represent events of daily life or our ordinary use of language and therefore cannot be grasped by the speaker with the help of ordinary language that he masters perfectly. As soon as the speaker abandons the discourse of his daily life, he will be confronted with complexity, which can be overcome only with a lot of knowledge about the world. Therefore, the method of pragmatics of legal discourse must include this element of broad, mainly professional and other advanced knowledge, to be able to describe the legal discourse convincingly and exhaustively.

Pragmatic narrativity of law

Discourse and narration – Narrative structures in law – Soft legal narration

Some conceptions of discourse distinguish it as linguistic action being present to interlocutors from narration that is defined as being about subjects not actually present. Linguistically, in such a communicative situation of narration, X tells Y what he heard from Z about the subject matter a. Transmission takes place under such conditions of narration that enriches it. Transmission depends on social status, interests, beliefs and commitments to values etc. This is a narrow concept of discourse that is less helpful in the legal-linguistic research that has to deal with abstract contexts in broad social settings. Therefore, pragmatic narrativity of legal texts deals with the question why are legal texts actually written in the way they are written. Legal narratives are special; they consist at least of cases (court opinions) that refer to past events and statutory provisions that refer to future events. Court opinions are not written for general readers, but for involved parties. Their understanding corresponds regularly to post cards addressed to third persons and found by chance. The pragmatic method of investigating implicatures and deconstructive approaches are helpful to clarify the position narrative action takes in legal discourses. As I have adopted a broad concept of legal discourse, narration is integrated in it with all methodological problems that such a decision causes. Conceptual limits of narration in law are unclear. In my view, the example of narrative action provided above is not convincing as an illustration of legal narrativity. Narrativity in law cannot be reduced to cases where A says to B something that is relevant in terms of law. Minimal samples of narrative structures are for instance issues of court proceedings, e.g. that the quantification of human life is prohibited by the constitution (in amendments to laws after September 11). Legal phraseologisms such as '*Im Namen des Volkes!*' at the beginning of a German court opinion (cf. Lindroos 2015) or legally binding inscriptions, such as the French proverbial *Un train peut on cacher un autre* introduce legal discourses and may give rise to new discourses. This is the case with the German formula as to its obligatory reading of the judgment by the judge and the explicitness of the legal language for the famous French inscription that charmed by its poetry generations of the French people. Furthermore, disambiguation becomes discursively acute in texts, such as a French bus ticket saying: *Dernier voyage – ne pas jeter sur la voie publique*.

Methodically, examples of legal discourses are not difficult to name. More problematic is the interpretation of discourse as legal discourse. Research into narrativity of law showed that the application of law could not be described within the syllogism matrix that suggests that application of law is a purely logical operation. Trials became the eminent domain of legal semioticians. For instance, in witness testimony they observed the action of truth-telling in an institutional

context; telling the story and claiming it to be true had to be analyzed as a complex speech act (cf. Jackson 2017: 8). What is more, the interrelation between fact and law in legal argumentation provided in court opinions strengthened the assumption that application of law reaches far beyond logical structures. In addition, Duncan Kennedy's critical legal studies proved that the legal argument is inherently political (cf. Balkin 1991: 1832). The strength of the legal-linguistic method in this area is its adaptability and openness to the reality of legal texts. This is the reason for one of the legal-linguistic achievements that is the demonstration of dependence of fact description upon legal arguments in decisions made by courts. The distinction of fact and law is less pertinent than most jurists assume.[80] Legal semioticians and legal linguists were able to arrive at this result methodically.

Formally, non-legal texts may acquire a notoriety that equals normative texts. For instance, the speech pronounced on July 16, 1995 by the then French President Jacques Chirac concerning the responsibility of the French state for the measures undertaken against Jews during World War II in occupied France, was frequently quoted in the French legal literature, also by the Conseil d'état.[81] Sometimes it was pretended that Chirac's statement was of symbolic nature, i.e. lacking the binding force of a legal text.

Affirmative discourse and excesses of political correctness

Non-critical approaches to legal discourse – Affirmative discourse and legal linguistics – Discursive attitudes

Narration is a function of power. This can be proven by the fact that censorship is exercised to critical discourse that is perceived as socially subversive while affirmative discourse is praised. Social affirmative discourse is politically correct.[82] It engenders language that is affirmative of the underlying activities,

[80] B. S. Jackson (2017: 8) described this finding (that is largely his): "I also argued…for the symmetry between – better, identity of – the sense-construction processes of 'fact' and 'law' within the trial process, despite the common conceptual distinction between the two assumed in legal scholarship."

[81] Cf. J. Chirac, *Discours prononcé lors des commémorations de la Rafle du Vel'd'Hiv'* – 16 juillet 1995: "Il est, dans la vie d'une nation, des moments qui blessent la mémoire, et l'idée que l'on se fait de son pays. Ces moments, il est difficile de les évoquer, parce que l'on ne sait pas toujours trouver les mots justes pour rappeler l'horreur, pour dire le chagrin de celles et ceux qui ont vécu la tragédie. Celles et ceux qui sont marqués à jamais dans leur âme et dans leur chair par le souvenir de ces journées de larmes et de honte. Il est difficile de les évoquer, aussi, parce que ces heures noires souillent à jamais notre histoire, et sont une injure à notre passé et à nos traditions. Oui, la folie criminelle de l'occupant a été secondée par des Français, par l'État français."

[82] Polish readers will find samples of affirmative discourse in Jerzy Bafia's (1926-1991) legal writings, for instance in his *Praworządność* (1985), where he wrote: "Na każdym ostrym zakręcie drogi Narodu Polskiego uświadamiamy sobie coraz powszechniej, pełniej i konsekwentniej

e.g. in Polish *specyfikacja I podział kompetencji w gronie organizacji prozwierzęcych*. Destitute or poor persons are called in Polish *osoby bez zdolności kredytowych*. The corresponding German term *kreditunwürdig* and the corresponding noun *Kreditunwürdigkeit* are clearly more stigmatizing. This type of discourse develops labels for criminal behavior such as the German terms *gewaltbereit*, *gewaltsuchend*, and *gewaltaffine* for certain acts perceived in society as criminal in contradistinction to other violent acts perceived as legal. It calls detention places for asylum seekers *transit centers*, in German *Transitzentren*, when others speak rather of *jails* or *camps*. Euphemisms of this sort are used for framing terms. As mentioned already, in the process of shaping terminology framing is the problem, not terming. Frames influence recipients of speech, especially of new terms. For instance, it is proposed to replace the German term *Steuerzahler* by *Steuerbeitragender* (*tax payer* by *tax contributor*) as the neologism allegedly stresses the sense of civic responsibility. The proposal to use in the German language *Elter* as singular for *Eltern* (*parents*), and *divers* for *intersexual*, in German *transgeschlechtlich*, to mark the third possibility of gender identification next to male and female has the same framing background. The German Constitutional Court demanded from the government to develop a positive term for intersexual persons. The term *divers* found general support, terms such as *anderes* (i.e. other) or *weiteres* (i.e. further) were refused. Affirmative discourse is easily uncovered. The German *Gesetz zur effektiven and praxistauglicheren Ausgestaltung des Strafverfahrens* from 2017 has in its name a programmatically positive formulation that linguistically favors the element of care that the government brings to the problem of effectiveness of penal justice. Meanwhile, one would have to ask why the government within the past hundred years did not solve the problem of effectiveness and practicability of criminal procedure. This is an example of critical legal discourse analysis.

Problematic in terms of political correctness is also the Art. 38 (1) of the Statute of the International Court of Justice:

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znaczenie państwa i prawa oraz konstruktywną rolę, jaką spełnia praworządne układanie życia publicznego. Właśnie w okresach przełomowych praworządność potwierdza swoją najważniejszą funkcję – ostoi i trwałości Rzeczypospolitej… Staram się też wyrazić aktualną refleksję społeczno-polityczną o potrzebie edukacji w praworządności. Nawiązuję do niej jako do potrzeby „kształtowania nowoczesnej kultury politycznej, łączącej świadomość demokratycznych praw z poczuciem obywatelskich powinności wobec państwa (W. Jaruzelski)", in *Prawo o cenzurze* (1983), and in *Zasady prawa i polityki penitencjarnej* (1988), as well as in theoretical works by Jerzy Wróblewski (1926-1990), for instance in his *Sądowe stosowanie prawa* (1988: 15): "Sądowe stosowanie prawa stanowi jeden z podstawowych rodzajów praktyki prawniczej. W państwie socjalistycznym, działającym na zasadzie praworządności i w którym wyznaczona jest doniosła rola prawu, jako narzędzi kontroli społecznej, sądy, poprzez wydawanie decyzji stosowania prawa, spełniają funkcje o znacznej doniosłości." In numerous other works, affirmative discourse is abundantly present. Critical discourse is less frequent in legal publications; writings by Duncan Kennedy are an illustrative example of this way of reasoning about law (cf. his *Legal Education and the Reproduction of Hierarchy*: *A Polemic Against the System* (1983)).

> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by *civilized nations*; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. (italics added)

The above examples also show that legal language is evolving over time. Therefore, and largely independently of ideologically motivated fashionable terminological creation, reviews of linguistic appropriateness are inevitable in law. Legal linguists may signal to legislators such necessary corrections, yet also identify in legal acts formulations that do not support efficient linguistic communication in democratic societies.

Discursive layers within legal discourse

Identifying discursive layers – Discursive understanding of law – Discourse and plain language – Legal-economic discourse

As mentioned, legal discourse is not homogenous in terms of professionalism. Most interest of researchers focused on professional legal discourse. It is identifiable in utterances in most legal texts.[83] Some research is available concerning laypersons' participation in legal discourses. Eventually, plain language initiatives could also be perceived as expanding the borders of legal discourse. For instance, media discourse is a quintessentially secondary legal discourse as it reflects the primary, i.e. professional legal discourse rather directly. Terms such as the German *zugelassener Mord* (i.e. approved murder) used in Frankfurter Allegmeine Zeitung (July 31, 2018) make part of it, yet they, as a rule, will not enter the professional

[83] Speakers identify legal language intuitively in samples such as: 1) Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in light of the anticipated harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty. (cf. Art. 2-718 (1) Uniform Commercial Code); 2) The party asserting that a liquidated damages clause is, in fact, a penalty provision has the burden of proof. Evidence related to the difficulty of estimation and the reasonable forecast must be viewed as of the time the contract was executed (cf. Baker v. International Record Syndicate, Inc. 812 S.W. 2d 53, 1991). Legal linguists researched speakers' intuitive identification skills and set up lists of characteristic features of legal language that are responsible for speakers' reactions to such professional texts of law or about law. Other, non-professional texts about law display equally complex characteristic features that were less systematically scrutinized in the legal-linguistic research.

discourse. They may be inspirational in a social debate about legal issues, yet the professional discourse will not incorporate them. Apparently, such terms are perceived as provocative in that they might challenge the legitimacy of public institutions. In the case, in which the term *zugelassener Mord* was used, the Berlin police was charged with passively following threats concerning a criminal, Tahir Özbek, coming from another criminal, Recep O., until the other killed the main protagonist, who was a dangerous criminal. According to the law, the police would have been obliged to warn the endangered culprit. The impression came up that the police was actually inclined to accept the killing of the main protagonist, Tahir Özbek, by the other criminal and by so doing it anticipated the reduction in the number of dangerous, intense criminals (in German *Intensivstraftäter*), having one eliminated by the other. Subsequently, the murderer was arrested together with the alleged instigator of the murder, Kadir Padir, and other members of the gang Hells Angels immediately after the murder.[84] The press coined for this situation the term 'approved murder'. The 'approved murder' is a challenge to the legal doctrine where it appears as '*Totschlag durch Unterlassen*' (i.e. homicide by negligence) concerning the police officers involved in the investigations against the Hell Angels. Intention is decisive in determining the difference between the action of negligently causing the death of another person, manslaughter, and murder. Intention is a pragmatic constant. Another discursive element comes in the evaluation of the trial by a member of the local parliament who said: "Das Landeskriminalamt hat in dem Prozess keine gute Figur abgegeben." What is more, this type of language is not appealing to users of professional legal language as it waters down the legal element of the trial by being linguistically too approximate and by sounding familiar. Professional legal discourse favors doctrinal and authoritarian language.

I insist upon the finding that methodologically the understanding of law is possible only discursively. Syllogistic approaches to application of statutory law will fail. Methodical failures of this sort are frequent. For instance, the prosecutor office in Hamburg instigated 2019 criminal proceedings against police officers who participated in the expulsion of the Moroccan terrorist Mounir al-Mottassadeque (cf. StA HH Az. 4 Js G16/19). Al-Mottassadeque was sentenced to fifteen years of prison for supporting the assailants of September 11 in New York. In 2019, his term in the German jail was over and the German authorities decided to expel him to his home country, Morocco. As Al-Mottassadeque worked during his term in jail and saved more than seven thousand euros on his account, the police officers in charge of his expulsion packed the money into an envelope and handed it over to him at the airport. Thereafter, the prosecutor office instigated criminal

[84] In the language of the Landgericht Berlin: "…das Gericht stellte fest, dass möglicherweise Kräfte des Landeskriminalamts schon seit Oktober 2013 von einer drohenden Tötung Özbeks durch Personen aus dem Umfeld der Hells Angels wussten, aber bewusst und unter billigender Inkaufnahme der Tötung zwingend gebotene polizeiliche Maßnahmen unterließen, um die potentiellen Tatbeteiligten nach einer Tatbegehung strafrechtlich zu verfolgen."

proceedings against them asserting that they infringed upon Art. 18 of the Law on Foreign Commerce (*Außenwirtschaftsgesetz*) in that they transferred funds to a person sentenced for terroristic activities, which the statute prohibits. The police officers claimed to have acted as in whatever case of expulsion and in perfect lack of knowledge about the provision of the Law on Foreign Commerce in question. Indeed, the syllogistic approach to statutory application makes the prosecution of the police officers possible, yet the broader, discursive approach prevents this sort of mechanical jurisprudence. As mentioned, the legal discourse is determined by our understanding of the world and its language. This means that we cannot understand the language when we do not understand the world.

Art. 18 of the German *Aussenwirtschaftsgesetz* is in itself a specimen of legislative complexity. One cannot wonder that competent authorities had a problem with its application:

§ 18 Strafvorschriften

(1) Mit Freiheitsstrafe von drei Monaten bis zu fünf Jahren wird bestraft, wer
1. einem a)Ausfuhr-, Einfuhr-, Durchfuhr-, Verbringungs-, Verkaufs-, Erwerbs-, Liefer-, Bereitstellungs-, Weitergabe-, Dienstleistungs- oder Investitionsverbot oder b)Verfügungsverbot über eingefrorene Gelder und wirtschaftliche Ressourcen eines im Amtsblatt der Europäischen Gemeinschaften oder der Europäischen Union veröffentlichten unmittelbar geltenden Rechtsaktes der Europäischen Gemeinschaften oder der Europäischen Union zuwiderhandelt, der der Durchführung einer vom Rat der Europäischen Union im Bereich der Gemeinsamen Außen- und Sicherheitspolitik beschlossenen wirtschaftlichen Sanktionsmaßnahme dient oder
2. gegen eine Genehmigungspflicht für a) die Ausfuhr, Einfuhr, Durchfuhr, Verbringung, einen Verkauf, einen Erwerb, eine Lieferung, Bereitstellung, Weitergabe, Dienstleistung oder Investition oder b) die Verfügung über eingefrorene Gelder oder wirtschaftliche Ressourcen eines im Amtsblatt der Europäischen Gemeinschaften oder der Europäischen Union veröffentlichten unmittelbar geltenden Rechtsaktes der Europäischen Gemeinschaften oder der Europäischen Union verstößt, der der Durchführung einer vom Rat der Europäischen Union im Bereich der Gemeinsamen Außen- und Sicherheitspolitik beschlossenen wirtschaftlichen Sanktionsmaßnahme dient.

(2) Mit Freiheitsstrafe bis zu fünf Jahren oder mit Geldstrafe wird bestraft, wer gegen die Außenwirtschaftsverordnung verstößt, indem er 1.ohne Genehmigung nach § 8 Absatz 1, § 9 Absatz 1 oder § 78 dort genannte Güter ausführt, 2.entgegen § 9 Absatz 2 Satz 2 dort genannte Güter ausführt, 3.ohne Genehmigung nach § 11 Absatz 1 Satz 1 dort genannte Güter verbringt, 4.ohne Genehmigung nach § 46 Absatz 1, auch in Verbindung mit § 47 Absatz 1, oder ohne Genehmigung nach § 47 Absatz 2 ein Handels- und Vermittlungsgeschäft vornimmt, 5.entgegen § 47 Absatz 3 Satz 3 ein Handels- und Vermittlungsgeschäft vornimmt, 6. ohne Genehmigung nach § 49 Absatz 1, § 50 Absatz 1, § 51 Absatz 1 oder Absatz 2 oder § 52 Absatz 1 technische Unterstützung erbringt oder 7.entgegen § 49

Absatz 2 Satz 3, § 50 Absatz 2 Satz 3, § 51 Absatz 3 Satz 3 oder § 52 Absatz 2 Satz 3 technische Unterstützung erbringt.

(3) Ebenso wird bestraft, wer gegen die Verordnung (EG) Nr. 2368/2002 des Rates vom 20. Dezember 2002 zur Umsetzung des Zertifikationssystems des Kimberley-Prozesses für den internationalen Handel mit Rohdiamanten (ABl. L 358 vom 31.12.2002, S. 28), die zuletzt durch die Verordnung (EG) Nr. 1268/2008 (ABl. L 338 vom 17.12.2008, S. 39) geändert worden ist, verstößt, indem er 1.entgegen Artikel 3 Rohdiamanten einführt oder 2. entgegen Artikel 11 Rohdiamanten ausführt.

(4) Ebenso wird bestraft, wer gegen die Verordnung (EG) Nr. 1236/2005 des Rates vom 27. Juni 2005 betreffend den Handel mit bestimmten Gütern, die zur Vollstreckung der Todesstrafe, zu Folter oder zu anderer grausamer, unmenschlicher oder erniedrigender Behandlung oder Strafe verwendet werden könnten (ABl. L 200 vom 30.7.2005, S. 1; L 79 vom 16.3.2006, S. 32), die zuletzt durch die Verordnung (EU) 2016/2134 (ABl. L 338 vom 13.12.2016, S. 1) geändert worden ist, verstößt, indem er 1.entgegen Artikel 3 Absatz 1 Satz 1 dort genannte Güter ausführt, 2.entgegen Artikel 3 Absatz 1 Satz 3 technische Hilfe erbringt, 3.entgegen Artikel 4 Absatz 1 Satz 1 dort genannte Güter einführt, 4.entgegen Artikel 4 Absatz 1 Satz 2 technische Hilfe annimmt, 5.entgegen Artikel 4a Absatz 1, Artikel 6a oder Artikel 7d dort genannte Güter durchführt, 6.entgegen Artikel 4b eine Vermittlungstätigkeit erbringt, 7.entgegen Artikel 4c eine Ausbildungsmaßnahme erbringt oder anbietet, 8. ohne Genehmigung nach Artikel 5 Absatz 1 Satz 1 oder Artikel 7b Absatz 1 Satz 1 dort genannte Güter ausführt, 9. ohne Genehmigung nach Artikel 7a Absatz 1 Buchstabe a oder Artikel 7e Absatz 1 Buchstabe a technische Hilfe erbringt oder 10. ohne Genehmigung nach Artikel 7a Absatz 1 Buchstabe b oder Artikel 7e Absatz 1 Buchstabe b eine Vermittlungstätigkeit erbringt. Soweit die in Satz 1 genannten Vorschriften auf die Anhänge II, III oder IIIa zur Verordnung (EG) Nr. 1236/2005 verweisen, finden diese Anhänge in der jeweils geltenden Fassung Anwendung.

(5) Ebenso wird bestraft, wer gegen die Verordnung (EG) Nr. 428/2009 des Rates vom 5. Mai 2009 über eine Gemeinschaftsregelung für die Kontrolle der Ausfuhr, der Verbringung, der Vermittlung und der Durchfuhr von Gütern mit doppeltem Verwendungszweck (ABl. L 134 vom 29.5.2009, S. 1, L 224 vom 27.8.2009, S. 21) verstößt, indem er 1.ohne Genehmigung nach Artikel 3 Absatz 1 oder Artikel 4 Absatz 1, 2 Satz 1 oder Absatz 3 Güter mit doppeltem Verwendungszweck ausführt, 2. entgegen Artikel 4 Absatz 4 zweiter Halbsatz Güter ohne Entscheidung der zuständigen Behörde über die Genehmigungspflicht oder ohne Genehmigung der zuständigen Behörde ausführt, 3. ohne Genehmigung nach Artikel 5 Absatz 1 Satz 1 eine Vermittlungstätigkeit erbringt oder 4. entgegen Artikel 5 Absatz 1 Satz 2 zweiter Halbsatz eine Vermittlungstätigkeit ohne Entscheidung der zuständigen Behörde über die Genehmigungspflicht oder ohne Genehmigung der zuständigen Behörde erbringt. Soweit die in Satz 1 genannten Vorschriften auf Anhang I der Verordnung (EG) Nr. 428/2009 verweisen, findet dieser Anhang in der jeweils geltenden Fassung Anwendung. In den Fällen des Satzes 1 Nummer 2 steht dem Ausführer eine Person gleich, die die Ausfuhr durch einen anderen begeht, wenn der Person bekannt ist, dass die Güter mit

doppeltem Verwendungszweck ganz oder teilweise für eine Verwendung im Sinne des Artikels 4 Absatz 1 der Verordnung (EG) Nr. 428/2009 bestimmt sind.

(5a) Mit Freiheitsstrafe bis zu einem Jahr oder mit Geldstrafe wird bestraft, wer gegen die Verordnung (EG) Nr. 1236/2005 verstößt, indem er 1. entgegen Artikel 4d dort genannte Güter ausstellt oder zum Verkauf anbietet oder 2. entgegen Artikel 4e eine Werbefläche oder Werbezeit verkauft oder erwirbt. Soweit die in Satz 1 genannten Vorschriften auf den Anhang II zur Verordnung (EG) Nr. 1236/2005 verweisen, findet dieser Anhang in der jeweils geltenden Fassung Anwendung.

(6) Der Versuch ist strafbar.

(7) Mit Freiheitsstrafe nicht unter einem Jahr wird bestraft, wer 1.in den Fällen des Absatzes 1 für den Geheimdienst einer fremden Macht handelt, 2.in den Fällen der Absätze 1 bis 4 oder des Absatzes 5 gewerbsmäßig oder als Mitglied einer Bande handelt, die sich zur fortgesetzten Begehung solcher Taten verbunden hat, oder 3. eine in Absatz 1 bezeichnete Handlung begeht, die sich auf die Entwicklung, Herstellung, Wartung oder Lagerung von Flugkörpern für chemische, biologische oder Atomwaffen bezieht.

(8) Mit Freiheitsstrafe nicht unter zwei Jahren wird bestraft, wer in den Fällen der Absätze 1 bis 4 oder des Absatzes 5 als Mitglied einer Bande, die sich zur fortgesetzten Begehung solcher Taten verbunden hat, gewerbsmäßig handelt.

(9) In den Fällen des Absatzes 1 Nummer 2, des Absatzes 2 Nummer 1, 3, 4 oder Nummer 6, des Absatzes 4 Satz 1 Nummer 5 oder des Absatzes 5 Satz 1 steht einem Handeln ohne Genehmigung ein Handeln auf Grund einer durch Drohung, Bestechung oder Kollusion erwirkten oder durch unrichtige oder unvollständige Angaben erschlichenen Genehmigung gleich.

(10) Die Absätze 1 bis 9 gelten, unabhängig vom Recht des Tatorts, auch für Taten, die im Ausland begangen werden, wenn der Täter Deutscher ist.

(11) Nach Absatz 1, jeweils auch in Verbindung mit Absatz 6, 7, 8 oder Absatz 10, wird nicht bestraft, wer 1. bis zum Ablauf des zweiten Werktages handelt, der auf die Veröffentlichung des Rechtsaktes im Amtsblatt der Europäischen Union folgt, und 2. von einem Verbot oder von einem Genehmigungserfordernis, das in dem Rechtsakt nach Nummer 1 angeordnet wird, zum Zeitpunkt der Tat keine Kenntnis hat.

The above act was prepared according to professional guidelines for legislative drafting. They regularly do not correspond to principles of language use in public communication. Meanwhile, administrative authorities and governmental agencies proud themselves on having developed this legislative style. They invite linguistic input only in matters concerning linguistic correctness, such as spelling mistakes, syntax, use of foreign words etc. The misunderstanding about the role of linguists or legal linguists in processes of legislative drafting could not be greater. Methodically, legal linguistics reacted to this deficit by adopting some of the requirements of the plain language movement, which were also approved by some legislators. Problems concerning the use of plain language are conceptualized in the legal-linguistic research in frames of reference broader than those preferred in governmental bodies. These issues were discussed by Milena Hadryan (2015)

as attempts at democratization of administrative language or by me as attempts at creating a language without speakers (cf. Galdia 2017a: 362). The future of plain language drafting is connected to strategic choices between governmental and academic positions. As so often, however, governments and not academia might have the last word in the debate about appropriate statutory language.

Another discursive layer represent mixed discursive structures that appear in form of legal-economic discourse. In the academic literature, they combine terminology of economics and law, for instance in Barbara Majewska-Jurczyk's *Dominacja w polityce konkurencji Unii Europejskiej* (1998). Due to the specifics of the issue in a country in transition, and as such Poland had to be perceived in 1998, in the text also comparative terminological elements appear, possibly also involuntarily, mainly due to the lack of standing terminology.[85] Meanwhile, problems of terming are temporary. For instance, in the area of the law of European Union the term *acquis communautaires* was perceived at its inception as problematic or even enigmatic, yet it was later easily replaced with *Besitzstand der Gemeinschaft* in German or clearer in Polish as *dorobek prawny*. Therefore, terming as such is never problematic in law; invention of concepts in legal systems is the real challenge.

As could be seen, legal language develops on all mentioned discursive layers. Non-professional legal terminology is no less terminological only because it is coined by non-professionals of law, for instance by journalists. It also represents specialized language as it develops in contrast to the specialized language of professionals of law with the justified aim in mind to communicate law efficiently. It is, however, often not recognized as such due to institutional boundaries, in which professional legal language emerges and is applied. In contrast, accepted professional legal language may trap lawyers and public servants, like the police officers in one of the above cases, and it can hinder the efficient application of law. The above conclusions mean for the methodology of legal linguistics that more attention should be devoted to mechanisms in which non-professional language use about law emerges in order to better understand its structure which, as I suppose, is as complex as the structure of the professional legal discourse. Such methodological focus would also facilitate the evaluation of my postulate to use ordinary language in legal communication.

[85] Cf. "Zniekształcenia na rynkach oligopolistycznych, które powstają jako rezultat szczególnych cech rynku, powinny być objęte specjalnymi przepisami i należy zastosować wobec nich sankcje konieczne do przywrócenia efektywnej konkurencji" (in: Majewicz-Jurczyk, 1998: 166) Translation language is omnipresent in such texts: cf. the beginning of the Polish text and 'Distortions in oligopolist markets that emerge as a result of'….

Non-discursive layers and legal discourse

Commitment to discursive practices – Refusal to communicate verbally – Violence as part of discursive practices – Technical, non-discursive practices

In terms of theory, legal discourse requires the commitment of participants to discursive practices, i.e. to finding rationally justified decisions within argumentation toward the background of predefined rules (legal provisions). In society, not everyone is committed to finding solutions to social problems while using arguments. Mute violence is at least one another way of managing society. Mute participation in social practices is not non-discursive as it positions itself clearly within discursive practices, be it only negatively.[86] This means that certain persons do not wish to participate in legal discourses with their linguistic input. This is a negative linguistic participation.

Refusal of discursive approaches is becoming a socially relevant issue in the area of law. More and more, due to changes in social stratification and the restructuring of group influence in society, the refusal to get involved in rationally founded discourses and the corresponding tendency to consider exclusively own interests and emotional arguments is growing in societies. Rational argumentation presupposes that it is used in propitious surroundings, yet it is frequently used in circumstances of discourse formation that are profoundly hostile to any rationale in the social exercise of speech. This is a challenge also for the legal-linguistic methodology as it until now focused on and used as a model the discourse structure that was based on the institutionalized exercise of rational speech. Apparently, the rational element in the discourse will have to be repositioned and investigated in all its emerged anti-discursive complexity rather than be supposed as a constant in advanced speech that the legal language may represent.

Truly non-discursive are legal practices that do not involve any linguistic communication. Among them are executions of prisoners and takings of property.[87] Meanwhile, in most cases, some additional discursive practices accompany non-discursive action. Law is a discursive practice and therefore it is difficult to provide convincing examples of action in law that would be solely technical, i.e. purely non-discursive.

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[86] Silence is semantically and pragmatically valuable as a means of communication. M. T. Lizisowa (2016: 317) wrote about this problem: "W języku prawnym milczenie jest środkiem ekspresji jako apel nadawcy, ponadto ma znaczenie sprawcze i pełni funkcję znaku semiotycznego przez odniesienie do czynności stanowienia prawa. Analizując milczenie jako fakt językowy, Jolanta Rokoszowa dowiodła, że milczenie w komunikacji, które zawsze jest mówieniem czegoś i przez mówienie może być zastąpione, jest milczeniem znaczącym." Already Paul Watzlawick mentioned the impossibility to refuse participation in communication by remaining silent because silence is meaningful in communication.

[87] Non-legal discursive contexts are present also in narratives, for instance in the Polish formulation: "Tragiczny los spotkał Akkona,…na którym po przeprowadzeniu śledztwa…wykonano wyrok śmierci." (in: K. Kumaniecki 1977: 173).

Various discursive functions

Legal-linguistic operations – Particular discursive functions – Legal-linguistic operations and discursive functions

Complex legal discourses consist of legal-linguistic operations that instrumentalize legal speech acts. Legal-linguistic operations are multiple. In legal linguistics, the best researched are legal interpretation, legal argumentation, and legal translation. Other legal-linguistic operations are less well known. Among them are: justification of legal decisions, description of facts, other narrative textual formations such as accusation acts, witness testimonies, and recordings of trials. What is more, Stanisław Goźdź-Roszkowski (2017: 103) found out that nouns present in argumentative patterns in court opinions are used to perform various discursive functions. Furthermore, evaluation plays a central role in judicial writings and specific nouns, such as assumption and belief signal 'sites of contentions' in judgments, e.g. in "But such a claim does not help the FCC, for relevant precedent makes clear that, when faced with ambiguity, we are to interpret statutes of this kind on the assumption that Congress intended to preserve local authority." Additionally, Piotr Pieprzyca (2016: 38) stressed that the number of expressions that could be classified as performative utterances is higher than it is mentioned in the linguistic literature. We may assume that the number of discursive functions in legal-linguistic operations is much higher than is the number of legal-linguistic operations. Detailed analyses are necessary to develop this area of interest in legal-linguistic studies.

Epistemic and creative interpretation

Interpretation in linguistics – Interpretation in law – Positivist interpretation – Legal-linguistic interpretation – Copernican turn in legal linguistics

Interpretation as a discursive operation is fascinating, as it proves that speakers master more than the formally identified structures of language.[88] In linguistics proper, interpretation was rarely researched, especially when its role in understanding language is considered.[89] In turn, legal interpretation has been researched intensely by legal theoreticians, other jurists, and also legal linguists.

[88] B. S. Jackson (1985: 157) while referring to Hart's *Concept of Law* stressed the temporality of legal semantics: "Where there exists a 'core of undisputed meaning', it is precisely because the meaning has not been disputed."

[89] B. S. Jackson (2017: 6) stressed that inquiries into interpretation are the domain of pragmatics: "Interpretation, I argued, is a particular use made of the text, and therefore belongs to pragmatics. It brings into play the act of will of someone other than the author of the text…The ob-

An example of legal interpretation may be provided by analyzing the Amendment VIII of the U.S. Constitution (1791) that says:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

In the light of this constitutional provision, one might wonder why capital punishment is still practiced in the U.S., although the provision seems to provide for the contrary, i.e. the prohibition of capital punishment. It literally says that 'cruel and unusual punishments cannot be inflicted'. Meanwhile, the U.S. Supreme Court does not perceive the executions that are practiced in the U.S. as particularly cruel, nor does it perceive the capital punishment as unusual. Positivist interpretation might end at this point. In our discursive approach, we have to reach further. Our interpretation has to reach beyond a piece of paper that might even aptly represent the intention of the drafters of the U.S. Constitution. Today, we ask ourselves whether in a civilized society of the twenty-first century acts such as executions of human beings due to court decisions can still be admitted and not perceived as barbaric. Clearly, the meaning of the Amendment VIII is not in the provision. Our arguments to understand law properly come from outside the written text of law. Regularly, they come from other areas than law as well. This is the reason why law cannot be understood from law. Studying exclusively law in order to understand it is therefore a methodological error. No area of law allows us to answer the question whether executions of death penalty are 'cruel and unusual punishments' or not. Decisive knowledge comes from elsewhere. This elsewhere can be determined as our general discourse about life in society. Meanwhile, knowing law is not a hindrance to the process of its understanding. Statutory provisions offer argumentative patterns to work out their meaning. In terms of academic ambitions, the study of law is therefore not a waste of time when aptly structured and expanded.[90]

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jective validity (not to mention meaning) of particular norms is a matter of social construction (through texts and other means), and the unity of the legal system is similarly an ideological claim whose construction can only be described, not validated."

[90] The study of law was frequently criticized as not scientific, a purely technical way of acquiring knowledge. Descartes, a studied jurist, never seriously dealt with law in his studies, apparenty perceiving it as a waste of time for a scholar and good only for economic purposes. It was also said that legal conclusions are pure sophisms due to the accidental emergence of propositions about the validity of law and that therefore there is no knowledge in law. Molière, another studied jurist, ridiculed law with all means of his trade as comedian. What is more, knowledge of regulation was perceived as a worthless enterprise and not as an academic domain, as regulation has the tendency to evolve, thus turning juridical libraries into waste paper, as formulated by Julius von Kirchmann. After all, primarily, we study law not to know it but to understand man and society. Knowledge of regulation, acquired in such studies, may prove useful for practical purposes. Like mathematics, legal studies may be used for practical purposes or remain purely theoretical, provided the right methodology is at the student's disposal. When the study of law

Interpretation is about understanding. However, what is the sense of understanding? (cf. Figal 1986). We interpret in order to understand. The deeper sense of understanding is not understanding, but the possibility to apply the understood messages. Therefore, claims that all problems of law are suited in its application seem correct. The Copernican turn in legal linguistics consists in the finding that the meaning of a legal text is not in the statutory provision. The statutory provision provides an argumentative pattern to work out its meaning.

Previous chapters concerned discursiveness of law and its consequences for legal linguistics. Now I will make a step forward and focus on the relation between discursiveness and discourse in law. In the methodology of legal linguistics, discursiveness is ontologically primary to discourse. We research legal discourse because law is a discursive practice and not something else. Discursiveness is as a concept rather transparent when compared with discourse. This is also the reason why most work in the legal-linguistic research is spent on discourse and not on discursiveness. Interpretation of legal discourse in terms of the epistemic and creative discursive approaches can be analyzed in an example that stresses the pragmatics of oath taking. It may be perceived as a provisional summary of matters discussed until now in this book.

Pragmatics of oath taking

U.S. Presidential oaths of 2009 and 2013 – Hong Kong Legislative Council Oath Taking Controversy – Pragmatic elucidation of both controversies

The oath taking by Barack Obama as the President of the United States in 2009 and also in 2013 caused problems that some American jurists perceived as constitutionally relevant. They are connected to the oath taking procedure regulated for the President-elect in the U.S. Constitution. The text of the Presidential oath is laid down in the Article II of the U.S. Constitution:

> I do solemnly swear (or affirm) that I will faithfully execute the Office of the President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.

Chief Justice Roberts, whose task was to pronounce the words of the oath, which are to be repeated by the incumbent President, instead of saying 'that I will faithfully execute the office of the President of the United States', said 'faithfully' after 'President of the United States.' While repeating the oath, Obama stopped after the word 'execute' to give Roberts the chance to pronounce the text again and

is solidly anchored in the theory of social sciences, it will provide valuable knowledge not only about law but also about man in society.

correctly. Yet, the Chief Justice, while repeating the text in correct order omitted the word 'execute'. After the public ceremony, the White House deemed the oath validly sworn. Nevertheless, it has been repeated the following day in the White House Map Room. We might ask for rational reasons for this new ceremony. We might be equally interested in irrational motives that stand behind the decision to repeat the oath. While asked why the oath swearing procedure has been repeated, President Obama answered 'because it was so much fun.'[91] The White House declared after the first ceremony, still on the inauguration day, that the oath would be sworn again 'just to be sure'. The second oath was not sworn on the Lincoln-Bible as the first had been, yet it had been perceived as valid nonetheless.

More protracted problems appeared during the Hong Kong Legislative Council Oath Taking ceremony in 2016. They led to a serious political controversy that persists until today. Elected members of the Hong Kong Legislative Council have to swear an oath of office according to Article 104 of the Basic Law of Hong Kong that says in its English language version:

> Hong Kong oath of office
> I swear that, being a member of the Legislative Council of the Hong Kong Special Administrative Region of the People's Republic of China, I will uphold the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, bear allegiance to the Hong Kong Special Administrative Region of the People's Republic of China and serve the Hong Kong Special Administrative Region conscientiously, dutifully, in full accordance with the law, honestly and with integrity.

The Chinese text says:

> 第一百零四條
> 香港特別行政區行政長官、主要官員、行政會議成員、立法會議員、各級法院法官和其他司法人員在就職時必須依法宣誓擁護中華人民共和國香港特別行政區基本法，效忠中華人民共和國香港特別行政區。
> 香港立法办事处的誓言
> 一《中华人民共和国香港特别行政区基本法》第一百零四条规定的"拥护中华人民共和国香港特别行政区基本法，效忠中华人民共和国香港特别行政区"，既是该条规定的宣誓必须包含的法定内容，也是参选或者出任该条所列公职的法定要求和条件。

In the elections of 2016 several members of localist and pro-democracy movements were elected to the Legislative Council. According to the Basic Law of Hong Kong, they were obliged to swear the oath rendered above in English

[91] The translation of the American text of the oath into contemporary French displays linear syntax that appears unproblematic: Je jure (ou affirme) solennellement de remplir fidèlement les fonctions de Président des États-Unis, et, dans toute la mesure de mes moyens, de sauvegarder, protéger, et défendre la Constitution des États-Unis.

and in Chinese. Several members-elect were unseated by court decisions due to specifics of their oath taking. They were initially reluctant to take the oath at all, yet finally decided to participate in the oath taking ceremony. In terms of method, it is important to distinguish between pragmatically relevant aspects that can be analyzed on the basis of reports in English and those, which cannot be meaningfully analyzed without researching the Chinese original material. Several pragmatically relevant elements of oath taking can be analyzed in English translation while others are Cantonese-dependent.

One member-elect, Lau Siu-Lai, read the eighty-word text of the oath during ten minutes making long breaks between words apparently to render it meaningless. The President of the Legislative Council invalidated this oath taking. Two other members-elect, Sixtus Leung and Yau Wai-Ching, modified the oath text and added own words to the text saying: 'as a member of the Legislative Council, I shall pay earnest efforts in keeping guard over the interests of the Hong Kong nation'. Another member-elect, Nathan Law, raised his tone while reading out the oath text sounding as if he was asking a question.

During the court proceedings about the validity of the oath taking in Hong Kong, the National People's Congress Standing Committee (NPCSC) issued upon a request from the Hong Kong Court a letter of interpretation stressing that "who intentionally reads out words which do not accord with the wording of the oath prescribed by the law, or takes the oath in a manner which is not sincere or not solemn" should be barred from taking office in the Legislative Council.

Previously, in 2004 a member-elect, Leung Kwok-Hung, shouted the slogan 'Long live democracy! Long live the people!' before and after delivering the oath and his oath taking was perceived as valid by the Legislative Council. In 2012, another member-elect, Wong Yuk-Man, skipped key words by coughing at strategic moments. His oath taking was invalidated. He was however allow to retake his oath that he read out partly in different tones of voice and then shouted 'Down with the Hong Kong communist regime, down with Leung Chun-Ying.' The Council accepted this oath taking.

Some pragmatically relevant elements cannot be analyzed based on the English version of the oath as it was sworn in Cantonese. Two members-elect pledged allegiance to the 'Hong Kong nation' and apparently mispronounced 'People's Republic of China' as 'people's re-fu…ing of Chee-na'. Both oath takings were invalidated. One legislator blamed his 'Ap Lei Chau accent' for alleged misunderstandings that might have occurred due to his mispronunciation of 'Chee-na' for China. The word goes back to Japanese soldiers' slang from World War II 'shina' instead of the standard Japanese 'chugoku' that means China. It is perceived as disrespectful among Chinese speakers. Apparently, it is not sincerity but allegiance to power structures that is decisive and also constitutive of the legal speech act of oath taking. Sincerity in the sense of inner commitment to one's word is therefore not required. Legal consequences (e.g. impeachment) follow even if this commit-

ment is missing. Jurists, who were dealing with the above oath problems seem to have underestimated this point that becomes clear in the discursive analysis.

Discursive treatment of legal terminology

Constructs and terms – Terms in isolation – Terms in discourses

One of the special fields in the legal-linguistic research is legal terminology. It seems to be truly a particularity in our area of knowledge, as most other academic disciplines perceive terminological research as peripheral. For them, the substance goes over the form, i.e. the language in which their findings are expressed. Even in general linguistics, which is the domain of the research into language par excellence, terminological or lexicological research is far from being dominant. There are also good reasons for it, mainly the complex structure of language itself that is constituted of rules and not of words. Meanwhile, due to the specifics of the legal science many legal linguists, among them most prominently Gérard Cornu and Heikki E.S. Mattila, positioned terminological research in the center of their legal-linguistic interests. Thus, a new area of advanced knowledge emerged in the intersection of doctrinal research into the words of law and the lexicological and lexicographical research accumulated in linguistics. This area evolves, like all other domains of the legal-linguistic research and it seems to be nowadays best integrated in approaches that stress communication in law. Some research deals with terminology in isolation from its co- and context. This approach seems today difficult to justify,[92] although certain tasks in daily legal-linguistic activities may necessitate such work. In addition, legal phraseology, e.g.…*included, but not limited to*…, displays specific requirements for its use and understanding.[93] Legal terminology appears in simple and in complex forms. I treat them all within my conception of legal construct where concepts and terms can be analyzed in close connection, like two sides of the same coin. Yet even this close analysis cannot explain the emergence of meaning in law. Only the notional framework of reference of the legal discourse provides the appropriate interpretive matrix that makes legal constructs truly comprehensive.

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92 Sambor Grucza (2011), quoted by M. T. Lizisowa (2016: 43-44), warned against the identification of the legal language with its terminology: "Języków prawnych nie należy identyfikować z odpowiednimi zbiorami jednostek leksykalnych (terminami), czyli ograniczać ich zakresu przedmiotowego do terminologii, nie uwzględnia to bowiem ani funkcji wiedzotwórczych, ani tekstotwórczych języków prawnych…, należy rozpatrywać je, odnosząc do najszerszego ujęcia języków prawnych, tj. struktur wyrażeniowych powiązanych ze znaczeniem i regułami komunikacyjnymi."

93 M. T. Lizisowa (2016: 325) wrote about phraseologisms: "Rozumienie frazemów prawniczych w zależności od wiedzy uczestnika aktu komunikacji oraz aktualna ich siła sprawcza prowadzi do konfliktów semantycznych mocy illokucyjnej ukrytej w intencji aktu mowy."

Legal constructs in legal discourses

Constructivism and discursiveness – Constructs and definitions – Terming concepts

Constructivism is the mirror image or a conceptual cousin of discursiveness. Being involved in legal discourses means to construct meaningful linguistic structures that can transfer the meaning of law. One could ask whether legal construction is actually necessary because our ordinary language might be better suited to render law. Jurists, starting with the ancient Romans, decided not to trust the ordinary language and its speakers. They constructed a legal language that is easily recognizable by its terminology and its syntax. Researching legal constructs is the specific activity exercised in the legal science. As legal constructs dominate the legal science since its very inception, they are also central to the legal-linguistic research.

Legal constructs are pragmatically defined by their contexts, no definitions are necessary to understand them. They may consist of simple terms such as the named Roman *praescriptio* or *contract*, yet they also can comprise complex terms such as *unjust enrichment* or the German term *positive Forderungsverletzung*.[94] Other, more recent constructs comprise: *genocide* (from Greek *genos* and Latin *cidere*) and *crime against humanity*. An even more recent term, *internet neutrality*, was proposed in the U.S. In the UK, the term *dependent contractors* was proposed as related to *independent contractors*. In the Mainland Chinese law, the terms *public* and *nonpublic enterprise* gained momentum. In Russia, Professor Yuri Rozhdestvenskiy (1996: 8) proposed the right to be protected from disinformation, право личности на защиту от дезинформации. Semantic fields are created around legal action, e.g. *dissolution*, *liquidation*, *winding up*, and *termination* in situations involving bankruptcy. Levels of abstraction differ: *gefahrgeneigte Arbeit* may be understood by non-professionals without problems, *positive Vertragsverletzung* is more complex. While the first term may be grasped intuitively, the second is a brain teaser even for German law students. Some innovation is accepted soon, e.g. *the right to be forgotten* in the internet law, other neologisms remain condemned to literature, for instance *stateless nation* in the case of Hong Kong,[95] *rights of the planet Earth* (cf. Chomsky 2016: 99), *gay nation* (cf. Graham 2010) or *le droit au bonheur* (cf. Emile Zola in *J'accuse*: "Je n'ai qu'une passion, celle de la lumière, au nom de l'humanité qui a tant souffert et qui a droit au bonheur.")

International usage is the rule in legal terminology. The Montenegrinian legal scholar, Čedomir Bogićević, dealt in his monograph *Pravo socijalne integracije*

[94] *Positive Vertragsverletzung* in the German private law is not a breach of a contract but the breach of a pre-contractual obligation, a closely affiliated legal concept is *culpa in contrahendo*.

[95] Brian Fong argued in an interview in *Le Monde* (17/18 November 2019) concering the term 'stateless nation': "(Question *Le Monde*) Comment comprendre le mouvement actuel, à l'aune du concept par lequel vous désignez Hongkong : une 'stateless nation', une nation sans Etat ? (Answer B. Fong) Il faut partir du postulat selon lequel les Hongkongais forment une nation sans Etat qui se bat pour son autonomie. "

(2004) with a concept of *social integration* and semantically related concepts *socijalna država*, *industrijska demokratija*, and *sloboda rada*.[96] Legal implants are adapted in the social discourse rather than in law directly. They do not work when limited to law exclusively. Terminology is coined in many languages on the stylistic level of nonordinary language. When jurists write about the *sky*, they will almost certainly prefer to use *air space*, in German *Luftraum* rather than *Himmel*, in Russian, instead of небо (*nebo*), they will write воздушное пространство (*vozdushnoe prostranstvo*), in Polish *obszar powietrzny* rather than *niebo*. Euphemisms will be preferred: (nasledie), instead of (nasledie po umershyh).

Terminology in discursive formations

Investigating legal terminology – Accessibility of legal terms – Legal terminology in ordinary language – Genre and the understanding of legal texts

Investigating legal terminology is central to legal-linguistic studies because the language of law or rather its professional variety depends on the specific linguistic feature that is developing special terms that represent legal concepts in deliberate contradistinction to ordinary language. Next to legal terminology come text types or genres that may in future develop to a topic more relevant than are legal terms today. Previously, which means some twenty years ago, non-professionals were at odds when they encountered legal terms in texts. Today, the situation changed profoundly as every cell phone connects to databases that list and explain legal terminology in a language that is, as a rule, understandable also to laypersons. Knowledge that is acquired in such searches is limited, yet it helps to cope with texts that include unknown terms that were previously perceived as mysterious. Jurists are aware of this mystery or magic in the legal language when they coin legal terms such as *culpa in contrahendo, promissory estoppel*[97] or the German *positive*

[96] Č. Bogićević (2004: 14) wrote about the discursive background of the conceptual construction of law: "Nas ovdje interesuje koncept ostvarenja socijalne države putem oblikovanja pojedinih njenih institucija čija bi struktura bića bila u funkciji njenih ciljeva i u kojoj bi država bila integrisana, ne na principu i poredku subordinacije (što ne znači nepostojanje hijerarhije elemenata strukture) već na poretku socijalne integracije…Pravni sistem utemeljeni na doktrini individualizma zasnivaju odnos među ljudima putem načela pravne subordinacije (javno pravo) i putem načela pravne koordinacije (privatno pravo). Socijalni teoretičari države i prava istakli su da to nijesu jedini mogući oblici odnosa među ljudima, već da se oni mogu osim na koordinaciji i subordinaciji, zasnivati i na poretku integracije (socijalne veze).

[97] As a term, it is sometimes rendered in Polish as *promisoryjne ograniczenie* or *estoppel przyrzeczenia* and in Finnish as *lupaus estoppel*. Meanwhile, the question could be asked what such translational neologisms actually mean in the legal language. Which requirements would have to be fulfilled to perceive such neologisms as equivalent in the legal language ? (cf. also Halberda (2014) about *klauzula nadużycia prawa* as the Polish equivalent to *promissory estoppel*). The comparative approach in translation produces terms, which may not be fully equi-

Vertragsverletzung. They could have expressed the content of concepts such as the above named much clearer, as they did for instance when they introduced the German term *gefahrgeneigte Arbeit* or *first lady* referring to the wife of the country's President (in Polish *pierwsza dama*), yet they did not. Legal discourse that unites language and power expresses this power linguistically on different levels that represent its normative and axiological components. Its specific feature is the emergence of interpretive and argumentative practices that create meaning in legal texts from subjective, interest-dependant perspectives.[98]

Some legal constructs have reached particular importance: *state* as distinct from *citizenry*, *crime* as isolated from its social background and *contract* as a utopian place where the minds of the parties used to meet. *Civil society* – a term with an unclear legal status – is contrasted with *state*. Equally, *war*, even *cold war* is the domain of states. The corresponding *cold peace* is not a legal notion, yet it accompanies discourses about law (cf. Blumenberg 1968). *State* may be defined differently, e.g. by religionist rebels who insist upon the sovereignty of the divine and therefore do not accept the definition of *state* coined in the aftermath of the Peace of Westphalia (cf. Fazal 2018). *Global governance* is one more such unclear notional coinage. In literature, George Orwell might have been the first author to have used the term '*cold war'*. He wrote in his essay *You and the Atom Bomb* in Tribune (October 19, 1945):

> We may be heading not for the general breakdown but for an epoch as horribly stable as the slave empires of antiquity. James Burnham's theory has been much discussed, but few people have yet considered its ideological implications – this is, the kind of world-view, the kind of beliefs, and the social structure that would probably prevail in a State which was at once unconquerable and in permanent state of 'cold war' with its neighbours.

Linguistic creation as such is banal; the embeddedness in broader argumentative structures is, as a matter of fact, the very intellectual effort needed to establish a concept philosophically. In procedures where absent persons have to be declared dead one can coin the Russian terms безвестное отсутстве or *объявлеие умершим*. The images invoked by the coinages are different yet not their conceptual content.

Discursive communication relies upon speech acts that steer it and determine its status, for instance as reflecting a legal discourse. Contemporary professional legal discourse is in the focus of researchers as their frame of reference cannot work without terminology. The non-professional legal discourse displays in one way or another legal terminology, even if it is used rather selectively. Legal terminology

vallent, yet its advantage is that the used terms exist in the concerned legal systems and are meaningful.

98 M. T. Lizisowa (2016: 491) wrote about this particular feature of the legal discourse: "Pojęciowa konstrukcja prawa jest zatem wartościowana subiektywnie…Autorzy tekstów ocennych odczytują niezamierzoną subiektywność ustawodawcy z pozycji danej grupy odbiorców…"

undergoes in the non-professional discourse semantic variations that are frequently idiosyncratic. Systematically, however, laypersons tend either to narrow or to broaden the meaning of legal terms that they use. Meanwhile, it is understood that many non-jurists use legal terminology in a way that is typical of jurists. Educated laypersons can learn easily legal terms; the problematic area in law for this group of speakers and for other laypersons is the legal genre as it seems to constitute an obstacle to easy acquisition of legal knowledge. Non-professionals will often have problems with the understanding of the way in which jurists use to draft and read statutory provisions in their systematic interdependence. Persons without legal education will be exposed in such situations to problems with the understanding of legal provisions, as they, as a rule, will focus exclusively upon one provision that narratively seems to them to provide the solution to their case. They will, however, frequently miss the point as the statutory provision in question has to be read in connection with other related provisions which, when read together, may fundamentally alter the meaning of the provision that was initially identified by the layperson as relevant.

Political discourse about law uncovers methodological problems of legal linguistics. In the recent debate within French governmental structures, a controversy opposed the Minister of Interior and the Minister of Justice concerning the existence of the 'right to blasphemy' in the French law. The background to this controversy was an internet video posted in January 2020 by a teenage girl in which she criticized Islam in vulgar terms. In the controversy, the Minister of Justice argued that there was a 'right to blasphemy' ('droit au blasphème') in the French law, which would guarantee unlimited criticism of religion, while the Minister of Justice denied the existence of such right. Actually, the French law does not mention the 'right to blasphemy' in any of the existing statutory texts. However, it does not include any provisions, which would prohibit blasphemy, either. In addition, French court decisions do not include precedents concerning sanctions for blasphemy. Moreover, in the case of the adolescent concerned, the public prosecutor office stopped investigations against her that were originally based on the charge of 'instigating racial hatred' (in French 'provocation à la haine raciale'). The ontological question, which is fundamental to legal-linguistic methodology, might be solved by reference to the concept of the 'right to blasphemy' that doubtless exists linguistically, especially when opposed to the term 'right to blasphemy' that has no existence in French legal texts. Meanwhile, the French legal doctrine does not know the concept 'right to blasphemy' that exists solely in the general social and political discourse. Within this discourse, which also makes part of the broader, non-professional legal discourse, the 'right to blasphemy' emerges in discursive (i.e. argumentative) practices, where it acquires meaning. Therefore, the 'droit au blasphème' makes part of the French legal discourse and of the French law. Law, after all, is a discursive practice. It is not a collection of concepts and terms, and it relies on the use of language within multiple legal-lin-

guistic operations, where concepts, terms, and other legal constructs emerge, and where they acquire meaning.[99]

The following terminological study of *contract* in epistemic and diachronic perspective may clarify some of the above problems. The term 'contract' emerged as an abstraction of multiple linguistic exchanges of the parties in negotiations. Particularly, the sale contract became central in the area of private law. In the terminological research, comparative approaches are particularly widespread because *sale contract* is present in all known legal systems. The ancient Romans labelled the sale contract *emptio venditio*, i.e. sale purchase. The reason for this terminological intricacy had been the logical structure of the contract that for one party constitutes sale and for the other purchase. From the sale contract obligations for both parties emerge, it is synallagmatic. The ancient Romans and later many other jurists coined terms that reflect this structural feature, for instance the French in *achat vente* or the Polish in *umowa kupna sprzedaży*. Art. 535 (I) of the Polish civil code speaks about the *sale/sprzedaż*.[100] It follows the terminological pattern that is rooted in the logical analysis of the structure of the sale contract. The Spanish law deals with *compraventa*, named in the Código civil *contrato de compra y venta* or simply *contrato de venta*. It distinguishes also the capacity to buy or to sell, *capacidad para comprar o vender* (cf. art 1457-1459).[101] The resolution of the contract concerns terminologically the sale.[102] Other laws and legal languages, for instance English in *sale contract*, German in *Kaufvertrag,* and Finnish *kauppasopimus* abandoned the traditional terminological distinction, although all laws of these countries strictly maintained the traditional logical and conceptual structure of the legal institute (cf. 433 BGB).[103] The synallagmatic nature of the contract is

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[99] T. V. Dubrovskaya et al. (2017: 44) wrote about the methodology of studying concepts in relation to terms with reference to the work by V. I. Karasik: "…для категории концепта и его анализа все-таки важна роль имени…Иными словами, лексическая единица обозначающая концепт рассматривается в разных ракурсах: осуществляется её дефинирование, анализ дефиниции в контексте, етимологический и паремиологический анализ, проводится опрос. Такой подход актуален и достаточен если речь идет об общекультурном концепте. Но, как мы полагаем, можно вести речь также о концептах формируемых и существующих в рамках отдельных дискурсивных практик, например внешнеполитических, и в том случае необходимо обращене к самим практикам."

[100] Cf. Art. 535 (I) Przez umowę sprzedaży sprzedawca zobowiązuje się przenieść na kupującego własność rzeczy i wydać mu rzecz, a kupujący zobowiązuje się rzecz odebrać i zapłacić sprzedawcy cenę.

[101] Cf. Art. 1445 cc Por el contrato de compra y venta uno de los contractantes se oblige a entregar una cosa determinada y el otro a pagar por ella un precio cierto, en dinero o signo que lo represente.

[102] Cf. Art. 1506 cc La venta se resuelve por las mismas causas que todas las obligationes, y además por las expresadas en los capítulos anteriores, y por el retracto convencional o por el legal.

[103] Cf. Art. 433 Vertragstypische Pflichten beim Kaufvertrag. (1) Durch den Kaufvertrag wird der Verkäufer einer Sache verpflichtet, dem Käufer die Sache zu übergeben und das Eigentum an der Sache zu verschaffen. Der Verkäufer hat dem Käufer die Sache frei von Sach- und Recht-

marked graphically in Art. 433 BGB in that the article is split in two paragraphs (1) and (2). Yet, the linearity of the linguistic utterance sets limits to the full display of the logical structure of the synallagmatic contract that produces rights and obligations simultaneously for both parties and where the obligation of one party is the right of the other and vice versa. At this point, language cannot provide more. This finding concerns whatever language, not only the German linguistic sample. At this point, the comparative analysis enables the understanding of the difference between conceptualization in law and its terminological counterpart.

The above terminological study helps us to discover and to address methodically the problem between the legal concept and its linguistic counterpart, the term. It seems that only the conceptualization is a problem, terming follows suit. Philosophically, behind every use of a word there is a concept (cf. Nagel 1986). To imagine a contract requires an effort, to term the imagined relation of rights and obligations *contract* or the like is less challenging. The ancient Romans initially imagined the contract that they did not name with such a term but called it a ball of woolen threads (*vinculum*) where rights and obligations of parties are contracted. Conceptual rationalization liberates contemporary jurists and others from the task to imagine basic legal concepts such as *contract*, yet for their creation this sort of innovative imagination is indispensable.

The split between *concept* and *term* corresponds also to different sorts of knowledge that is involved in applying concepts and terms. There is a difference between my knowledge of IT technology that is limited to pure know how (for instance how to use basic functions of the Word program and an IT specialist's knowledge who is able to write the Word code). Terms are insofar the use of a ready program, but concepts require programming. To understand may mean to be able to use the remote control of a TV set and the knowledge of equations that state the physical fundamentals of the steering process based on electromagnetic waves. Levels of knowledge are different and different levels of knowledge are necessary to exercise a profession. At this place, one might compare the theoretical knowledge of medicine of a medical doctor and the specific level of medical knowledge of a nurse. Understanding what *promissory estoppel* means in the common law does not equal the knowledge how to translate it into Polish. The translator needs, classically, the explanation of the term and its equivalent term, or (in some approaches) the equivalent term. Both areas are complementary, not contradictory. Yet, full understanding of law is acquired only in the legal-linguistic perspective.

Legal terminology appears regularly in broader contexts. For instance, legal aspects pertaining to minority protection in the area of so called 'ethnic' or 'inter-ethnic' relations were counted among the most important issues in the International Law of the 80ties and the 90ties of the last century. Despite some progress achieved in the international institutions, which used to draft international legal

mängeln zu verschaffen. (2) Der Käufer is verpflichtet, dem Verkäufer den vereinbarten Kaufpreis zu zahlen und die gekaufte Sache abzunehmen.

instruments relating to minority protection and to monitor their implementation, the issue is still on the agenda of international organizations and research institutions.[104] In many parts of the world, conflicts and tensions linked to ethnic aspects persist and their possible solution in the framework of the international legal standards is still a subject of vivid debates. The Montenegrinian researcher, Ivana Jelić, traced the development of the protection instruments and the conceptualization of their most significant mechanisms (cf. Jelić 2004). Consequently, not only the terminology but also the emergence of the international system of protection is canvassed in her research and the first fundamental theoretical problem of minority rights as individual and/or as group rights is critically approached. The traditional approach to this problem distinguishes between the subjects and the objects of rights and the mechanisms of their legal protection.[105] The subject of rights may be an individual person or another legal entity like e.g. a group constituted along some federating features. As human rights, of which minority rights are a part, are mainly construed as individual rights, the conceptualization of group rights leads to theoretical and practical problems in the drafting and in the implementing of this sort of legislation. However, it is understood that many minority rights like most educational and cultural rights can be meaningfully exercised only in groups. This challenging problem will remain for the international legislator to be solved if hope for a modern minority protection should remain legal.

Next to the subject of minority rights, which remains problematic, their object is often shaped but not clarified. The obligations of states are often described in an ambiguous way e.g. the states 'should as far as possible' or 'under specific circumstances' guarantee a specific right. This problematic aspect is also reflected in the area of monitoring and protection of minority rights where blurred provisions lead to uncertainty in their interpretation and application. Moreover, the concept of *ethnic* or *national* minorities is analyzed as well in Jelić's research. As already the title of the book signals, the author is sceptical about the use of both concepts in the international instruments and rightly so. All too often the notions of *racial*, *national*, or *ethnic* minorities are used without the necessary distinction as to their subject matter and treated nearly as synonyms. The impressive work done until now by international scholars did not lead to the development of a generally recognized terminology, which would also pass the test in specialized disciplines like anthropology, ethnology, and political sciences. However, whilst a commitment to one of the known definitions of *minority* may be avoided in a piece of research, the

[104] Sergei V. Sokolovskij (2004: 127-159) researched the evolution of Russian terms such as: *автохтоны*, *коренные народы*, *туземцы*, *инородцы*, and *иноверцы* in Russian legal acts that constitute the professional legal discourse about interethnic relations in Russia.

[105] I. Jelić (2004: 21) writes: "Dakle, zavladao je novi pristup u odnosu na manjinsko pitanje – zaštita prava pripadnika manjina, a ne manjinskih grupa." This problem has a discursive dimension: "Međutim, ukoliko govorimo o pripadništvu pojedinaca određenoj grupi, treba imati u vidu da ono ne zavisi samo od samoidentifikovanja onih koji se osjećaju pripadnicima odnosne manjine, već i da budu prihvaćeni od te grupe."

practice of international law still needs a workable definition of those controversial concepts when applying international instruments to cases. Only a substantial change in the structure and conceptualization of international instruments might bring the final solution to the long-standing debate about the right concepts and their workable contents.

Ivana Jelić described the content of the most important minority rights along interpretations provided by international bodies. She also remarked that minority rights are often cultural rights and concern the cultural rather then the *ethnic* or *national* identity. Rights concerning education in minority languages or the use of these languages in the public sphere could be easier dealt with when cultural needs would be focused on. Instead, in many cases the political mobilization of minorities around very unclear and sometimes obscure notions of *ethnicity* or *race* is instrumentalized by political structures. It would be therefore interesting to ask whether the concept of *minority rights* could be in future, maybe only partly, replaced by the concept of *cultural rights*, which primarily concern the identification of an individual with a specific culture. This approach would not only help to overcome the cumbersome issue of assigning these rights to *ethnic* or *national* minorities but also help to redefine the concept of *group* or *individual rights*. Undeniably, rights to political participation in issues concerning state and society make also a part of this area of human rights but they could be successfully addressed within the anti-discrimination legislation as well.

The analysis of the domestic legislation on minority protection in Southern Europe provided by Jelić shows at least one additional interesting feature. Namely, the tendency in the domestic legislation to follow international standards of minority protection becomes apparent as a structural characteristic of this type of legislation. On the one side, this fact is encouraging as the harmonisation of domestic legislation with international standards can help avoid ethnic tensions as it shows the domestic legislators concern for the human rights standards and guarantees the equal treatment in international comparison, even if sometimes the level of protection can be perceived as insufficient. On the other side, however, it does not provide any innovative structures and concepts and abandons the conceptual field of drafting legal instruments to international organizations in the hope that they might provide new and more effective ways for the minority protection. Broader discursive analyses of legal terminology within texts provide more information about the subject law. Thus, the methodological approach to legal terminology should be dynamic and focus on semantic developments rather than on the doctrinal status quo.

Diachronic aspects of terminology formation

History and concepts – Constructions and concepts – Obsolete concepts

Legal terminology is a stable element of the legal language. Paradoxically, it is so stable that it could be criticized for being too stable. Legal terms, once coined by jurists, have the tendency to remain in the legal language for ever. They cause problems in the understanding of legal texts due to their long-living nature. Frequently also concepts that underly their emergence are not functional any more. Yet terms resist, apparently due to the wish of jurists, any modification. For instance, the terminology of the U.S. real property law, e.g. *fee simple absolute*, reflects the conceptual world of the feudal England, where the King, as *Lord Paramount*, who owned the land by the right of conquest, distributed property to his barons.[106] This use of the term *fee simple absolute*[107] and of many others did not have much sense after the creation of the United States, yet they remain in use until today, like *counties* that have no right of existence in a republic. Conceptualization is a demanding intellectual task, terming concepts is rather easy and depends upon the fantasy of speakers. This circumstance may explain why legal terms survive historical evolution of institutions in which they were coined centuries ago.

A fascinating feature of the research into legal terminology is the possibility to compare legal constructs that belong to other epochs with ours. Diachronically, *sale contracts* are not necessarily composed of an *offer* and a corresponding *acceptance* as main structuring elements. The Babylonian sale contract is construed differently (cf. Galdia 2017a: 439). An ancient sale contract says:

> Sini-Ushtar has bought a slave, Ea-tapi by name, from Ilu-elatti, and Akhia, his son, and has paid ten shekels of silver, the price agreed. Ilu-elati, and Akhia, his son, will not set up a future claim on the slave. In the presence of Ilu-iqisha, son of Likua; in the presence of Ilu-iqisha, son of Immeru; in the presence of Likulu-bishtum, son of Appa, the scribe, who sealed it with the seal of the witnesses. The tenth of Kisilimu, the year when Rim-Sin, the king, overcame the hostile enemies.

[106] Coke, L.C.J. is regularly quoted in this context: "The King, the Sovereign Lord, or lord paramount, either mediate or immediate of every parcel of land within the realm."

[107] An estate in *fee simple absolute* is a property right, the complete ownership of land. *Fee* means that it can be inherited, it is *simple* because it is not a *fee tail*, i.e. limited to certain descendants and can pass to general heirs of the grantee, it is *absolute* because it is not subject to conditions, and it is *in possession* because the grantee is entitled to the immediate possession of the estate. Etymologically, fee comes from the French *fief*, unlike the *fee* paid to someone, which is of Germanic origin and derives from the common Germanic like the contemporary German *Vieh* (cattle). The origin of the word goes back to times when cattle was used as a means of payment. Methodically, the inquiry into the etymological background of legal terms represents history of the English language rather than legal linguistics, yet it is relevant to the research into the understandability of legal terms that is linked to the methods of efficient terming (cf. Mattila 2017: 184-188).

(in: George Aaron Barton, "Contracts," in: *Assyrian and Babylonian Literature*: *Selected Transactions*, With a Critical Introduction by Robert Francis Harper (New York: D. Appleton & Company, 1904: 256) quoted after Ancient History Sourcebook: A Collection of Contracts from Mesopotamia, c. 2300-428 BCE; www.fordham.edu)

The text enables to distinguish purely linguistic and legal-technical mechanisms of law in interaction. It identifies the legally relevant action S-I bought x and establishes a legal mechanism to guarantee the property of the new owner by the seller's guarantee not to claim the slave back. To ensure the enforcement of the guarantee the written form of the contract is chosen and the presence of witnesses is assured. Unlike in modern contracts, all actions undertaken are reflected or commented upon; e.g. ten shekels of silver is commented as the price agreed and fixed in writing. The seal is not only put on the document, the action of putting the seal is also mentioned in it. This procedure of reference to action seems to be characteristic of early periods of meaning constitution in law where everything must be explained because law is only emerging. As falsification of written contracts was frequent in Babylonia, sophisticated devices were imagined to counteract it.[108] As wood was scarce in Babylonia, in contracts about real property all objects that were partly or wholly constructed of wood were listed separately as particularly valuable (cf. Klengel 1991: 30). Our short commentary is obviously influenced by the English translation of the original Babylonian text, its presumably anachronistic language, spelling etc. The legal linguist should never work with translations alone. Professional methodological standards oblige the researcher to consult the linguistic sources that he comments. I take here the risk of linguistic misconception in order to show that textual forms such as contracts are deeply rooted in the history of linguistic conceptualization. Furthermore, in terms of comparison, one may also recall Hesiod who says in his *Works and Days* (II. 370-372): "Let the wage promised to a friend be fixed; …and get a witness; for trust and mistrust, alike ruin the man." In *The Iliad*, which displays more ancient sources, testimony is still pathetic. Agamemnon says in book XIX 249-265: "I call Jove the first and mightiest of all gods to witness, I call also Earth and Sun and the Erinyes who dwell below and take vengeance on him who shall swear falsely…" Contract law seems to be immunized against such a lofty wording. Meanwhile, the above texts teach a lesson on legal conceptualization, which could be perceived as a mirror image of legal terming. Also in ancient Chinese texts, conceptualization that differs from the Greco-Roman tradition can be traced. Lionel Giles (1910: xlv) quotes from Tu Mu's preface to his commentary of Sun Zi's 孫子兵法 (*Bing Fa*):

[108] Horst Klengel (1991: 18) wrote about such technical procedures: "Oft steckten diese Urkunden noch in einer tönernen Umhüllung, auf der der gleiche Text noch einmal zu lesen ist. Die Innentafel wurde dadurch vor Verfälschungen geschützt; im Zweifels- oder Streitfalle konnte man die Hülle aufbrechen und den Text der Innentafel zu Rate ziehen."

> War may be defined as punishment, which is one of the functions of government… Nowadays, the holding of trials and hearing of litigation, the imprisonment of offenders and their execution by flogging in the market-place, are all done by officials. The objects of the rack and of military weapons are essentially the same. There is no intrinsic difference between the punishment of flogging and cutting off heads in war. For the lesser infractions of law, which are easily dealt with, only a small amount of force need be employed: hence the institution of torture and flogging. For more serious outbreaks of lawlessness, which are hard to suppress, a greater amount of force is necessary: hence the use of military weapons and wholesale decapitation. In both cases, however, the end in view is to get rid of wicked people, and to give comfort and relief to the good.

Another classic example comes from the ancient Japanese law. The Japanese Seventeen-Article Constitution (十七条憲法 *Jūshichijō Kenpō*) from 604 is perceived by historians of law as one of the oldest constitutions in the world (cf. Steenstrup 1996). For legal linguists, the first methodological issue in the approach to this historical text is its quality as 'constitution'. The text type 'constitution' has, at least since some two hundred years, certain structural specifics that are less clearly displayed in *Jūshichijō Kenpō*. Meanwhile, the Japanese text deals with the organization of the state, not in our, but in the perspective of its time. Its Article 3 says, in the original written exclusively with Chinese signs: 三曰。承ㇾ詔必謹。君則天ㇾ之。臣則地ㇾ之。天覆臣載。四時順行。萬氣得ㇾ通。地欲ㇾ覆ㇾ天。則致ㇾ壞耳。是以君言臣承。上行下效。故承ㇾ詔必愼。不ㇾ謹自敗。In the English translation by W. G. Aston, Article 3 says: "When you receive the Imperial commands, fail not scrupulously to obey them. The lord is Heaven, the vassal is Earth. Heaven overspreads, and Earth upbears. When this is so, the four seasons follow their due course, and the powers of Nature obtain their efficacy. If the Earth attempted to overspread, Heaven would simply fall in ruin. Therefore is it that when the lord speaks, the vassal listens; when the superior acts, the inferior yields compliance. Consequently, when you receive the Imperial commands, fail not to carry them out scrupulously. Let there be a want of care in the matter, and ruin is the natural consequence." An analogous problem is present in the discussion about the *Hammurabi Code* whose quality as a code has been regularly questioned in the research (cf. Galdia 2017a: 440).

Meanwhile, some traditional legal concepts such as 'race' appear nowadays obsolete. Previously, in many areas of knowledge and in legislation the term was used unproblematically. Today, social sciences distance themselves from this term mainly because epistemologically it lacks any distinctive quality and therefore has no function in social research. For instance, the French Constitution of 1958 says: "*La France [...] assure l'égalité devant la loi de tous les citoyens sans distinction d'origine, de race ou de religion.*" The French President F. Hollande promised to abolish the term in the French legislation saying*:* "*Il n'y a pas de place dans la République pour la race.*" The new draft of the Article says: "La France *assure*

l'égalité devant la loi de tous les citoyens sans distinction de sexe, d'origine ou de religion", instead of "*sans distinction d'origine, de race ou de religion*". Meanwhile, the term 'race' remains unchanged in the preambula of the 1946 Constitution, as it is perceived as a historical text: "[…] le peuple français proclame à nouveau que tout être humain, sans distinction de *race*, de religion ni de croyance, possède des droits inaliénables et sacrés" and in "La France forme avec les peuples d'outre-mer une Union fondée sur l'égalité des droits et des devoirs, sans distinction de *race* ni de religion". (emphasis added)

Extra-legal emergence of legal constructs

Law in literature – Linguistic creation as conceptualization and terming – Earnest and ironical attempts to deal with legal terms

Legal constructs emerge also extra-legally, for instance in literature.[109] In a novel, *L'École du Sud* by Dominique Fernandez (Paris: Graset, 1991), which is otherwise overcharged with details and ambiguous as to its ethical commitments, one can find an anecdotic example of a 'fluid contract' (pp. 15-17). The protagonist of the novel returns after forty years of absence to his native town in Sicily. While passing by a monastery, he decides to buy there some pastry as he used to do in his childhood. He knocks at the door, a nun opens and he demands two hundred grams of patelle. The nun is perturbed and seems not to understand him. He realizes his mistake; his demand is too explicit. Instead, it would be more appropriate to say (as I imagine): 'I will have a couple of friends for tea this afternoon. Could I get some patelle.' The nun would then bring some pastries and indicate a price according to the circumstances and the assumed financial possibilities of the buyer. However, in the scene described by Fernandez the nun overcomes her initial embarrassment as the numerical system has been adopted even in her monastery during the forty years of the protagonist's absence from home. Meanwhile, her idea of a magnitude such as two hundred grams is at best approximate. She brings a package weighing some two kilos, maybe more. The hilarious exchange described in the novel contrasts the sale contract of the law with a procedure of free exchange inspired by the heavens ("libre échange inspiré du ciel"). Traditionally, patelle, coriandoli, mantecati and the like were sold for centuries in a procedure of approximate and equitable exchange in the Sicilian

[109] B. S. Jackson (1985: 53) wrote about the relation of law to literature: "Law and literature are sometimes presented as standing at opposite poles of a spectrum – the one characterised by literalism and constraint, the other by imagery and creativity. If so, the attempt to apply a 'narrative model' to law would appear idiosyncratic…Literature too is subject to semiotic constraints, and at the deepest level these constraints are universal features of discourse – whether literary or legal."

monastery and not only there. Modern economical paradigms that dominate Western societies require other forms of exchange.

Another example is borrowed from Molière (1622-1673), who received a law degree in 1642. He used the intricacies of legal constructs in *Le Malade imaginaire* (1673). He wrote about the customs of Paris compared with the landscapes where the Roman law was applied: "Le notaire: …Si vous étiez en pays de droit écrit, cela se pourrait faire; mais à Paris et dans les pays coutumiers, […], c'est ce qui ne se peut, et la disposition serait nulle...Comment vous pouvait faire ? Vous pouvez choisir doucement un ami intime de votre femme, auquel vous donnerez en bonne forme par votre testament tout ce que vous pouvez ; et cet ami ensuite lui rendra tout." Argan, the hypochondriac, cannot directly donate all his goods to his second wife and by so doing disinherit his children. He is advised by the notary to circumvent the customs of Paris and to donate to a friend of his wife who will be obliged to pass the assets further to his wife. Later in the text, the medical doctor renders correctly the contractual obligation of a physician: "On n'est obligé qu'a traiter les gens dans les formes." And indeed, even today medical doctors are obliged to treat their patients according to the state of their art, not to heal them. The argumentative construct remains in force since centuries, yet already Molière was suspicious of it.

Another writer, the Russian classic Alexandr Pushkin, after having experienced interference with the secret of correspondence with his wife by the Russian postal services, claimed the necessity to introduce the *right to inviolability of the family* (*inviolabilité de la famille*). This right would protect against spying into family life, violating the secret of correspondence with family members and other relatives. Pushkin mentions the concept in Russian and adds to it its translation into French, apparently to avoid misunderstandings (cf. Letter dated 3 June 1834 in the vol. XV of his collected works). As a conceptual matrix, he apparently used the right of *inviolability of a person* (*inviolabilité de la personne*) from the European law. Violations of the secret of correspondence for political purposes were systematic in Imperial Russia, at least since Catharina II. As a practice, the control of correspondence was introduced by the director of the postal service, Ivan Pestel, the father of the Decembrist Pavel Pestel (1793 – hanged 13 July 1826) (cf. Lotman 1989: 278). Conceptually, Pushkin distinguished between political freedom (i.e. the right to criticize the government or the tax rate imposed upon citizens) and intellectual independence. He linked the *right to inviolability of family* directly to the *right to intellectual independence* as a natural right (cf. Lotman 1989: 280). It seems that the treaties on natural law by Aleksandr Kunytsin, Право Естественное (1818), which Pushkin studied at high school, formed the intellectual basis for this creation of the concept and for arguments that accompanied the very act of linguistic creation (cf. Hollingsworth 1964: 115, Lotman 1989: 27).

Some philologists pretended that Walt Whitman's *Leaves of Grass* is the best U.S. Constitution ever written. Walt Whitman treated law and justice in the first

edition of his *Leaves of Grass* (1855) in the style of poetic affirmation that he developed as based on a patriotic undercurrent in the cycle *Great are the Myths*: "Great is the law…Great are the old few landmarks of the law…they are the same in all times and shall not be disturbed." Justice is describes in the same vein: "Great is Justice; Justice is not settled by legislators and law…it is in the soul, It cannot be varied by statutes any more than love or pride or the attraction of gravity can, It is immutable…it does not depend on majorities…majorities or what not come at last before the same passionless and exact tribunal. For justice are the grand natural lawyers and perfect judges…it is in their soul." Certain ideologies of the judicial apparatus in America are rooted in this affirmative view of law and justice that transcends people, which means that it finally cannot be controlled by them. Poets, after all, can also profoundly misunderstand society and Whitman's vision of law and justice is one of numerous examples of such misconceptions.

Some concepts are purely linguistic. When J. Joyce in *Ulysses* (1922) speaks about *menial molestors of domestic conviviality* and *recalcitrant violators of domestic connubiality*, when in *Finnegan's Wake* (1939) he invokes the *constitution of the constitutionable as constitutional,* he is simply playing with words. Conceptual creation in law is of different nature. Illustrative of such procedure is a broader textual sample, borrowed from James Joyce's *Ulysses,* where the named concepts appear in their fuller textual surroundings that are all but fundamental in terms of conceptual creation:

> Loyal to the highest constituted power in the land, actuated by an innate love of rectitude his aims would be the strict maintenance of public order, the repression of many abuses though not of all simultaneously (every measure of reform or retrenchment being a preliminary solution to be contained by fluxion in the final solution), the upholding of the letter of the law (common, statute and law merchant) against all traversers in covin and trespassers acting in contravention of bylaws and regulations, all resuscitators (by trespass and petty larceny of kindlings) of venville rights, obsolete by desuetude, all orotund instigators of international persecution, all perpetrators of international animosities, all menial molestors of domestic conviviality, all recalcitrant violators of domestic connubiality.

The reason for this legal-linguistic textual regularity is that the creation is purely linguistic, and even if broader semantic reference is supplied to it, the conceptual creation remains purely linguistic and its meaning is literary, not literal. This means that beyond literature it has no meaning. Linguistic creation as such is banal; the embeddedness in broader argumentative structures is in fact the very intellectual effort needed to establish a concept philosophically.

Finally, in an ironical context, the British writer Ben Schott listed terms specific to *homicide*. In the French version of his book they appear to be: *homicide*, *génocide*, *suicide*, *altruicide*, *parricide*, *matricide*, *fratricide*, *sororicide*, *infanticide*, *uxoricide*, *encise*, *tyrannicide*, *vaticide*, and *déicide* (cf. B. Schott, *Les Miscellanées*

de Mr. Schott, 2006, Paris: Allia, p. 26). Such a literary listing of terms that form a sematic field remains philology or lexicology. Notwithstanding its general interest, the list of terms does not belong to legal linguistics, yet it can be used by a legal linguist. All above term formation is fun, yet it shows that terming is not particularly demanding as a legal-linguistic operation. 'Féminicide' is a serious terminological creation in law, while some of the terms or pseudo-terms listed by B. Schott exist only for pastime purposes. This occurrence demonstrates once again that terming is an undemanding and ethically ambiguous activity. Terms can emerge easily in many social contexts because the social discourse is multi-layered and admits earnest speech and also infinite jest. The quality of times determines which discursive role a term actually plays in social interaction. Conceptualisation of terms takes place within discursive mechanisms where time and social formation play a decisive role. This circumstance explains, for instance, the paradoxical communicative situation where 'old Communist' could be perceived as distinction or as defamation or outright offence simultaneously in two different social formations or in historical sequence within one social formation. Also 'féminicide' is practiced since times immemorial, yet only recently it gained momentum in the Occidental non-professional legal discourse.

Investigating particular legal languages – Chinese legal language

Research into particular languages – Specific features of legal Chinese – Ubiquitous legal language – Semiotic approach to the fundamentals of legal Chinese

In terms of method, research into a particular legal language may appear easier than a comparative study. Meanwhile, there is no general method of description for all legal languages as the description depends also on some characteristic features or developments that concern the described language. For instance, in the description of legal Greek, the historical controversy about the use of katarevsa or dimotiki deserves special attention of researchers, while there is no such problem in the description of the legal Polish. Therefore, a uniform approach to the description of particular legal languages may prove counterproductive and sterile. In comparative linguistics, descriptive approaches are generalized, yet their application comes at a price. Particular legal languages such as legal English or legal Chinese can be researched both in monolingual and in comparative perspective. In fact, great legal languages have been researched in both perspectives and both research perspectives have contributed valuable results. Meanwhile, research into legal Chinese is less known than research into legal English. Therefore, in the following paragraphs, some of its methodically decisive findings and problems will be mentioned. Deborah Cao (2004) argued that legal Chinese is much less complex than is legal English. Chinese may own this particularity to its character as a means of general

education (cf. Cao 2004: 45) and it may also have some inherent reasons grounded in the development of the Chinese literary language in the 20th century. The legal Chinese language is simple, yet texts drafted with its help are often semantically broad and indeterminate. Not unexpectedly, their semantic indeterminacy is remedied through reference to social and political contexts (cf. Keller 1994: 750, Cao 2004: 45). In this context, R. Peerenboom (2002) provocatively asked whether the Chinese legal language exists at all. Methodically, this question is a challenge as in some approaches the legal language is perceived as a global phenomenon, notwithstanding regional cultural particularities. In my perspective, there is no doubt about the existence of legal Chinese as legal language because my conception is determined by the use of language as a means of communication in legally relevant contexts. In this sense, legal Chinese definitely exists. It also displays some characteristic features that in the comparative legal-linguistic microperspective could be perceived as particular.

Central to the modern systematic research into the Chinese language of law has been the semiotic approach developed by Deborah Cao (2004, 2018). Cao focused on contemporary language of law toward the background of cultural and social values coined and inherited by the Chinese during their particularly long period of uninterrupted and traceable development as state and as society. The first innovation introduced by Cao is the interest in meaning and interpretation as dominating features of law. Classical interests in the philosophical analysis of Chinese legal concepts, although not really abandoned, appear in Cao's approach in another light. Second, Cao made regularly use of the comparative perspective when investigating the Chinese legal language. She found out that legal Chinese, when compared with legal English, appears as ordinary and plain (cf. Cao 2004: vii). She stressed however that the lack of complexity in linguistic utterances does not necessarily make them easy to apply. This finding is also in accordance with pragmatic approaches to the legal language where legal-linguistic operations such as interpretation are perceived as structural constants of law that cannot be overcome with linguistic plainness (cf. Galdia 2014). Cao discovered in this context the imprecision of the Chinese legal language that causes more interpretive problems than many complex formulations in English legalese. Other researchers when speaking about legal Russian (cf. Pigolkin 1990) or legal language in general (cf. Galdia 2009) stressed explicitness of legal message as the textual mechanism that reduces imprecision and also paves the way toward a more reliable interpretation of the statutory language. Third, Cao stressed communicative and discursive aspects of the use of language in law, also in the diachronic perspective that looks at classics of the Chinese legal doctrine (cf. Cao 2004: 20-34). Cao's research into the Chinese legal language is the first serious step toward the establishing of legal sinology postulated already by Jean Escarra (1936).

Concept of law in Chinese legal culture

Chinese concept of law – Script and law – Classics on law – Legal codes

Parts of Chinese and foreign legal-linguistic research are dominated by the analysis of the Chinese concept of law. In this context, D. Cao (2004: 15) rightly referred to Clarke (1996) who criticized this interest in the analysis of the isolated concept of *fǎ* (法) without connection to the entirety of the Chinese law, i.e. without discovering potential consequences of such philosophical analyses for the development of the Chinese law. Additionally, strong interest has been shown in the interpretation of the Chinese script as basis for a better understanding of Chinese legal concepts. This approach, however, may put the process of reconstruction of ancient Chinese law into jeopardy as it regularly over-interprets the signs in the sense of essentialist claims. The sign *lǐ* (理, law, rationality, truth) has the sign *wáng* (王, king) as radical. It would however be premature to interpret *lǐ* as law set by the king. Also in Chinese *héli* (合理composed of *hé* – be in line and *lǐ* – (natural) law, meaning 'reasonable') corresponds with *héfǎ* (合法composed of *hé* – be in line and *fǎ* – (juridical) law, meaning 'legal' (cf. Timoteo 2014: 98, Timoteo 2010, Kozanecka 2018). Furthermore, one of the three signs of *guó* (国, country) might be interpreted as displaying the ruler (王) surrounded by borders of his territory that set limits to his exercise of power. One could even see in this sign the source of inspiration or reflection on the concept of sovereignty. Yet, such interpretation may also overstretch the epistemological potential of the sign (cf. Cao 2004: 33, 42, 107). In fact, inner systemic motivation for the construction of a Chinese sign will often be available, yet epistemologically such motivation has its limits as it is based on associative rather than analytic methods.

Already the classical Chinese philosophy recognized the power of legal language (cf. Cao 2004: vii). The legists stressed that clear and precise laws protect the citizens against the abuse of power by the dominant class (cf. Pinto 1998: 13). Confucian classics dealt with philosophy of law and ethics, mainly in the form of codes of conduct, rather than with law in the stricter sense of the word. Especially Confucius's *Analects* (論語) include thoughts, which were fundamental to the shaping of the ideology of the imperial Chinese state. Meanwhile also minor Confucian treaties such as *Xiao Jing* (孝經, Treatise on Filial Piety) contribute profoundly to the elucidation of basic concepts of the classical Chinese law. The very term of 'filial piety' is less interesting in its application to family structures than to more complex social structures. Filial piety is an inspiring sentiment that regulates all societal action (cf. Maspero 1950), especially the obedience to authorities. Some questions that are fundamental to law such as why someone should obey someone else or why can someone by perceived as sovereign in a country are analyzed in *Xiao Jing* with unique exactness of arguments. Also the element

of stability is instrumentalized in many classical texts. The element of stability is central to the Chinese party-state even today (cf. Liebman 2014).

Legal historians stressed the orientation toward penal law in the Chinese codes that cover only a part of issues usually regulated in the legislation that more or less closely followed the Roman legal tradition. Pre-imperial and imperial Chinese law can be therefore characterized as deficient in theory. Interest in it was oriented toward studying, i.e. interpreting the existing codes. The scholarly discipline dealing with this task was called *l*üxue / 律学 (cf. Cao 2004: 4). Later, the legalists added thoughts about the efficiency of provisions, mainly in penal law, which stabilize the social order. It seems therefore that in China there has not been any 'Roman law' of its own to which future generations could look for guidance and epistemological clarification. This circumstance explains, at least partly, the readiness to incorporate Western law into the Chinese legal-cultural landscape. Later, Marxist and Maoist ideology contributed to the understanding of law as a regulative mechanism in society. The traditional conceptions are still relevant to the understanding of the contemporary Chinese law that may be rooted in the century old Confucian thinking, although it displays its socialist roots more directly. Meanwhile, Confucianism, like the Roman law, is deeply rooted in legal reasoning. Also in the West, only a minority of jurists studies Roman law explicitly and thoroughly, yet Roman law is omnipresent in their thinking.

Classical Chinese law

Classical legal sources – Risks in anachronistic interpretation of the concept of law – Legal pluralism in the Chinese speaking landscape

Classical legal sources have been described by Hong Pimo in *Zhongguo gudai falü mingzhu tiyao* (Synopsis of Classical Works on Law in Ancient China) (1999), by Zhang Boyuan in *Falü wenxian xue* (Documentary Study of Legal Writings) and in Guo Chengwei's *Synopsis of Major Works on Legal Studies in China and Overseas* (2000). D. Cao (2006: 1) also mentioned the translator's Yan Fu work on the conceptualization of Chinese and Western law. Yan Fu distinguished: *lǐ* (禮) – order in nature, things as they are and *fǎ* (法) for the human made and Western law. Thus, Western law can concern *li* (order of things), lǐ (rites), *fǎ* (human made law) or *zhi* (order) in relevant contexts. Researchers regularly stress that confession of crimes (*tanbai*) has been encouraged by the classical Chinese law (cf. Cao 2004: 17). For instance, Zhang Pei differentiated between deliberate and negligent acts and different degrees of conspiracy (cf. Wallacker 1986). Meanwhile, other legal systems were no less interested in confessions of criminals, notwithstanding the upcoming concept of the presumption of innocence. Some concepts, e.g. *qinqin xiangyin* (亲亲相隐, approximately *hiding crime of relatives* or *the kinship con-*

cealment institution), which is mentioned already in Confucius's *Analects* (論語), are original Chinese creations that cause difficulties in translation (cf. Li 2015: 181). Li Li listed eighteen different equivalents of *qinqin xiangyin* in English translations, *concealment of crime* is dominating in the attempts to render this terms in English. Cultural connotations are, as so often, nor transferred properly in purely conceptual creations.

Classical Chinese law has been perceived as embedded in the traditional textual heritage of the Chinese culture. Therefore, the examinations for future governmental officials and judges were based on the totality of classical texts, and especially on the interpretation of the classical literary canon rather than on analyses of texts perceived as explicitly legal. This view upon legal culture is however today as unproductive in China as it is in the rest of the world. In fact, the Chinese law develops today in splendid isolation from the textual heritage of its long-reaching culture.

In some contemporary outlines of the classical Chinese law, no difference is made between this conception and the law in force today. This led to the misunderstanding that the contemporary Chinese law is based on a different idea of law than Occidental law. It is like quoting Thomas of Aquino's reflections on law in his *Summa Theologica* for the characterization of modern European law. All legal systems are historically rooted in broad philosophical conceptions of law. Meanwhile, there is continuity as well as discontinuity in the development of conceptual fundamentals of legal systems. The Chinese law is not an exception to this rule.

Moreover, contemporary law of Mainland China, Hong Kong and Taiwan is not homogenous. There are, in fact, three different, linguistically interrelated legal systems on the territory dominated by the use of the Chinese language. Therefore, legal linguists speak about the pluricentric Chinese legal language.

Studying classics of Chinese legal science

Classics of Chinese law – Chinese jurists on the development of law – Legal codes

One of the fundamental sources for the understanding of the process in which legal Chinese emerged is the study of classical legal writings (cf. Caldwell 2018). The legalist Guan Zhong (dec. 645 BCE) is probably the author of *Guanzi* where *fǎ* (法) is construed as a central point of the structure of the state. Meanwhile, also the eclecticism of the text that includes elements of Confucianism (*lǐ*) and daoistic thought has been stressed in the research (cf. Rickett 1965). Meanwhile, Han Fei (ca. 280-233) is perceived as the most prominent representative and synthesizer of the legalistic thought. In his writings, known as *Han Feizi*, he focused on the already mentioned *fǎ* as central to the structure of the state. Confucian thought is construed as outdated in these writings, mostly due to the evolution of Chinese

state and society, while *fǎ* is favored. Shang Yang (ca. 390-338 BCE) in *Shangjun shu* expressed analogous thoughts. Shen Buhai (dec. 337 BCE) as a legalist also stressed formalism of law (*shu*). Li Kui (ca. 400 BCE) authored *Fajing* (Law Canon) that many scholars perceived as a prototype of Chinese law codes (cf. Pokora 1959). There, provisions concerning the protection of private property are particularly interesting as they were neglected in many codes that used to focus on penal law. Wang Anshi (1021-1086) as public official and reformer was responsible for introducing the examination in law for all candidates for public office in 1073. Sun Ci (1181-1249) authored the eldest known handbook on forensic medicine *Xiyuan jilun*, a compilation of defenses against accusations in penal proceedings (cf. Giles 1924). A special role played the jurist Bao Zheng (999-1062) whose person became known through numerous medieval dramas based on criminal cases (cf. Hayden 1978). He is also the protagonist of the Chalk circle that has been used as a motive by some authors, among them Bertold Brecht in his *Kreidekreis*. In an epoch closer to our time, Shen Jiaben (1840-1913) excelled especially in his *Lidai xingfa kao* (History of Chinese Penal law) in numerous legislative initiatives both in the area of private law and in penal law that are perceived by scholars as textual precedents of the Civil Law Code of 1929.

The first fully preserved law code *Lüshu* is known also as *Gu Tanglü shuyi*. This legal text is valuable as it illustrates the process of rationalization in drafting legal texts. *Gu Tanglü shuyi* has been modified several times. It is divided into two parts, the first part covering general provisions and the second dealing with special provisions. The code of the Sui dynasty of 583 comprises one third of the code of Northern Zhou (564) and the Liang dynasty of 503 (cf. Johnson 1979). All these codes build up on the model of the code of Cao Wei or the code of Jin (268) prefaced by Zhang Pei who provided valuable comments and definitions that facilitate our understanding of ancient codes.

In the tradition of the codes, *lü* refers to penal law, *ling* to statutes. Complementary provisions are called *ge* and rules concerning special areas of law are referred to as *shi*. Numerous *ling* has been preserved in the available texts; *ge* and *shi* are extant only in fragments.

Reception of foreign terminology

Influence of foreign terminology upon legal Chinese – Foreign origin of fundamental legal terms – Translation and terminology

Best researched in the Chinese legal linguistics is legal terminology. Chinese legal terminology is largely translated terminology (cf. Grzybek 2013: 19, Cao 2004: 169). Historically, such fundamental concepts as *falüxue* (法律學, jurisprudence) and *fazhexue* (法哲学, philosophy of law) had to be coined following Western

lexical patterns (cf. Cao 2004: 8). Even *quanli* (權利, right) and *faren* (法人, legal person) emerged following the same path of coinage. Further innovations are *xianfa* (宪法/憲法, constitution) and *faguan* (法官, judge). A term such as *minzu* (民族, nation) is a borrowing from Japanese that received its full meaning upon recourse to Stalin's definition of nation based on fundamental concepts such as territory, language, economy, mentality, stability, and permanence (cf. Chancel/Pielberg 2008: 187). Likewise, *junzi xieding* (君子谢丁), i.e. gentlemen's agreement, was borrowed from the common law. Wang (2012) stressed the importance of the German Civil Code for the development of the Chinese terminology of private law under the Qing dynasty at the beginning of the twentieth century. The draft of the Chinese Civil Code that has been developed in the process of the modernization of the Chinese law included new coined legal terminology that has been subsequently used in other Chinese legal acts. This terminology became fundamental to the future language of the Chinese private law. Hence, translation of legal terminology has been fundamental to the emergence of the modern Chinese terminology (cf. Cao 2004: 161-162).

Lexicological studies

Polysemy – Modal verbs – Phrasal compounds

Like in all other research into legal languages, also in China interest in legal terminology emerged gradually and is focused on particular issues. Some specific features, for instance, polysemy were identified as important in the Chinese legal lnguage due to limited number of signs in the written language (cf. Grzybek 2013: 52). Verbs such as *bixu* (必须) and *yingdang* (應當/应当) have been studied. In many studies, however, it is underestimated that the category of modality is not necessarily limited to verbs and that it may be expressed with other parts of speech or syntagmas.

A particularity of the Chinese language is the existence of phrasal compounds, idioms mainly composed of four signs (*cheng yu*, 成語/成语). They are also used in legal Chinese (cf. Grzybek 2013: 40). Their use in legal texts could be compared with the use of Latin formulae in other legal cultures. However, it is important to bear in mind, that the use of *cheng yu* is generalized in the Chinese spoken and written language and is therefore not a characteristic feature of the legal Chinese. Some legal terms of the classical times such as *shi e* (十惡,ten evils) referring to crimes that could not be pardoned and that used to be enumerated in the imperial codes survive today in the ordinary Chinese as metaphors with ethical connotation after the legal term has long disappeared from the Chinese law (cf. Cao 2004: 19).

In the terminological research into legal Chinese recent works by Ho-yan Chan (2014, 2015, 2017) gained particular importance. They focus upon the linguistic

harmonization and the legal pluralism in English-Chinese contracts, torts, and in company law. Ho-Yan Chan's, 《两岸三地合约法主要词汇》*Liang An San Di. Heyuefa Zhongyao Cihui*. *Key Terms in Contract Law of Hong Kong, Mainland China and Taiwan* deals with contract law terminology. It aims, as a first step in a more ambitious project that comprises the Chinese and the English legal languages in a comparative perspective, to identify and to clarify the fundamental legal terms that are relevant to translation of contracts from English into Chinese. The first volume on contract law terminology concerns basic terminology of contracts in a broader setting. It contrasts English common law terminology and its equivalents in the legal language of Hong Kong that is dominated by the common law tradition and the varieties of legal Chinese of Mainland China and Taiwan that lean more toward legal languages of Continental Europe, yet also include elements of traditional Chinese law, as is the case in Taiwan. This is also the reason why every main English language entry in the first part of Chan's handbook is contrasted with distinctively marked three terminological equivalents taken from Hong Kong, Mainland China and Taiwan legal terminology.

In its methodical approach, the work addresses one of the most important issues in legal Chinese studies that is the normalization of legal terminology. Existing legal dictionaries of the Chinese language abound in multiple material samples and terms without reference to their actual use by professionals. Users of such works may in fact be writing Chinese, yet not necessarily legal Chinese that may be their point of concern. This task is enormously complex as Chinese legal terminology is multiple and develops today at least in a two-fold perspective between civil law and common law. As the Chinese law embraces today three formally independent legal systems of Mainland China, Hong Kong and Taiwan, its language is as manifold as are these systems, yet also related legal systems like the one of Singapore (cf. Galdia 2014: 354). Work on the terminology of Chinese law is therefore a challenge, especially when it is undertaken in a contrastive perspective based on English legal terms (cf. Grzybek 2013: 17).

Methodically, Chan's work establishes the reference between the systems in that it approaches legal terms in two different parts. In the first part, a basic term in legal English is introduced and it is related to three Chinese equivalents of Hong Kong, Mainland China and Taiwan legal languages. For instance, 'contract' is rendered in Hong Kong terminology as *heyue* (合约), then for Mainland China as *hetong* （合同）and for Taiwan as *qiyue* (契约). In addition, broad textual quotations and references to common law case law and common law legal literature provide information about the meaning of the English legal term in the Chinese language. This mainly relates to Hong Kong terms that are based on the English legal system. Their functional equivalents and counterparts in the Mainland and Taiwan civil law systems are then explained and compared. This is an innovation particularly valuable to Chinese translators as terminological databases frequently provide the relevant legal information in the source language and not in the target language.

This method helps the translators who attempt to understand the common law, yet it underestimates their needs for contextually well founded linguistic knowledge in the target language (cf. Mattila 2013: 23). The contrary approach adopted in Chan's work fits perfectly such needs of professionals who have to acquire knowledge about law and about its linguistic representation in the target language.

Chan's work is called in Chinese 'cihui' (词汇), a glossary. Seen in its entirety, it presents common law and Chinese contract law from a language perspective. Methodologically, the work is clearly a progress in Chinese terminological research as it goes beyond the listing of legal terms out of context as is the case with most legal dictionaries. It introduces the English and the threefold Chinese legal terminology in their textual embeddedness in legal texts. These texts are identified for the common law as precedents and rendered in Chinese summary translations that include the most salient terms in English. This feature of the handbook is particularly helpful because it does not only refer the user to the legal and linguistic source of the English legal term. It also provides the Chinese text that the user – translator or student – badly needs in order to render the English text that is made understandable through textual explanation. Regularly, better understanding of legal texts can be achieved by reference to sources and it is done frequently in modern lexicographical on-line and off-line works. Meanwhile, the translation problem is not fully solved when comprehension is achieved because the translator needs next to his understanding of a concept also a term that represents language in law.

The two follower volumes in the series, 《兩岸三地侵權法主要詞彙》(*Liangan Sandi Qinquanfa Zhuyao Cihui*), *Key Terms in Tort Law of Hong Kong*, *Mainland China and Taiwan* (2015) and 《兩岸三地公司法主要詞彙》(*Liangan Sandi Gongsifa Zhuyao Cihui*), *Key Terms in Company Law of Hong Kong*, *Mainland China* and *Taiwan* (2017) are structured like the first book on contract terms around high frequency terminology called *key terms*. For torts, as for contracts, the task of key terms selection clarifies in the use of terms in the century-old legal doctrine. Meanwhile, for company law key terms are more difficult to identify, as borders of this area of law are less clearly determined. Company law may include aspects of corporate governance and corporate finance depending on the scope of the underlying legal doctrine. Chan adopts a broad and an integrative approach to the subject and delimits it by practical needs of translators rather than by doctrinal determinations and she includes also areas such as insolvency and corporate social responsibility. Therefore, the volume on corporate law covers as key terms *company* yet also *listed issuer's obligations to disclose* (上市發行人披露責任). Methodically, and as in volume I on contract terminology, a key term in legal English is introduced and related to three Chinese language equivalent groups of Hong Kong, Mainland China and Taiwan also in volumes II and III. For instance, *tort* in volume II is rendered as a key English language term as *qinquan* (侵權) for all three groups, *negligence* as key term is rendered for Hong Kong as *shuhu* (疏忽) and for the two other groups as *guoshi* (過失). Main reference is made to

Hong Kong terms as they directly match the English common law terms being their absolute equivalents (cf. Chan 2015b: 336). After every key term, the English terminology relating to it is analyzed, described, and provided Chinese functional equivalents, again in three groups of Hong Kong, Mainland China, and Taiwan terms. For instance, *negligence* as key term constitutes a semantic field comprising *duty of care*, *causation*, *reasonable care*, *foreseeability, the thing speaks for itself*, *presumption or inference of negligence* or *due to a cause not involving negligence on his part* etc. At this point, the choice of terminology in broader contexts is steered by translation problems into Chinese and the method is very efficient in this respect. In the second part of every volume, English language legal terms are contrasted with corresponding Chinese language terms, again divided into three groups, for instance the English key term *third party* is rendered for Hong Kong as *disanfang* (第三方) and *disanzhe* (第三者), for Mainland China as *disanren* (第三人), and for Taiwan as *disanren* (第三人). After every entry, a quote from the respective legislation is provided as a lexicological basis for the existence of the term and a justification for its choice.

As mentioned, legal Chinese embraces a polycentric (i.e. pluricentric) terminology. Due to historically determined discontinued development in the Chinese language area, uniformity in legal terminology cannot be expected. Main centers of the development of the Chinese legal terminology are: Mainland China that is committed to the civil law tradition, Hong Kong that follows the common law, and Taiwan that regularly reflects Chinese legislation and its legal language as well as the language and legal acts of the first Chinese republic. Terminological pluricentrism may be treated in different ways. It can be taken for granted and be marked in specialized dictionaries accordingly. This is the case with legal German in German speaking countries and with legal English in the English speaking world (cf. Kubacki 2015). It may also be portrayed in isolation from other varieties as is the case with Hong Kong legal terminology in the dictionary prepared by Hong Kong jurists and lexicographers (cf. Chan et al. 2005). Meanwhile, pluricentric legal language may also give rise to attempts at uniformization. The first approach is linguistic, the other is the domain of legal linguists and legal comparatists who not only research but also shape the legal language.

For the purposes of legal linguistics, it is decisive to acknowledge that linguistic pluricentrism can encompass the standard language as well as the specialized language (cf. Galdia 1999, Kubacki 2014: 172). Chinese legal terminology definitely developed in at least three largely independent centers, if the development in Singapore is put aside. When the legal language as a language for special purposes is concerned, its pluricentric nature is made plain by all three works by Chan. Linguistic pluricentrism can be researched also in relation to lexicographic works (cf. Kubacki 2015: 33). The focus of the linguist is centered on the tasks of identifying terminological varieties and marking them appropriately in dictionaries. Yet, the legal-linguistic concern in this area may go further and this step is illustrated

in the works by Chan. Unlike the strictly linguistic approach, the legal-linguistic approach may comprise beyond codifying and quantifying terminology also aspects of linguistic policy. They encompass, yet are not limited to, creative measures and attempts at shaping a more uniform terminology. Streamlining terminology is one of such possible methods of uniformization. Special terminology always emerged toward the background of lexical diversity. When shaping the basic terminology of an area of law there will always be plenty of choices for instance between *company*, *corporation*, as well as the more general terms such as *enterprise* and *undertaking*. Terminology emerges in processes where choices are exercised to the benefit of certain terms, which also means that these choices are made to the disadvantage of other terms that are abandoned (cf. Grzybek/Fu 2017: 101-130). As Hong Kong law developed in a close relation to the English common law the English terminological tradition is stressed in it. For instance, the term *company* is listed in Chan's work as key term, but *corporation* (a term used predominantly in the US law) appears only in derivative forms such as *corporate finance* (vol. III: 214) or *corporate governance* (vol. III: 215). In the Chinese equivalents of both last terms *gongsi* (公司) is proposed as a notional counterpart of both legal terms. The dilemma at the bottom of the problem is that linguists are reluctant to shape language as their professional ethics obliges them to record and to analyze rather then to create language. This self-imposed limitation might be also the reason for a relatively weak social impact of linguistics as a subject upon society at large. The more courageous approach that is documented in the three volumes written by Chan in respect of the Chinese legal language can only be supported.

In fact, normalization and uniformization of legal terminology make part of legal-linguistic activities as this variety of language rarely develops spontaneously and it needs some institutional support to function efficiently in processes of professional legal communication. Sometimes such processes may be strictly institutional and supervised in terminological commissions, sometimes they may become effective as individual initiatives, as is the case with Chan's three volumes discussed here. This activity can be exercised in form of recommendations, for instance concerning the Chinese equivalents for *tort*. The legal linguist could recommend *guoshi* (過失) to become a general term as *shuhu* (疏忽) has a somehow colloquial connotation of daily carelessness as in *Zhe ren tai shuhu le* (這人太疏忽了) *This man is too careless* or to make other, even contrary recommendations as *guoshi* (過失) may also be used in some colloquial contexts. This proceeding also marks distinctively the descriptive activity of a linguist and the normative activity of a legal linguist.

Some key terms in torts, for instance *tort* / *delict* that is called *qinquan* (侵權) are surprisingly unproblematic in all three groups. Of course, this terminological equality masks the difference in the structure of concepts behind the terms in common law and in civil law. This difference is essential to legal-lexicographic undertakings (cf. Mattila 2017: 36), yet it does not always manifest itself visibly

in dictionaries. This principle is particularly important for the structure of the three analyzed volumes because it predetermines the structure of semantic fields emerging around the key terms. As the legal terminology of English common law was chosen as terminological basis for the whole project, terms accompanying the key term depend strictly on this choice. For instance, *battery* and *assault* (vol. II: 161), *false imprisonment* (vol. II: 171) or *nuisance* (vol. II: 115) owe their presence in the semantic field to the mentioned choice. This structural challenge is somehow balanced by occasionally presented terms having their origin in the civil law such as the German *unerlaubte Handlung* (vol. II: 11), *Gefährdungshaftung* (vol. II: 45), or the Russian *moralnyi vred* (vol. II: 12). The common law term *Act of God* (vol. II: 41) rendered as *tien zai* (天災) must be split in two terms in Chinese by ideological necessity and is then (vol. II, p. 187-188) referred to as *buke kangli* (不可抗力) for Mainland China and *tien zai* (天災) for Hong Kong and Taiwan.

Legal terms do not represent the totality of the legal language. Even more, they actually make only a skeleton of the legal language; they are scaffolds upon which the legal language can be set. Therefore, the discussed volumes include, especially in the book on Company law also broader syntagmas and other phraseologisms such as *Contracts made before Company's Incorporation* (公司成立為法團前訂立的合約) as key terms. Such terms easily develop to phraseologisms, cf. *piercing corporate veil* (揭開公司面紗), vol. III: 31).

The process of globalization of law engenders universal legal language. In all three terminological areas covered in the discussed volumes, the emergence of globalized language of law is visible, for instance in vol. III, p. 17 (*yi ren gong si* 一人公司) *one-man company*. Unlike in some other countries, no attempt is made in Chinese speaking countries to develop originally coined terminology based on conceptual borrowings. It is also interesting to note that in the legal Chinese there is no tendency toward developing phonetic borrowings from other languages, as is the case in the Chinese terminology of natural sciences.

In streamlining the Chinese terminology, Chan is committed to the plain language drafting style. This approach reflects the risk of emergence of Anglicized Chinese, e.g. *shadow director* (影子董事, vol. III: 54) or *zero transaction costs* (零交易成本, vol. III: 14), and the risk of linguistic arbitrariness, i.e. everyone writes his own legal Chinese as well as the risk of terminological diversity, including double or triple legal Chinese terms.

Some researchers signalled also in translation studies particular terminological problems in the area of Chinese property law (cf. Kozanecka 2016: 23). This would be an important area for future comparative research into the terminology of Chinese law.

Courtroom discourse

Language use in trials – Language in court opinions

Foreign research influenced the interest of Chinese researchers in courtroom discourse. The available analyses are largely in line with the known particularities that were uncovered by the research abroad. Yet, they also occasionally point out textological specifics of Chinese court judgments, such as the judge's postscript mentioned by Meizhen Liao (2012: 405). The experience of courtroom discourses was generalized by Zhengrui Han (2012) in the research into the discursive construction of Chinese civil judgments in the process of legal reforms in China. Han based his approach upon V. Bhatia's genre analysis model. He found out that the Chinese court discourse is highly standardized and conventional, yet it provides also some room for judges' individual inputs. Furthermore, Qing Zhang (2019) analyzed the general principles of the use of language in Chinese trials.[110] Ester Sin-man Leung (2017) described the courtroom discourse in Hong Kong. Although the Chinese legal-linguistic courtroom research is largely based on foreign methodology, it acquired, at least quantitatively, a particular position in the Chinese legal linguistics.

Influence of legal Chinese

Regional impact of legal Chinese – Problems of understandability of Chinese signs – Chinese influence upon legal culture in East Asia – Conclusion on research into a legal language in isolation

Legal Chinese imposed its script and concepts all over the Confucian world. Japanese legal language bear witness to this influence until today (cf. Horie 2010). In modern legal Japanese, the use of traditional Chinese signs causes problems in understanding. Especially, penal legislation is printed today in Japanese syllabic script, i.e. without Chinese signs in the Japanese text, for the use of citizens at large. On the other side, Chinese signs that represent complex legal concepts may be also instrumental in understanding legal texts written in Vietnamese and Korean, which

[110] Zhang (2019: 65) writes: "Judges normally adopt some discourse strategies to reach their trial goals. Based on our trial corpora, we find judges commonly adopt some strong goal-driven discourse strategies, such as question-answer strategy, power control strategy, presupposition strategy, repetition strategy, and interruption strategy, etc., in order to realize their trial goals as well as discourse goals. Strategy in effect refers to means, with which the goal of discourse is to be achieved. As words are intended for both the expression and the achievement of goals, the choice of a means or a strategy relies on the decision of the goal. Only from this perspective is the link between strategy and goal meaningful, and in this sense, strategy means rhetoric."

today do not use or use only sporadically the Chinese signs. Sometimes, complex legal concepts can be understood easier in their Chinese form, mainly however by specialists. Another, semiotically relevant Chinese influence concerns the restricted use of signatures. Historically, written signatures played in China a limited role. In East Asia, stamps were in general use to guarantee the authenticity of an act. Even today, this tradition is still productive.

Overall, the above short description of methodological problems and approaches to Chinese legal language shows that it is difficult, and maybe even unnecessary and useless to try to distill the particular Chinese language out of data that display multiple diachronic and synchronic interconnections to other legal cultures and languages. Legal Chinese as a language of law was formed like all other legal languages in institutions that eagerly accommodated foreign influence. It is therefore much less Chinese that one would assume while contemplating a legal document written in Chinese script.

Conclusions

The sense of our dealing with elements of legal language, which are more complex than single terms, is the expectation to understand law within a broader context of the universal discourse. We do not know any broader concept as universal discourse, which would provide the matrix for our approaches to language, in casu to legal language, i.e. to our speaking about law. Therefore, legal discourse is fundamental to any dealings with law and its language. Whatever other phenomena, for instance legal norms and concepts, have their role to play in legal linguistics where they are approached toward the background of legal discursiveness. Legal discursiveness states a fundamental matter for every legal linguist. It maintains that law is a discursive practice. Legal propositions about the content of law are therefore not deducted from legal norms, legal concepts, or broader structures such as legal texts but constructed in social discourses about the valid law.

PART III. LEGAL – LINGUISTIC ORIENTATIONS

The most important practical question in this area of legal-linguistic methodology is what is the legal linguist actually expected to do, especially what he or she is expected to research. In terms of method, the question concerns so-called approaches and also broader intellectual orientations in academic activities. Approaches are narrow by nature, they can be, for instance, structuralist or pragmatic. Orientations include also fundamental epistemic interests and commitments to values and beliefs. They manifest themselves as positivist or neo-Marxist research, as affirmative or critical academic discourse. Legal-linguistic orientations are best expressed in research programs and in the daily, systematic work of legal linguists. Next to scholarly research, the legal linguist may be further expected to give advice concerning practical issues, for instance on legislative drafting, or to translate legal texts. Therefore, legal-linguistic orientations concern the professional agenda of the legal linguist. This agenda depends on the paradigm that steers the research carried out by the legal linguist. Setting up such a paradigm is fundamental to any serious legal-linguistic activity. Until now, not many legal linguists were willing to support explicitly this methodological demand. Meanwhile, when this demand is not fully satisfied, the research that comes about in line with restricted or haphazard methodology will not have much bearing upon the course of legal linguistics. With these presuppositions in mind, in this part of my reflections I will be dealing with explicit methodological orientations in the legal-linguistic research. By necessity, issues concerning method will appear also in this part linked to substantive questions and issues in the legal-linguistic research.

Preliminary methodological determinations

Variety of approaches – Interdisciplinary and intradisciplinary approaches – Communicationally relevant situations in law

The variety of existing and possible legal-linguistic research imposes upon the inquiry into the legal-linguistic method the question what this area represents in terms of general methodology and what it is actually about. The results achieved in this book encourage the view upon legal linguistics as an area of studies between interdisciplinary Law-and-Language research and intradisciplinary, more independent and methodically clearer determined approaches. The other substantial point is to determine the area of studies that concerns the language of law in all communicationally relevant situations. In this area, discursive approaches seem to be more efficient than research into isolated terminological problems, especially

in times of increased access to online terminological databases that largely solve the problem of understandability of legal language as far as its terminology is concerned. The biggest existing problem in the area of understandability of legal language is the structural complexity of text types or legal genres in the area of law that persistently bar access to legal information to non-professionals and also make the daily work of professionals of law cumbersome. Professional legal discourse is stated in complex texts such as systematic codes where provisions are interrelated. Understanding this relation that creates the complexity of the legal discourse in a code or around it is available today exclusively in academic legal education. This finding might lead to a paradoxical conclusion that law cannot be communicated efficiently beyond professional discursive mechanisms. Legal linguistics becomes truly fascinating when it accepts the challenge that follows from the above preliminary conclusion. I assume that methodically the first step toward clarification of this intellectual deadlock would be the attempt to use ordinary language also in the professional legal discourse.

Where is law positioned in legal linguistics

Legal linguistics better positioned – Realistic approaches to law – Interrelation of law and language

The question asked in the above headline sounds like the childish question 'What is the wind doing when it is not blowing?' as we discovered in the course of this investigation that there is not much law beyond its linguistic appearance. Yet, the childish question may also lay bare a more profound problem that is important for the legal-linguistic methodology. How and where to find the signs of law that are relevant to the subject of legal linguistics? The analysis of some fundamental research in the previous two parts of this investigation shows that legal signs have to be precisely defined before they are researched.[111] It means that not simply a piece of legislation or a court decision is researched as such, i.e. as law, but the signs of law that are determined in such texts. Legal semiotics rather than legal phenomenology is decisive in this respect. Furthermore, to elicit problems of law and language such investigation approaches issues of legal discourse. It can, which is frequently the case, also stop halfway and not reach the level of discourse, yet then it will not be truly explicative and may remain solely informative, and it will necessitate further interpretive efforts of other researchers.

[111] M. T. Lizisowa (2016: 30) characterized the role of signs in law: "Znaki języka prawnego konotują prawo jako fakty istniejące w relacji interpersonalnej, z której wywodzą się prawa podmiotowe, a także konotują prawo jako istniejące zjawiska prawa stanowionego w aktach prawnych utrwalonych w tekstach prawnych oraz jako realna rzeczywistość prawna, w której obowiązuje stosowanie prawa stanowionego."

I assume that realistic approaches to law correspond best with linguistic approaches in terms of method as most contemporary linguistic approaches focus upon language as a biological and social reality and not only as a philosophical concept. Therefore, I favor legal approaches to law such as those that emerged in the tradition of the American and the Scandinavian legal realism. In addition, critical legal studies in the U.S., alternative legal science in the Scandinavian countries, critical theory in Germany, and finally yet not less importantly, critical analysis of the legal discourse provide a solid conceptual basis for the understanding of law from the perspective of its language. What is more, methodically, language cannot be petrified,[112] as it is omnipresent on both sides of law expressed with linguistic means where it appears as 'servante-maîtresse' (cf. Jackson 1985: 25).

Setting up a paradigm for legal linguistics

Legal-linguistic conceptualization – Structuring the field – Identifying appropriate methodological approaches

The most demanding methodological task in legal linguistics is the work on conceptualization and on the structuring of the field. It could be described as the process of setting up the paradigm for this area of knowledge. First, legal language and legal linguistics could be investigated in that the existing research is examined systematically. However, this approach has the disadvantage to expose the researcher to obsolete material and to theoretical approaches that are no more relevant to fundamental research. Therefore, the systematic scrutiny of existing research may not be the most fortunate start in legal-linguistic studies. More promising could be the identification of central methodological approaches in social sciences and in linguistics and the attempt to apply them to the language of law. Methodologically, it goes without saying that what the language of law is also depends on methodological preconditions. Thus, the starting point for the legal-linguistic research is rooted in methodology rather than in the object of study. Second, the method should be explicitly determined. To illustrate, in this book, main issues for the research are described as the investigation of the legal discourse in all its dimensions. Third, goals that are socially relevant should be taken into consideration as well. In this book, ideas concerning legal futurology, the concepts of global law and of better law are examples of such ideological determinations.

[112] B. S. Jackson (1985: 3) characterized the dominant approaches in the legal theory: "Jurisprudential theories are often classified as naturalist, positivist or realist. Both naturalism and positivism see law as a reified system, but differ according to whether it is a matter only of human convention, or whether it includes (often rational) universals. Realism commonly rejects the reification of law, in favour of a view of legal rules related to human goals, practices and psychological states. Semiotic theories admit of similar classification."

Rewriting law

Writing law – Rewriting law – Prospects of rewriting law

The biggest task for future legal linguistics would be to write laws along the lines of actual language use. It means practically not only the reformulation of existing legislative acts but the adaptation of all discursive practices in juridical institutions and related areas to linguistically justified communicative practices. Law that would be expressed (i.e. communicated) under such circumstances would be a truly linguistic products. Its understanding and application would correspond to the communicative practices discovered by linguists and exclude any obsolete and unjustified practices that are dictated by the exercise of power rather than by the requirements of the rational practical discourse. Rewriting law would have consequences for the structure and methods of legal science. The legal science of today is exposed to legislation and court opinions that it accompanies and influences through scholarly writings. This problematic situation is rooted in legislative techniques that produce statutory law and in legal opinions issued by courts that represent law. These main areas of scholarly interest are independent of scholarly research into law and not accountable to academic institutions. Therefore, in most cases, legal academia is confronted with ready products, i.e. statutes and court opinions, which discursively, unlike the ordinary language communication, do not offer the possibility of feedbacks to elucidate meaning, mainly because they represent distanced and not interpersonal communication.[113] This structural feature of contemporary law imposes upon jurists the task of guessing, a form of interpretation or a pre-interpretation technique that is still badly known among jurists and better researched among legal theoreticians and legal linguists.[114] Scholarly efforts of disambiguation of legislation and precedents by legal scientists deepen rather than clarify the existing structural deadlock. Therefore, the incorporation of the linguistic understanding of language into legislation and all communicative situations in law, such as trials and issuing court opinions would also reform the legal science. It would reduce the element of guessing in the legal science, which has been regularly criticized for making arbitrary choices in approaches to legislation, called by its critics 'sophisms', and therefore not representing true science. For non-professionals of law, this state of affairs is even more problematic because it causes confusion, uncertainty, and the fear of law and its institutions. Irritations

[113] B. S. Jackson (2017: 6) speaks about 'semiotic variables within the legal system' mentioning specifically "not only the differences between the legislation, doctrine and adjudication, but also the variables of audience…, of interpersonal vs distanced discourse, and of the needs of different audiences for immediate transparency of meaning."

[114] B. S. Jackson (2017: 5) mentions this circumstance calling it 'added meaning': "Occasionally, added meaning may, by that process, actually 'enrich' (or distort) the text, but this will be by structural rather than semantic analysis, and few lawyers have any conception of interpretation beyond their own version of semantics."

caused by uncertainty are balanced in the case of professionals by the remuneration they obtain for their services to disambiguate law either in line with interests of their clients or with the alleged interests of the 'legislator' and the 'state' that the 'legislator' represents. This state of affairs is unbearable in the twenty-first century and it is difficult to accept in modern society that is based on the idea of democracy and on the rule of law. Thus, the rewriting project would be the first step from the legal-linguistic position to promote actively the named social goals with the methodical means developed in legal-linguistic studies. It would contribute to the idea of a better law that I advocate in my other legal-linguistic writings.

Drafting legislation

Rewriting law and drafting – Drafting methods and postulates – Limits of legal-linguistic involvements in drafting

The methodology of legislative drafting is closely related to the legal-linguistic idea of rewriting law. Contemporary drafting follows the guidelines developed by governmental bodies. Sometimes, postulates emanating from plain language initiatives are included in such guidelines as well. Meanwhile, drafting is communicating law. It should therefore follow the general principles of communicating contents in society. Social communication has to be efficient in this area of interaction and therefore there is no reason to hesitate over the choices of appropriate legislative drafting techniques. Unavoidable, however, is the requirement to be able to state legislator's intention clearly, i.e. to know precisely what one is going to legislate. Frequently, disaccord or uncertainty reign in legislative bodies in this respect and legislative formulations represent political compromises that finally cause understanding problems in voted laws. Concealing legislative purposes, for instance measures particularly harmful to parts of citizenry, also engenders legislative acts that are unclear. Therefore, drafting laws is by far not a matter of the application of technical guidelines. When general principles of communication are not followed in legislative processes, their results will cause the known problems with the application of laws. Most prominent legal linguists will not be able to solve problems in expressing legislative intentions when these intentions are concealed or expressed in a deliberately unclear manner. This point marks also the limit of legal-linguistic involvement in legislative drafting initiatives.

Legal-linguistic gender studies

Particular, ideologically motivated research areas – Gender in law – Generalization of research results

Some issues come up in legal linguistics as results of contemporary social debates. They are, unlike many other theoretical problems less stable as research issues, yet they elucidate some aspects of language use in law. Legal-linguistic gender studies are an example of such modern and also fashionable research areas. Legal language reflects gendered interaction in multiple discursive surroundings. It seems that no method exists until now which would cover all constellations of gender-specific speech. Research may easily show the arbitrary character of gender distinction, as in the example below, and the stable tendency of marking gender in legally relevant speech, even in cases where its function appears weak. Some research shows intermediary tendencies oriented at setting up a more balanced reference to gender in legal texts, yet it is deficient as far as the explanation of reasons for this sort of speaking and its evolution is concerned. Meanwhile, a German court refused the request by a female bank customer to add on a bank form next to *Name des Kunden* also *Name der Kundin* (i.e. *name of customer* in female gender) due to impracticability (cf. BGH VI ZR 143/1).[115]

As mentioned, classical examples of gender-related speech are statutory acts. For instance, Art. 77 of the United Nations Convention on the International Sale of Goods (CISG) says:

> A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If *he* fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated. (emphasis added)

The party in the above text sample is perceived as masculine ('he') without any grammatical or legal necessity. Discursively, 'he' also follows regularly upon its antecedent 'the judge' in many texts notwithstanding the fact that the profession of a judge is regularly exercised by women and that in some countries, for instance in France, female judges form statistically the majority in judicial institutions, although many particularly influential positions in judiciary are still held by men, who otherwise are in minority among French judges.

Occasionally, courts may avoid the perception of legal problems in terms of gender relations. This is for instance the case in Kyle Keeton v. Flying J, Inc. (U.S.

[115] The court also discussed the German terms '*Einzahlerin*' and '*Kontoinhaberin*', which present analogous problems.

Court of Appeals, Sixth Cir. 04-6023, 2005).[116] The court reduces the main issue to a formal discussion of disadvantages a commuting employee may experience.[117] Also the U.S. Supreme Court dealt with the case, again on formal grounds, finally denying certiorari. Furthermore, in the case Nelson v. James H. Knight DDS, P.C. (834 N.W. 2d 64, Iowa Sup. Ct. 2013) the court fell into the gender trap constructed centuries ago when it formulated the issue that it had to decide: "Can a male employer terminate a long-time female employee because the employer's wife, due to no fault of the employee, is concerned about the nature of the relationship between the employer and the employee? This is the question we are required to answer today… Generally, an employer engages in unlawful sex discrimination

[116] In the part of its opinion that concerns fact description the court avoids any characterization of the case as related to gender issues: "Flying J operates travel plazas that cater to interstate travelers. Each plaza has a restaurant. Kyle Keeton applied to be an assistant restaurant manager at a Flying J plaza. On his employment application, he stated that he was willing to relocate to other Flying J travel plazas. Keeton agreed because he believed that relocation would increase his chances for advancement. Keeton lived in Georgia when Flying J hired him, but he agreed to relocate to Tennessee for training. After he completed his training in June of 2001, Flying J assigned Keeton to work as an associate manager at the Walton, Kentucky plaza. Flying J orally committed to keep Keeton at the Walton store for five years. Judy Harrell was the General Manager and his immediate supervisor. In September, Harrell began making several sexual advances toward Keeton, which he rejected. Even though Keeton was not scheduled to work on December 4, 2001, Harrell called him at home and asked him to come to the restaurant so that she could speak to him in person. When Keeton arrived at the restaurant, Harrell told him that he was fired, explaining, "you're not supporting me." Prior to this meeting, Harrell had never disciplined Keeton formally or informally, had not criticized him at all during management meetings, and Keeton had no warning that his job was in jeopardy. After the meeting, an assistant manager escorted Keeton from the building."

[117] The court limits its analysis to the statement of naked facts. Meanwhile, and while so doing it lays bare the legal-linguistic problem that is the gender issue: "In this case, Keeton's responsibilities in Cannonsburg were not different from his responsibilities in Walton. The only difference between the two positions was location, and Keeton did not present any evidence that Cannonsburg was objectively a worse location than Walton. Cannonsburg was, however, at substantial distance from Walton. Defendant correctly points out that Koscis and White focus on the differences in job duties and not on other impacts on the employee. We have not precluded consideration of such factors as commuting distance or relocation, however. In Policastro v. Northwest Airlines, Inc., 297 F.3d 535 (6th Cir. 2002), we explicitly stated that increased distance to a work site can amount to a constructive discharge. There, the plaintiff was a sales agent living in the Cincinnati area. Id. at 537. Her sales territory included Louisville and Lexington, Kentucky, which were one hundred miles and eighty miles, respectively, from her home. Id. The Louisville/Lexington region comprised about forty percent of her sales, and she was required to be physically in the Louisville/Lexington region four to six days per month. Id. She was assigned to work in the Louisville/Lexington areas exclusively following a corporate restructuring, and she was expected to be physically present there four days per week. Id. She was not required to relocate and chose not to, commuting instead and spending three nights per week in Kentucky. Id. She did not experience any change in salary, benefits, diminution in responsibilities, or a modification of her title, and the reassignment was expected to advance her career. Id. at 539. She was unhappy with the change and resigned about ten months later. Id. at 538. She sued her employer for sex and age discrimination, claiming that the reassignment amounted to a constructive discharge."

when the employer takes adverse employment action against an employee and sex is a motivating factor in the employer's decision…We are asked to decide only if a genuine fact issue exists as to whether Dr. Knight engaged in unlawful gender discrimination when he fired Nelson at the request of his wife. For the reasons previously discussed, we believe this conduct did not amount to unlawful discrimination, and therefore we affirm the judgment of the district court." The 'nature of relationship,' which in essence is jealousy of the employer's wife rather than a personal relation between employer and employee, is expressed by the court in the evasive language of the law. Thus, the neurotic fantasy of a wife is here the basis of a court decision about discrimination. Jurists read the decision as motivated by the commitment to preserving the employment-at-will rule of the American law, although no reference to this rule is made in the judgment.[118] Sub-conscious associations may condition this type of speech. The contemporary theory of gender studies is not able to show ways that would help avoiding such traps and that would lead to overcoming gender-related language use. Instead, gender-related language is often perceived as a given in our social discourse. Needless to say, legal-linguistic methodology does not offer more than general gender studies are able to offer. In terms of method, the main issue that is misunderstood is the treatment of gender-specific language as a structural feature of law instead of perceiving this language as a discursive development that should evolve and enable speakers to use language that does not commit to gender interaction. Celebrating gender-specific distinctions in the research means from the legal-linguistic methodological perspective missing the main point.

Methodological problems in legal translation

Strictly legal-linguistic problems in legal translation – Creative aspects in legal translation – Legal translation uncovers legal-linguistic problems – Translational perspectives

Legal translation is a stable and a reliable area of legal-linguistic studies. Next to the task of drafting legal texts, it represents an area of practical involvement of legal linguists as translators and constitutes one of rare legal-linguistic practical

[118] Also Jérôme Kerviel in *L'engrenage*. *Mémoires d'un trader* (2010, Paris, Flammarion, pp. 13-14) describes the language use in a financial institution that he perceives as excessive in terms of gender: "Celle-ci n'empêchait pas en revanche les félicitations que nos chefs nous adressaient lorsque les gains s'accumulaient… Bravo, tu as été une bonne gagneuse aujourd'hui…Cette formule au goût douteux, combien de fois l'ai-je entendue de la bouche de mes responsables directs lorsque la lecture quotidienne des gains les comblait d'aise !…Au sein de la grande orgie bancaire, même considération que n'emporte quelle prostituée de base: les traders ont donc juste droit à la reconnaissance rapide que la recette du jour a été bonne."

professions. There exist also other practical areas of application of legal-linguistic studies, such as those dealt with in forensic linguistics, yet this involvement is, as a rule, occasional and depends on requests from public authorities to legal linguists. It seems that only legal drafting, which is exercised in public bodies and legal translation can be perceived also as legal-linguistic professions. This practical implication explains the particular interest in the topic that has the tendency to dominate whatever debate about legal-linguistic issues.

The methodology of legal translation starts with the separation of general problems of translation from particularities of legal translation. This separation facilitates studies in legal translation, which may be, and in fact often are, overburdened with problems that do not concern primarily the translation of legal texts. Whenever a text is translated from one language into another, problems will emerge at a stage due to differences in the structure of languages on their surface. These problems are researched in the general theory of translation. The main finding of the general theory of translation is that the linguistic transformation as a semiotic act involves operations that are creative and that cannot engender any automatic results as far as the entirety of texts is concerned. Translation problems are as unavoidable as is the competence of translators to solve them skillfully. This means also that the area of professional deficiency of translators, which fills volumes of academic writings, is strictly speaking not an area of the theory of legal translation because the theory presupposes a competent translator. Everyone is of course aware of the fact that no translator masters fully two languages, mainly because no other speaker does. The component of acquisition of professional knowledge is because of practical necessity included into some theoretical approaches to legal translation, yet it does not make any logically necessary part of them. The theory of legal translation starts with the question whether legal translation is possible at all. Views that lead to a negative answer refer to the lack of any common set of referents in legal languages that are, unlike the language of chemistry or physics, at least terminologically incongruent and sometimes also divergent as to the texts types of the source and of the target language. Positive views about the possibility of legal translation refer to existing legal translations that render good services to their users. They furthermore point out numerous, successful attempts to revise existing translations, which were perceived as deficient. The very possibility of correction indicates the general possibility of existence of good legal translations. Furthermore, the skopos-theory was proposed as a compromise between the two extreme views in the discussion about the theoretical possibility of legal translation. The methodology of legal translation has reached a point of problem awareness that is overall satisfactory. Yet, the learned methodology does not engender automatically perfect translations because in translations the creative element has still a preponderant role to play. We could therefore ask whether legal translation can be further improved, especially when viewed in the contexts of problems that constitute it as a social phenomenon.

It seems that work on translation devices may further improve practically identified deficiencies in the translation of legal texts. Here especially institutionalized translation in international organizations is an additional topic. Translating legal texts is a profession and the exercise of a profession presupposes the mastery of sets of professional skills. Surgeons during operations apply their professional skills that they acquire as a set of actions to be taken in a certain situation. Legal translators work in the same way. A. Matulewska (2013) developed the approach to legal translation that can be characterized as the theory of this sort of legal translation. J. Bańczerowski and A. Matulewska (2012, cf. also Matulewska 2013) introduced the parametrical approach to legilinguistic translatology. Legilinguistic translatology is focusing on the "translational legal reality which consists of: (i) translandive (source language) and translative (target language) texts, (ii) translators of legal texts, (iii) authors of translandive texts, and (iv) recipients of translative texts" (cf. P. Kozanecka, A. Matulewska, and P. Trzaskawka, 2017: 12). Within this general conceptual frame of reference detailed approaches to legal translation can be developed.

Frequently, translation language indicates legal-linguistic problems. When clumsy translations are set aside, translation language often indicates legal implants: '*obsolescence programmé'* comes from *planned obsolescence* (cf. L 111-3 French Code de la consommation). It can also indicate terming problems, i.e. the lack of a generally approved equivalent term. Such terms emerge discursively and frequently their emergence can be traced. In the above example, *obsolescence* (in German *Veralten*) is treated as a sociological problem since the 60ies of the last century, for instance in V. Pacard's *The Waste Makers* (1960) or B. Röper's *Gibt es geplannten Verschleiß?* (1976). The discussion of the problem in economy and sociology influenced the emergence of the legal term within the semantic field that provides detailed terminology irrelevant to law, e.g. *functional obsolescence*, *qualitative obsolescence*, and *psychological obsolescence*.

Methodically, legal translation can be undertaken from at least three perspectives. Among them are: (1) the translation from the point of view of the source legal language, (2) translation from the point of view of the target legal language, and (3) autonomous translation that is based on a third system, for instance on the conceptual framework of comparative law. Therefore, when for instance the translation of the Vietnamese civil code into Polish is envisaged a choice has to be made among the named mutually excluding approaches. As a rule, translators and their clients favor the translation that reflects the target language legal terminology, yet this choice is purely conventional and it mostly reflects priorities set by the translator's clients. For academic purposes, a translation that follows closely and reflects the original concepts of the source text almost literally may be the most helpful translation. For broader research programs where legislation coming from different countries has to be integrated, autonomous translation may be the most appropriate choice to enable conceptual and terminological coherence

in the research. None of the discussed translational choices represents a logical necessity. The named types of legal translation correspond to different possibilities to characterize legal concepts in the area of private international law. There, characterization, in French *qualification*, is undertaken from the perspective of lex fori, or of lex causae, or autonomously reflecting the terminology in use in comparative law. This method has its limits in the theory of legal translation as it mainly concerns the systematic place of a foreign concept in another legal system and not the foreign term for which the legal translator is searching. For instance, the Spanish terms *gananciales* may be perceived as belonging either to German family law or to the German succession law for the purposes of a suit in Germany where the Spanish law would apply due to a rule of the German international private law. The characterization is an interesting phenomenon in legal linguistics, yet it is not sufficient to solve problems of legal translation. Nevertheless, it may be instrumental in facilitating translational choices.

From the point of view of method, the question whether genetically distant languages cause more problems in legal translation than others is important for the parametrization procedure. In terms of general translatology this question can be answered overall positively, it is easier to translate from Polish into Czech than from Polish into Japanese. Sometimes however, correlatives that are rooted in linguistic contact impose themselves. For instance, translation from French into Polish or Russian is a rather smooth process; translation from German into Dutch may be more complex than the translation from Dutch into German due to the directionality of transfer in linguistic contacts (cf. Braunmüller 1991: 246 about semi-communication). Meanwhile, translation of legal texts from genetically distant languages such as Finnish and Swedish in Finland is perceived as largely unproblematic (cf. Bonsdorff et al 1986: 1), unlike the translation from closely related Latvian and Lithuanian. In the Finnish-Swedish legal translation the main problem seems to be the avoidance of translation language. While the legal translation in Finland is facilitated due to the existence of one legal system expressed in two languages of different origin, the translation of private law texts from Latvian into Lithuanian causes problems because the Latvian private law is based on German law and its terminology, while the Lithuanian civil code follows Polish and French models. Language contact is therefore an important parameter in legal translation and it is apt to explain many issues that may appear paradoxical at the first sight.

In the fundamental research into legal translation, the discursiveness of law in relation to the act of translation has been stressed by Margarete Flöter-Durr who supported the discursive approach to legal translation (cf. Flöter-Durr 2019: 70). This approach can also clarify the limits of legal translation. Legal texts are translated as *idle texts*, yet legal semantics is dynamic in the above sense. Translated idle texts (statutes, contracts, fact descriptions, and expert opinions) become meaningful in the acts of application, mostly by courts. It is impossible to figure out all problems that such texts may cause in communicational practice.

Legal translations will therefore remain largely indeterminate. They have their inherent, structural limits. This does not mean that translators can write whatever they wish; yet it is necessary to understand the limits of translation that are caused by its discursiveness.

The analysis of the Russian translation of the Moldovan *Codul civil* of 2002 may clarify some issues that are central to translation of legal texts. As mentioned above, when legal acts of some complexity such as legal codes, which expose systemic terminology, are translated several choices are at translator's disposal. The source language code terminology may function as the referential matrix, the target language code terminology may play the same role, and an autonomous perspective may be selected to render the code, and especially its terminology, in the target language. As can be seen, these choices largely correspond with the method of characterization that is known from the conflict of laws or private international law in the Continental parlance.[119] As so often, the skopos-theory helps in the situation where choices are unavoidable. The translation from the terminological perspective of the domestic code makes the translation easier applicable by persons who know exclusively the domestic law. The translation from the terminological perspective of the foreign law enables insights into this law for persons, who otherwise, due to their lack of the knowledge of the foreign language, would not be able to trace the conceptual map of this foreign law. Finally, the translation from the terminologically autonomous perspective may facilitate the comparison of the terminology in question with other conceptual frames of reference. Practically, due to the needs of juridical institutions, the translation of codes into the terminological frame of reference of the domestic law dominates the work of translators in this area. Yet, it would be methodologically erroneous to assume that foreign legal codes are to be translated into the language of the domestic code. Epistemic expectations and interests determine the choice of the perspective for the translation of legal codes.[120]

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[119] Characterization of legal concepts can be undertaken from the perspective of lex fori, lex causae, or autonomously. The first two methods are relatively easy to apply. Characterization lege fori transforms the foreign legal concept in accordance with the domestic law of the court that deals with the matter. It is problematic when the domestic law does not know any related concepts to the foreign concept, e.g. Polish law does not know *promissory estoppel*. It could be compared to the Polish *klauzula nadużycia prawa* (cf. Halberda 2014). Characterization lege causae considers the original semantic anchorage of the foreign legal concept. More challenging is the autonomous characterization for which a system of reference must be set up, for instance in comparative law research. Murad Ferid (1986: 148) wrote about this problem (partly with reference to Giuliano-Lagarde): "…die Auslegung internationaler Schuldverträge… (soll) nicht nur das eigene nationale Recht, sondern im Interesse einer möglichst einheitlichen Auslegung des Übereinkommens, auch dessen Wortlaut in den Sprachen der anderen Vertragsstaaten und deren Rechtsprechung berücksichtigen. Dies wäre in der Tat eine Möglichkeit, dass sich *autonome Begriffe* bilden. Ob die Entwicklung diesen Weg geht, ist eine andere Frage." (italics added)

[120] Murad Ferid (1986: 148) reflected upon the link between characterization in the area of the conflict of laws and legal translation: "Die Suche nach dem Adäquaten ist in der außerrecht-

The Russian-language version of the Moldovan civil code of 2002 follows strictly the Moldovan and not the Russian terminology.[121] Meanwhile, the structure of the Moldovan code clearly benefited from the Russian civil code, which is particularly visible in its introductory chapters I and II, when compared with the Russian code's chapters I and II, Art. 1-16. The Moldovan Civil code includes in its Art. 287 (Animalele) a provision protecting animals.[122] The text of this provision renders literally the Art. 90a of the German Civil code (BGB).[123] The Russian translation of this provision is unproblematic.[124] Meanwhile, the introduction of the German provision, which in itself is a legislative innovation, causes problems in

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lichen Sphäre besonders ein Problem des Übersetzers, der bei gewissen unübersetzbaren, seiner eigenen Sprache fremden Ausdrücken ein ähnliches Maß von differenzierten Einfühlungsvermögen, ja schöpferischer Begabung benötigt, wie der Jurist bei der Qualifikation der fremdrechtlichen Gebilde gemäß den Begriffen seiner eigenen Kollisionsnormen." Areas where problems intertwine are methodically particularly valuable because they facilitate the emergence of a uniform scientific method. It is exciting to discover the common geometry behind legal translation and legal characterization, which are interrelated like the two sides of the same coin.

121 Cf. Art. 3 Legislaţia civilă (1) Legislaţia civilă constă în prezentul cod, în alte legi, în ordonanţe ale Guvernului şi în acte normative subordonate legii, care reglementează raporturile prevăzute la art. 2 şi care trebuie să fie în concordanţă cu Constituţia Republicii Moldova. The term *ordonanţe* is translated without any further doctrinal transformation into Russian as ордонансы: Статья 3. Гражданское законодательство (1) Гражданское законодательство состоит из настоящего кодекса, ордонансов Правительства и подзаконных нормативных актов, которые регулируют отношения указанные в статье 2, и которые должны соответствовать Конституции Республики Молдова. (italics added)

122 Cf. Art. 287. Animalele (1) Animalele nu sînt lucruri. Ele sînt ocrotite prin legi speciale. (2) In privinţa animalelor se aplică dispoziţiile referitoare la lucruri, cu excepţia cazurilor stabilite de lege.

123 Art. 90a Tiere. (1) Tiere sind keine Sachen. (2) Sie werden durch besondere Gesetze geschützt. (3) Auf sie sind die für Sachen geltenden Vorschriften entsprechend anzuwenden, soweit nicht etwas anderes bestimmt ist. Art. 137 of the Russian civil code of 1994 is constructed differently: Статья 137. Животные. К животным применяются общие положения об имуществе постольку, поскольку законом или иными правовыми актами не установлено иное. При осуществлении прав не допускется жестокое обращение с животными, противоречащее гуманности.

124 Статья 287. Животные. (1) Животные не являются предметами. Они защищаются специальными законами. (2) К животным применяются положения о предметах, за исключением случаев предусмотренных законом. Interestingly, the translator uses the term предмет for chattel, although the provision is situated in the part of the code dealing with property, where the otherwise more popular term вещь dominates. In so doing, the translator follows the Moldovan doctrine that differentiates between *bunuri* and *lucruri*, e.g. in Art. 285. Bunurile. (1) Bunuri sînt toate lucrurile susceptibile apropierii individuale sau collective şi drepturile patrimoniale. (2) Lucruri sînt obiectele corporale în raport cu care pot exista drepturi şi obligaţii civile. The Russian Civil code in its version of 1994 speaks about вещи, e.g. in its capriciously or maybe extravagantly drafted Art. 128: Виды объектов гражданских прав. К объектам гражданских прав относятся вещи, включая деньги и ценные бумаги, иное имущество, в том числе имущественные права; работы и услуги; информация; результаты интеллектуальной деятельности, в том числе исключучительные права на них (интеллектуальная собственность); нематеряльные блага. (italics added)

other areas of law, especially in the penal law. Penal legislation protects objects from theft and destruction. As according to the new provision of Art. 287 animals should not be perceived as chattels, modifications in the penal law become necessary in order to ensure that their theft or damage become sanctionable.[125] Legal textuality is subordinated here to principles of text constitution in law because analogy is prohibited in penal law. This circumstance necessitates further amendments of the existing legislation. Again, aspects of text constitution, sometimes called genre, prevail over terminological intricacies.

Although much is known about legal translation, and in legal linguistics the legal translation can be perceived as the best-known linguistic operation in law, newer inputs are not excluded. They, as a rule, enter into details of the translation process, which until now was treated in general terms. For instance, Fernando Prieto Ramos (2015) dealt with the quality assurance in the process of legal translation and proposed a holistic approach to quality. Previously, quality assurance has been treated as an informal task that could not be expressed parametrically due to the specifics of the translation process. Meanwhile, Prieto Ramos connected legal, contextual, macrotextual and microtextual variables in order to coin a definition of translation adequacy strategy.[126] Especially, in institutionalized translation such an approach may render valuable services.

It can be assumed that in the area of legal translation a new stage is emerging where the practical and theoretical knowledge will be systematized and made theoretically explicit. New areas such as those named above will gain momentum and the fundamental problems of the nature of text and discourse will provide new incentives for further developments in the theoretical exploration of legal translation (cf. Chan 2020).

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[125] Claus Sprick (2002: 25) writes: "Însă, dată fiind interdicţia analogiei în dreptul penal (care sancţionează doar furtul şi distrugerea lucrurilor), ar trebui poate asigurate şi, la nevoie, adoptate dispoziţiile necesare pentru ca furtul şi nimicirea animalelor aparţinând altuia să fie sancţionabile." (trans. from French A. Bănaru) The requirement to adapt legal provisions to changes caused by amendments concerning the legal status of animals was precisely and explicitely implemented e.g. in the Polish Civil code's Art. 424: Kto zniszczył lub uszkodził *cudzą rzecz* albo zabił lub zranił *cudze zwierzę* w celu odwrócenia od siebie lub od innych niebezpieczeństwa grożącego bezpośrednio od tej *rzeczy* czy *zwierzęcia*, ten nie jest odpowiedzialny za wynikłą stąd szkodę, jeżeli niebezpieczeństwa sam nie wywołał, a niebezpieczeństwu nie można było inaczej zapobiec i jeżeli ratowane dobro jest oczywiście ważniejsze aniżeli dobro naruszone. (italics added)

[126] Such an approach is methodologically possible when 'text' is not conceptualized rigidly. F. Prieto Ramos (2015: 11) writes: "If we treat text merely as a self-contained and self-governing entity, instead of as a decision making procedure and an instance of communication between language users, our understanding of the nature of translating will be impaired."

Investigating history of legal linguistics

Determining predecessors – Regional traditions – Continuity in research

Questions of history are usually approached chronologically, sometimes however achronological methods are perceived as more fruitful. One can trace a line from the epistemic origins of problems or of scholarly ideas or proceed inversely, i.e. to ask how contemporary legal-linguistic questions emerged starting with today and yesterday and going further down. Next to the classics of immediate legal-linguistic exploration whom I mentioned in Part I, there is an abundant literature on issues that today could be framed as legal-linguistic. Historically, the founding treatise of legal-linguistic inquiry could be seen in Aristotle's Ρητορική (*The Art of Rhetoric*), the magic book of legal linguistics, or, in a sense, the bible of legal linguists. Most problems of contemporary legal-linguistic debates – starting with enthymeme in legal argumentation, the interrelation of facts and law, and culminating in the structural elements of legal discourse – are anticipated in this book and expressed in terms of its time. One of the central conclusions that contemporary legal linguists can draw from Aristotle's book is the claim that an independent area of knowledge that researches the use of language in law is necessary in every civilized society. Another central conclusion is based on the conviction that this area of knowledge can be structured systematically and methodically. A reflex of this conclusion is the postulate that legal- linguistic findings are not footnotes to the doctrine professed in legal science but a theory that explains law from the perspective of language use in the domain of law. At this point one may position the intellectual origins of the project of the linguistic turn in law.

Also regional approaches to the history of legal linguistics may find some justification as the discipline developed regionally and not as a worldwide intellectual enterprise. Isolating approaches may lead to misleading results. For instance, it cannot be contested that the fundamentals of contemporary legal linguistics were laid by George Kalinowski (1916-2000) esp. in his *Introduction à la logique juridique* (1964), Chaïm Perelman (1912-1984) in his epoch making *Traité de l'argumentation – la nouvelle rhétorique* (1958), Eugeniusz Bautro (1891-1961) in *Idea lingwistyki i sematyki prawniczej* (1935), Tadeusz Kotarbiński (1886-1981), especially in his *Kurs logiki dla prawników* (1951) as well as in his ethical studies, for instance in *Medytacje o życiu godziwym* (1966). Also the German Freirechtsschule contributed ideas that can be situated at the origin of legal-linguistic reasoning. As far as Freirechtsschule is concerned, works by Hermann Ulrich Kantorowicz (1877-1940), born in Posen/Poznań, who worked with Eugen Ehrlich (1862-1922), author of *Freie Rechtsfindung und freie Rechtswisseschaft* (1903) und *Die Erforschung des lebenden Rechts* (1911), Ernst Fuchs (1859-1929), especially his *Schreibjustiz und Richterkönigtum* (1907) on a conception of jurisprudence formatted many legal-linguistic approaches. The German Freirechtsschule was neglected in Europe, yet gained momentum in the United States, especially in writings and in the

legal practice of judges such as Benjamin Cardozo, mainly in his criticism of the mechanical jurisprudence. In this book, the conception of epistemic interpretation of law is rooted in this thinking. Meanwhile, all named scholars developed their conceptions within broader, mainly Central European schools of thought. More promising seem to be approaches that liberate themselves from biographies and focus on research programs, e.g. on the Poznań legilinguistic school.

Particular issues can also be researched in terms of history of legal linguistics. Philippe Sands described in his book *Retour à Lemberg* (2017) the process in which the terms *genocide* and *crime against humanity* emerged in the international law.[127] He found out that both were coined by jurists who studied in Lemberg (Lviv) before World War II and who were later active in the prosecution of war crimes. Raphaël Lemkin proposed the term and the definition of *genocide*; Hersch Lauterpacht coined the *crime against humanity*. According to Lauterpacht, every systematic killing of individuals qualifies to be termed *crime against humanity*, while Lemkin specifically insisted on *genocide* that involves systematic killings with the intention to annihilate a group of people. The difference between the two concepts is found in the intention their perpetrators have when they commit the crimes. In Sands's analysis, the emergence of the two concepts is connected to a place, a town in contemporary Ukraine, also due to the fact that a large part of the Shoah is geographically situated in this part of the world.

The trap of the Middle Ages

Historical background of Continental legal-linguistic debates – Fundamental borrowings – Juridicity of borrowings

Surprisingly enough, European legal science in its most influential form that is represented by the legal doctrine has been dominated for centuries by concept creation or concept construction and their analysis in the medieval sense. This takes indeed by surprise, if it is considered that practically only theology has preserved this doctrinal mood of thinking until our day. What then, after ancient Rome and its constructed, yet still very literary and rhetorical jurisprudence, attracted the jurists from the Middle Ages until today to doctrinal thinking? Why did they follow this cumbersome and obscure way of professional reasoning? And why, despite this overlong fascination, the doctrine is about to become abandoned in the future law?

[127] Terminology in this area is uniform as domestic legislators follow the language of international instruments on the matter. The German Völkerstrafgesetzbuch (VStGB) treats in its Part II, Chapter I *Straftaten gegen das Völkerrecht*, in its Art. 6 *Völkermord* and in Art. 7 *Verbrechen gegen die Menschlichkeit*. In Part II, Chapter II the statute regulates *Kriegsverbrechen*, e.g. *Kriegsverbrechen gegen Personen* in Art. 8 and *Kriegsverbrechen gegen Eigentum und sonstige Rechte* in Art. 9. The Polish Penal code regulates in its Art. 118a *zbrodnie przeciwko ludzkości*.

The fascination with concepts came about simultaneously with the fascination with justice. In the Middle Ages, the Greek democratic polis has become less interesting for the people dominated by thoughts of divine law and justice. Borrowed concepts have to be juridicized in the legal language. There, they acquired their specific meaning. In fact, legal concepts do not need to be particularly creative. Very often, they represent internationalisms in legal use. Not accidentally, the legal science became interested in already existing concepts such as action, causation, intention, and evidence. These concepts are neither created nor constructed by the legal science. Legal science is often concerned with states of affairs or events that seem to be connected in a specific way, i.e. such that the first seems to bring about the second. These specific relations are called causal and the problem discussed with reference to them is called causation. In philosophy, the problem of causation has been discussed in a long course of centuries and it has been abandoned in analytical philosophy for more satisfactory concepts and procedures. Bertrand Russell is known to have claimed that the advanced scientific understanding needs no notion of causation. In modern philosophy, causation gained some more attraction but it still remains a matter of dispute. Linguistically, causation was described through the subjunctive conditional: 'If a had not occurred, b would not have occurred', but the linguistic reconstruction alone cannot replace the philosophical analysis. In the legal science, causation has been a common notion both in private and in penal law. Some criticism on it concerned the application of the notion and more attention was required to it in order to avoid surprising solutions in court decisions. In statutory law, causation manifests itself as a problem of application of provisions in criminal law, for instance while 'causing death by reckless driving' or 'causing wasteful employment of police'. Legal science seems to be trapped in this sort of doctrinal thinking. Medieval reasoning strengthened this intellectual attitude, yet did not provide any viable solutions to doctrinal problems such as causation. Meanwhile, the problems of the Roman legal tradition, which is based on Greek dialectic reasoning, are problems of contemporary law. A new type of law, narrative law as future law may be the answer to these problems. The new law would be truly Greek in the sense that it would develop as a prolongation of the tradition that thinks law in terms of discourse and communication.

Language of research

Academic writings – Writing for interdisciplinary academia – Advantages of compromises – Disadvantages of compromises

The language of legal-linguistic research is academic, a sort of prose in public use. Its background is rather disenchanting as it was coined, like the rest of the academic languages, in medieval monasteries where assertiveness and linguistic

sterility were used to impose contents and discourage criticism. Therefore, this language may appear apodictic and categorical. Contents expressed in this sort of language are, however, less so and are clearly less reliable than the formulations that transfer them. The best way to deal with this sort of language is prudence and criticism, as well as constant testing of legal-linguistic hypotheses. Academic writing is exercised mainly for readers coming from the same discipline. It can therefore afford a certain degree of hermetic terminological isolation from the language of other disciplines. Legal linguists are in a different situation because among readers of their writings there will be not only other legal linguists but also jurists and general linguists. Therefore, the language they use has to be understandable for all prospective academic readers. Already Gérard Cornu (2005) mentioned this problem and requested a more transparent language in legal-linguistic writings. It is not easy to fulfill this request, yet very often theoretical issues of one discipline can be expressed in the language of the other discipline provided the writer's clear understanding of the problem in question. After all, specialized language is rooted in ordinary language and it cannot survive without it. Therefore, it is possible to support and to recommend the use of language that tests the limits of traditional academic prose in legal-linguistic writings.

Legal limits in legal discourses

Regulating language use – Law of linguistic communication – Approaches to hate speech

Legal discourse is exposed to legal regulation of the use of language that constitutes all discursive practices. In this context, some speak about the general freedom of speech as the basic human right while others stress the necessity to regulate the use of language in democratic societies. Depending on the perspective taken upon the use of language in society, one can distinguish the critical discourse that is steered by the argument that the use of language is generally the decision of the speaker and the affirmative discourse that stresses rather the necessity to regulate the generally admitted freedom of speech with regard to other social values that are perceived as equally or even more decisive, such as public order or social cohesion. Critical discourse critically reflects its own preconditions while affirmative discourse profuses law and order ideology that it negligently or deliberately confuses with civil liberties. In such society, all is for the best in the best of all possible societies in the view of its proponents.

I call this area of legal regulation of the use of speech a guest in legal linguistics as it is not inherently connected to the use of language. Besides, another guest in legal linguistics is legal translation that is not a logically necessary operation in law, unlike interpretation or argumentation. I tried to structure the area of legal

limits to discursive practices within a topic called 'law of linguistic communication' (cf. Galdia 2017a: 377-416). This specific area of regulation emerged and became urgent particularly in democratic societies where freedom of speech is a guaranteed constitutional right. It would seem that, at first, this freedom of speech is unlimited, as limiting it would put into question its very existence as a constitutional right and as a discursive social practice. Occidental legislators chose another way of regulation and established types of discourse that are protected in an unlimited way and other types, which do not merit protection. Pragmatically, speaking is always speaking under systemic and social constraints, as speech, i.e. linguistic communication with others, takes place in communicative social situations where hierarchy and exercise of power are omnipresent. With this idea in mind, the regulation of speech by legislators is not an extra-systemic element in language because social regulation of speech seems to have existed since the beginning of human communication. Legal regulation of the freedom of speech appears as an additional device that shapes speakers' communicative skills. The American constitutional doctrine distinguishes three categories of speech: 1) fully protected speech, 2) limited protected speech, and 3) unprotected speech. Fully protected speech is political speech that cannot be limited by laws. Limited protected speech cannot be prohibited, yet it can be subject to time, place, and manner restrictions. It includes offensive speech and commercial speech. Unprotected speech may be totally forbidden. It includes: dangerous speech, fighting words, speech that incites the violent overthrow of the government, defamatory language, child pornography, and obscene speech. Classifications of this sort lead to methodological problems in legal linguistics as the usefulness of this taxonomy might be questioned in linguistic studies. Linguistic practices in a society may or may not correspond with such classifications and the doctrinal classification may cause even problems within social discursive practices when it contradicts or blurs existing conventions of language use. What is more, legal standards in this area are far from being general, for instance Europe and the U.S. differ in their approaches to hate speech in relation to the freedom of speech (cf. Weber 2009). Indeed, wherever hate speech provokes legislative initiatives there also protective constitutional mechanisms are as a rule invoked. In all, the use of language in public sphere is not treated convincingly and rationally by legislators. Meanwhile, the very fact that it is regulated invited legal linguists to become involved in research aiming at the harmonization of legally protected speech and the use of speech in public sphere.

Critical discourse is divided on the issue of combatting hate speech by legislative measures because such measures may conceal existing, unsolved social conflicts. On the other side, dangers for society that result from excessive hate speech are evident. By contrast, affirmative discourse is close to law and order ideology. It is committed to the policy of conflict avoiding at whatever price. Meanwhile, the imagery of building peaceful and inclusive society in a world on fire may prove counter-productive. Today, even Occidental hate speech standards differ in most

considerable parts.[128] Legal linguistics should contribute to the area of the law of communication and develop standards for the use of language in the public sphere that enable the social discourse to function efficiently.

Synchronic and diachronic perspectives in legal linguistics

Investigating legal language of the past – Epistemic interpretation – Contemporary perspective on ancient texts

In this respect, legal linguistics follows unproblematically linguistic and legal methodology and combines or separates synchronic and diachronic perspectives in the research. It adds to them the epistemic method and tries to trace the processes in which concepts emerged in law. The legal-linguistic perspective upon legal texts of the past differs profoundly from purely linguistic and from legal-historical perspectives. For instance, Thomas Hobbes (1588-1679) wrote: "Law properly, is the word of him, that by right hath command over others." Hobbes's rule is linguistically perfectly clear, and the legal linguist has no reason to further investigate its language. The specialist in English linguistics may, however, analyze it as a sample of changes that took place in the English language until our time. Notwithstanding the evident fact that the wording of the rule from Hobbes's time differs considerably from contemporary English, the legal linguist, unlike the linguist who researches the English language, is not interested in such intricacies of historical development of the English language that can be traced in Hobbes's rule because they are legal-linguistically irrelevant.

More interesting are legal-linguistic mechanisms that were effective in history. For instance, young Caesar acquired notoriety in Rome after his accusatory speech against Gneus Cornellius Dolabella in the year 77 BOE. Senator Dolabella abused his power in Macedonia by fraud and oppression. Caesar in his speech before the court that consisted of Roman senators masterly described and proved Dolabella's

[128] Already in U.S. v. Schwimmer (279 U.S. 644, 655, 1929) the U.S. Supreme Court held: "Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate'." This opinion was quoted also in Matal v. Tam, a U.S. Supreme Court decision from 2017 concerning the disparagement clause of the Lanham Act, which was discussed in this book in another context. Meanwhile, in the Recommendation No. R (97) 20 of the Council of Europe Committee of Ministers to Member States on 'Hate Speech' from 1997 the term 'hate speech' is defined in the context of media work: "The principles set out hereafter apply to hate speech, in particular hate speech disseminated through the media. For the purposes of the application of these principles, the term 'hate speech' shall be understood as covering all forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance, including: intolerance expressed by aggressive nationalism and ethnocentrism, discrimination and hostility against minorities, migrants and people of immigrant origin."

guilt. The ancient compared his rhetoric skills with Cicero's oratorical talents. This resemblance is not surprising as both had the same rhetoric teacher, a Greek called Molon, from Rhodos (cf. Kumaniecki 1977: 121). Yet the legal-linguistic moment in this example is marked by the rarely quoted result of Caesar's accusatory master speech. Dolabella was acquitted by his peers. For a legal linguist, the analysis of Caesar's speech makes sense only in connection with its discursive efficiency.

Contemporary legal-linguistic analysis of historical documents may also follow the method of critical discourse studies. An example of such a methodological approach to legal documents is Noam Chomsky's analysis of the *Magna Carta* in the chapter *Magna Carta, Its Fate, and Ours* in his book *Who Rules the World?* (2016). Chomsky interprets the historical document toward the background of contemporary political events and legal decisions that elucidate the importance of conceptualization of public liberties in modern society. Concepts that emerge in the social discourse about public liberties are not resistant to change. They can be easily reconceptualized as shown by Chomsky (2016: 95) on the example of the extension of the semantic range of 'presumption of innocence' under Obama administration to cover 'post-assassination determination of innocence' in U.S. military interventions abroad. In fact, terms, even after being exposed to a series of evolutions, as is the case with e.g. 'marriage' and 'divorce', maintain their function of structuring elements in social discourses.

Shift to language in action

Action in law – Linguistic action – Ethical action

The pragmatic dimension of the legal language causes the shift in attention toward action. Language is not investigated any more in isolation. Action in the area of law is interesting in the sense of the better law approach when it is simultaneously efficient and ethical. Extreme efficiency that in law can be illustrated in the use of formalized language causes linguistic disasters. A German judge dealing with a succession case wrote: *Der letzte Wohnort der Erblasserin war die Gemeinde Ausschwitz* (The last domicile of the testator was the municipality of Auschwitz). The judge, being aware of the efficiency principle, used in this case the pre-formulated pattern that fits most such cases, yet clearly not this one. What is more, the judge committed also a juridical mistake while trying to be expedient, as no-one can be domiciled in a concentration camp. Also purely linguistically we do nor say that someone 'lived in a concentration camp' and by so doing we stress that living somewhere means living somewhere of one's free will.

The analysis of legal-linguistically relevant action shows the relation between the declarative character of law as a written text and its social consequences. Action in law concerns both the shaping of law, which constitutes the normative

component, and the application of law. Both are interrelated. For both there is responsibility of persons acting as best expressed by Karl Jaspers:

> Es ist das Verhängnis jedes Menschen, verstrickt zu sein in Machtverhältnisse, durch die er lebt. Dieses ist die unausweichliche Schuld aller, die Schuld des Menschseins. Ihr wird entgegengewirkt durch Einsatz für die Macht, welche das Recht, die Menschenrechte, verwirklicht. Das Unterlassen der Mitarbeit an der Strukturierung der Machtverhältnisse, am Kampfe um die Macht im Sinne des Dienstes für das Recht, ist eine politische Grundschuld, die zugleich eine moralische Schuld ist. (cf. Jaspers 1946: 33)

Also Theodor Adorno stressed in his *Minima Moralia* that ethically responsible private life is not possible in isolation, under circumstances imposed by a regime hostile to human rights (cf. Adorno 1969: 42). Therefore, actions of persons performing duties in the area of law are measurable along the lines of ethic, also in legal linguistics.

Legal language of the future

Semantic congruency – Complicating law as a matter of fact – Ordinary language is not unorderly language

Methodically, some prediction about the future of the legal language seems to be possible. First, the legal language of the future may lexically overcome the dichotomy of ordinary and specialized language or at least to narrow the gap between both. In such a language, legal terms such as *ownership* or *possession* will mean approximately what they mean in ordinary language. This general tendency is best illustrated in the Spanish 'manada' rape cases. In such cases, 'manadas' (i.e. wolf packs, gangs of mainly young men) aggress and rape women collectively. Spanish courts, due to the division of sexually related crime in the Spanish criminal law into *acoso sexual*, *abuso sexual*, *agresión sexual*, and *violación*, have the tendency to follow in the 'manada' cases doctrinal semantic conventions that differ from the ordinary use of the Spanish language. This preference of judges for alleged professionalism leads to protests in the citizenry that perceives judgments based on structural intricacies of the named concepts as unjustified and insists on sanctioning rapists for having committed rape. Especially, when the rape is denied by the courts, for instance in a case where the victim is first intoxicated with alcohol and narcotics and then abused, while being unconscious, and thus unaware of the occurring abuse and unable to resist the rapists, public concern is regularly expressed by citizenry. The courts tend to sanction the perpetrators for sexual abuse; the public at large identifies such crimes as rape (cf. Audiencia Provincial

de Navarra, judgment of April 26, 2018, no. 00038/2018). For instance, the High Court in Barcelona explained 2019 its motives while saying: "La corte considera que es inequívocamente un delito de abuso sexual porque se ha demostrado que la víctima, mientras los eventos tuvieron lugar y desde el momento anterior hasta horas después de lo sucedido, se encontraba en estado de inconsciencia, sin saber lo que se hizo o no se hizo, en consecuencia, sin poder determinar y aceptar u oponerse a las relaciones sexuales mantenidas con los acusados, que podrían realizar actos sexuales sin usar ningún tipo de violencia o intimidación." This justification is doubtful also in terms of traditional doctrine. One could ask whether the perpetrator of a criminal act should benefit from rendering his victim physically unable to resist him. Furthermore, linguistically, it is doubtful whether the victim had 'maintained sexual relations with the accused' while being unconscious (cf. 'oponerse a las relaciones sexuales mantenidas con los acusados'). The lower Spanish courts seem to have been trapped in the 'manada' cases linguistically and doctrinally in argumentative structures, which they were not able to interpret properly. Petrified positivist thinking impedes the appropriate interpretive approach to emerge in such cases. The Spanish Supreme Court reversed on June 21, 2019 the 'manada' verdict concerning the events in Pamplona and affirmed the charges of rape.

Second, in terms of genre, legal texts will be composed following the patterns of ordinary communication. In James v. City of Costa Mesa (700 F 3d 394, 9th cir. 2012) the U.S. Court of Appeals for the Ninth Circuit had to deal with the 'other' in American with Disabilities Act (ADA) Title II, where 'illegal use of drugs' is defined as:

> The use of drugs, the possession of which is unlawful under the Controlled Substances Act. Such term does not include the use of a drug taken under supervision by a licensed health care professional, or *other* uses authorized by the Controlled Substances Act or *other* provisions of Federal law. (emphasis added)

The plaintiffs in this case used marijuana prescribed by their doctors to alleviate pain resulting from diseases from their serious medical condition. In California, where they live, the state law allows the use of marijuana for medical purposes. Marijuana remains however a controlled substance under the Controlled Substances Act (CSA). Therefore, it constitutes a federal crime to possess or to distribute it. The plaintiffs demanded therefore from the cities they sued to stop efforts to close marijuana-dispensing facilities. The case primarily, therefore, deals with the question whether the plaintiffs' medical use of marijuana constitutes 'illegal use of drugs'. While discussing the text of the provision the court stated: "…if the Congress had really intended that the language excepting 'other uses authorized by the Controlled Substances Act or other provisions of Federal Law', be entirely independent of the preceding supervised use language, it could have omitted the word 'other,' thus excepting 'use of a drug taken under supervision by a licensed

health care professional, or uses authorized by the Controlled Substances Act.' Moreover, unless, the word 'other' is omitted, the plaintiffs' interpretation renders the statutory language outright awkward." In the dissent, Justice Berzon wrote: "…the word 'other' is not necessarily redundant at all. It could be read to indicate that use under supervision of a doctor is meant to be a category of uses entirely subsumed by the larger category of uses authorized by the CSA…Put another way, omitting the word 'other' entirely would certainly have compelled the reading (i.e. which the plaintiffs advance), but its presence does not invalidate (i.e. this) interpretation. There is, after all, a middle ground between these two readings… (T)he two clauses could be seen as partially overlapping, with the group of uses supervised by the doctor partially independent, encompassing in addition a set of uses not authorized by the CSA. This reading strikes me as the most sensible. Under this interpretation, 'other' is not redundant." This understanding of *other* corresponds also with our daily use of the word.

Meanwhile, use of informal language may blur the legal message rather than make it more accessible to the audience.[129] Lady Hale in giving the judgement of the UK Supreme Court in the matter concerning the constitutionality of the UK Prime Minister's prorogation move (cf. judgment of 28 September 2019, UKSC 41, 2019) used several times colloquial expressions in the midst of judicial legalese: "It is a one-off…", "The Prime Minister ticked 'yes' to the recommendation., "…the Cabinet meeting was held…in order to bring the rest of the Cabinet 'up to speed' ". No further consequences follow from this sort of linguistic experiments and the court decision does not become clearer when it is expressed in informal language. Sometimes, hilarity may come up when legal terminology appears in ordinary, familiar speech, e.g.: "Inside they found petitioner sitting partly dressed on the side of the bed, upon which his wife was lying." (cf. Rochin v. California, 1952) Therefore, the use of ordinary language in the area of law does not equal unreflected use of unorderly language.

[129] Blurred semantics and problematic conceptualization dominate the Internet language, where texts such as: "Commercial law or Mercantile law, also known as trade law, is the body of law that applies to the rights, relations, and conduct of persons and businesses engaged in commerce, merchandising, trade, and sales. It is often considered to be a branch of civil law and deals with issues of both private law and public law," can be found. The text sample is not wrong in terms of content, yet it is imprecise. While referring to the body of the legal doctrine, it targets non-professional audiences. As a result, it fails to describe the doctrine, as it lacks precision and it does not support non-professional speakers because it cannot free itself from the doctrinal reference that is the main obstacle for non-jurists in their attempt to understand law. In fact, it lacks the necessary commitment to ordinary language that would be instrumental in re-formulating the doctrine in line with the daily use of language and remove the text-type specific hindrance to the understanding of law by non-jurists.

Issues of technological interest and legal linguistics

Non-academic interest in legal-linguistic findings – Co-operation with non-academic institutions – Independence in defining perspectives of legal-linguistic research

Certain legal-linguistic problems arise interest in parts of governmental structures, international organizations, and society at large due to their immediate applicational character, especially in juridical and governmental bodies. Issues such as legislative drafting and use of plain language in public acts and other governmental information, legal translation for purposes of international institutions such as the European Union, legal lexicology and lexicography, and language expertise in criminal investigation may generally play a positive role as they legitimize the existence of legal-linguistic research in the eyes of non-legal linguists who, nevertheless, shape the legal-linguistic surroundings through financing research projects and offer stable employment in institutions that need services based on legal-linguistic findings and competences. Therefore, the use of the existing research and the development of research in the named areas is as such welcome as technological progress is an issue of general interest. Meanwhile, when legal linguistics is reduced in such settings to social engineering and treated as useful technology, the distortion of the research perspective is its natural consequence. A shift in perspective upon legal-linguistic problems that are perceived as relevant, yet from the perspective of the legal-linguistic theory appear minor, may take place and definitely also takes place now due to preferences imposed from outside of academic institutions upon legal linguists. The application of legal-linguistic findings in the named and other areas of practical life is uncontroversial as long as it does not impede the development of theoretical research that constitutes the basis of all applied forms of knowledge. Particularly, fundamental research suffers under such conditions of imposed preferences justified by immediate needs. What is more, such immediate needs are often defined rather naively, as identifying social needs is a complex intellectual enterprise that shapes rather than states them.

Questions of academic strategy

Strategy and academic rhetoric – Strategic alliances – Risk of colonization

Strategy as a means of politics and military operations seems to be contrary to academic undertakings, which are not directed at unconditional victory but at the search of truth. Already the ancients pretended that truth triumphs and protects itself by its quality of being true. Indeed, in the history of science, this assumption has proven true, yet only in a very generously sketched timely perspective. It took, for instance, some eighty years to establish the Copernican heliocentric system at

European universities as a dominant scientific theory. Scientific truth, therefore, triumphs, but not immediately. Transition periods are elements of waste and signs of misery in academic institutions. Therefore, the idea of strategic alliance could come up in order to strengthen the position of legal linguistics in academic institutions.[130] Meanwhile, legal linguistics' primary potential ally, the legal science, is reluctant to support efforts at the modernization of our approach to law. At best, it commits itself to lip services and tolerates interdisciplinary research into law and language. As the legal science is an influential player in the established academia, it is difficult to imagine the evolution of legal linguistics without its support. This support cannot be limited to rhetorical exercises but it would have to include mandatory education of law students in legal linguistics, professorships of legal linguistics at law schools, and possibilities of systematic research in this area. This is clearly not the case today. In some countries, law students are exposed to rudimentary studies of legal-linguistic issues, some ephemeral research is supported by established academia, while systematic research is often an issue of private scholarship. Strategies in the academic world are easy to set up, yet difficult to implement. Henry Dunant, while aiming to establish the Red Cross was aware of the fact that the army and not the citizens at large would have the last word on the matter. Therefore, he maintained close contacts with high-ranking army officers during the process of the forming of the organization, largely against his own moral convictions, in order to make his idea palpable to the institutionalized world of military conflict (cf. Dunant 1986). Henry Dunant was finally successful in his undertaking, yet the price paid for his success was high. I am not sure, whether under the given circumstances seeking academic alliances politically would be the best solution for the future of legal linguistics. In fact, the risk of colonization of this area of knowledge by governmental structures and positivist academia should be avoided at whatever price.

Criticism on legal-linguistic contributions as a problem of method

Multiple notions of criticism on legal-linguistic research – Strategies in dealing with criticism – Institutional limits of exposure to criticism

Criticism on legal-linguistic research comes from multiple directions. It represents perspectives of sceptics, condescending attitudes of positivists and neo-positivists in legal sciences, and of persons generally hostile to any expansion of science that they perceive as final. For instance, a question by a judge 'Would my judgments become better had I studied legal linguistics?' is a legal-linguistic chal-

[130] In the context of this idea, A. Wagner and J.C. Gémar (2013: 731) wrote: "New disciplines emerge not only as knowledge grows and spreads but also as power relations and reputations change within academia."

lenge. The judge's reasoning reminds of an anecdote about the Spanish grammarian Nebrija and the no less Spanish queen Isabel of Castile. When Nebrija finalized his Spanish Grammar, he presented his work to the queen. On seeing the voluminous work, the queen asked: 'Will my Spanish become better when I have read this book?' Nebrija, unprepared for such a question responded: 'The best Spanish is spoken at your majesty's court'. And the queen replied: 'So, why should I read this book?' Nebrija's answer fits narrative requirements of an anecdote, yet it is not satisfying as an answer coming from a scholar. It may embarrass a beginning researcher, especially when asked in a provocative tone. Also claims that legal linguistics challenges jurists because it presupposes that the legal science is deficient represent hostile attitudes to research into law undertaken from other perspectives than legal. Legal linguistics is often critical of the legal science and what is more important, it is independent in its approach to law from the legal doctrine that it, however, takes seriously into consideration. Methodically, critics are expected to research into the criticized area thoroughly and systematically. They must have a record of substantial inputs into an area of knowledge before criticizing works of others. It is not advisable to express discontent with contributions of others that one may perceive as deficient unless one is able to address the issues treated methodically and substantially in a more convincing way. Therefore, meaningful criticism on a book is another book. What is more, due to weak institutionalization of the subject in academia, legal-linguistic research has to be made often by enthusiasts and be financed privately, thus representing private scholarship. Research made under such conditions cannot be evaluated along the lines established by and for institutionalized academic research. Without private scholarship there would not be any legal linguistics as institutionalized academia preferred to deal with traditional topics. After all, the first largely known legal-linguistic treatise, David Mellinkoff's *The Language of the Law* (1963), was written by an attorney-at-law on a self-financed sabbatical.

Conclusions

Legal-linguistic studies are best developed within the holistic approach to law. This approach presupposes the paradigmatic commitment of the researcher and a broad research agenda. Legal-linguistic research can, of course, also focus upon particular phenomena, yet it will be less informative and it will explain less about the use of language in the area of law. Therefore, the most ambitious legal-linguistic research project is the attempt to rewrite law in line with the rules of language use in contemporary society. This project has many facets that can be scrutinized simultaneously. Some of the examples of such facets such as legal-linguistic gender studies, legal translation studies, or history of legal linguistics were mentioned above to show that the main goal of rewriting law is embedded in broader social

contexts and particular research projects. Legal-linguistic orientations, i.e. the set of postulates that steer the research, are the methodical prerequisite for every legal-linguistic research undertaking.

PART IV. CONCLUSIONS UPON THE LEGAL-LINGUISTIC METHOD

Conclusions and prospects for the legal-linguistic research will constitute the final part of this book. Many detailed conclusions were presented passim in the above three parts; most of them do not need to be repeated. However, some of the findings of the above parts will be generalized in this part in order to clarify the most relevant methodological requirements of the legal-linguistic research. The most relevant, although not new, is the interrelation between method and knowledge. This finding is particularly relevant because we found legal linguistics while looking for the legal-linguistic method. This result is not surprising because knowledge depends upon method and upon the enquiry into methodological fundamentals of an area of knowledge. Discourse about method corresponds largely with the subject matter, at least in terms of theory. Theoretical legal-linguistic knowledge is an amalgam of method and its application to legal language. This, in turn, is legal discourse. The commitment to legal discourse also marks the point where the linguistic turn in law takes place. The linguistic turn in law is not the result but the most important goal of the legal-linguistic activity. It means that we deal with legal linguistics in order to achieve a change in legal sciences, especially in those dominated by doctrinal considerations. Some, although less spectacular results of the legal-linguistic research are also relevant to general linguistics. At least in this respect, the legal-linguistic research contributes to the unification of research results. As the legal-linguistic contribution to the unification of research results is perceived in this book as a primary contribution, it will also be treated first.

Linguistic turn in law through legal-linguistic research

Overcoming different treatment of language in law and in linguistics – Unified approach to legal language – Legal language central to legal science

Legal linguistics may be construed as an area of knowledge in its own right. Yet its independence is not perfect. Legal linguistics stands and falls with its contributions to law and to linguistics. Methodologically, the issue of primary contribution is difficult to decide.[131] As of now, at least, one may assume that the primary impact

[131] M. T. Lizisowa (2016: 17, 20) stressed the interrelation of philosophy of law, legal theory, and legal linguistics: "Komunikacyjna teoria języka prawnego koresponduje z badaniem tego języka z pozycji filozofii prawa i teorii prawa… W toku analizy współczesnego języka prawnego odwołania historyczne wskazują na tradycję kształtowania się polskiego języka prawnego pod wpływem filozofii prawa i teorii prawa." Indeed, legal-linguistic research that does not

of legal-linguistic research could be seen in law rather than in linguistics proper. For law, legal linguistics could become important in showing its subject matter or object of studies in a new perspective. The linguistic turn in law within such an approach could modify the course of the study of law. Problems connected to this issue are the lack of serious attempts at the reception of legal-linguistic research in the area of law and a relatively limited number of legal-linguistic works that would be explicitly committed to achieving the linguistic turn in law.

Today, language is the starting point in the approach to law of laypersons and other non-professionals of law, who deal with elements of law in their professional work, such as legal translators, journalists, fiction writers etc. Jurists, including law students, rarely start their education in law with the study of the legal language (cf. Bleifuß 2015 about deficits in the German legal education system). As a rule, they are said that the understanding of the legal language is the natural and immediate effect of their doctrinal studies of law, which would suffice to obtain full understanding of law. Yet, in the light of the findings of this book, the positivist legal doctrine has to be perceived as the study of law that neglects law's fundamental ontological feature, which is its discursiveness. As discursiveness is a linguistic phenomenon, law in its fundamentals is best approached and understood as a discursive practice, i.e. with the methods based upon legal linguistics. Legal doctrine, not only at this point, confuses jurists about the very nature of the phenomenon that they study and it commits them to a reified conceptual skeleton that at best displays some characteristic features of legal texts, yet definitely not law. In instances, when the positivist legal doctrine admits the primary existence of law as a linguistic practice, for instance in legal interpretation, it introduces all possible approaches to legal interpretation, with the exception of the legal-linguistic methodological findings. By so doing, the legal doctrine cultivates unnecessary exercises in the conceptual structure of law and it procrastinates the process in which many jurists (law students included) arrive at the conclusion that the adequate use of language is the essence of their profession. At that point in time, however, most of them will be left alone with their findings, as they will graduate and start exercising a profession in which the most important skill will be acquired and applied spontaneously and intuitively, in makeshift attempts to reach professionalism. Graduate jurists, in their absolute majority, will not be able to benefit from the findings in social sciences and linguistics because of the specifics of their education that hinders their methodical access to research results in other areas of knowledge. The methodological isolation of the legal science, and foremost of its legal doctrine, is also the biggest obstacle to the development of legal linguistics that would need a strong ally and a convinced supporter in academic institutions that the legal doctrine, by the very nature of its method, cannot become. Therefore, the necessary evolution of the

match up to achievements in the existing legal-theoretical research cannot be perceived as relevant in the perspective of unification of research results and methods that is the leading idea in this part of my reflections on the appropriate legal-linguistic method.

legal science is one of the fundamental preconditions for the further development of the legal-linguistic research. The academic community would have to arrive at the understanding that legal linguistics is not an ornamental element in multidisciplinary studies or a harmless pastime discipline for some enthusiasts but one of the central areas of our scholarly preoccupation with law.

Partly fulfilled expectations

Theoretical goals – Practical achievements – Future action

The different, linguistic perspective upon law should show law as a linguistic phenomenon. Practically, it would mean that law would be reformulated or rewritten according to the legal-linguistic findings. Some practical approaches in legal drafting and in plain language studies tend in this direction, yet they do not accomplish the total reformulation of law. Therefore, one could claim that they fulfill the expectations related to the linguistic turn in law only partly. Meanwhile, achievements of legal linguistics cannot be easily dismissed. Comparative legal linguistics described mechanisms in which particular legal languages emerged and developed. It identified processes in which language contacts shaped legal languages. It also contrasted differences and similarities among legal languages and made a step toward the generalization of relevant findings in this area. Universal legal-linguistic structures emerged in comparative legal linguistics as one of its most important contributions. Also the monolingual legal-linguistic research contributed valuable findings about particular legal languages that can be generalized in comparative legal linguistics. As a result of all this work, legal language is not a mysterious and incomprehensible internal code for communication among jurists any more. It has been demystified by legal linguists as a language for special purposes with its rules and its terminology that can be methodically scrutinized.[132] Furthermore, the legal-linguistic approach based upon discursive methods described law as a mechanism in which power is exercised in society with the help of language. This finding demystified legal language further, and even more persistently and decisively. Meanwhile, many legal linguists still avoid critical discursive methods and view the law in the books rather than the law in action, where its most fundamental linguistic features manifest themselves. Further

[132] The task of demystifying terms was mentioned already by B. Pascal in his *Provincial Letters* that is the first treatise on terming. Terming usually interested philosophers less than conceptualization. Pascal stressed in the reply to the first and the second letter, dated February 2, 1656, the demystifying role of research into terminology: "These words *proximate power* and *sufficient grace*, with which we are threatened, will frighten us no longer. We have learned…., in how many different ways they may be turned, and how little solidity there is in these new-fangled terms, to give ourselves any trouble about them." (Transl. Thomas M'Crie)

substantial legal-linguistic achievements depend largely upon the institutionalization of legal linguistics as a discipline in its own right.

Consequences of discursiveness for legal linguistics

Decoding meaning – Researching discursive practices – Interpretive practices in law

The first practical consequence that follows from the above findings and that is methodologically relevant is the determination of the mechanisms in which meaning emerges in law. For the most pertinent problem of meaning constitution in law, it proposes the shift from the decoding of meaning to researching discursive practices (i.e. strategies and devices) in which meaning emerges in law. Additionally, consequences that follow from this postulate for legal translation would be the following: the result of translation is an idle text, yet meaning emerges in institutional processes of text application. Meanwhile, in law, the hierarchy of courts determines what a legal text actually means. Here lies the misery of legal translation. The translator is not the master of his text and the legal linguist can help him to understand his profession properly.

What is more, the linguistic turn in law would mean a challenge for the doctrinal analysis of law as meaning that emerges in law cannot be determined in advance. Meaning in legal language is not deciphered, but constructed in legal discourses. Both above findings show the linguistic turn in law in action. It became also clear that the legal language does not consist of isolated legal terms and notions and therefore it cannot be researched as such, especially not in terms of isolating lexicology. Methodologically, pure linguistics will not do in the area of law, legal linguistics is needed. Furthermore, the possibility to use ordinary and explicit language challenges the idea that legal language is and ought to be a language for special purposes and an object of plain language experiments. Reification of legal language could be prevented through explicit and expressive speaking. Rigid patterns for drafting laws, sometimes decades old, should be abandoned and replaced by communicational mechanisms and devices worked out in legal linguistics. Explicit speaking (saying what one means), and expressive speaking (communicating with means of ordinary language according to the rules of ordinary language) are legal-linguistic alternatives that can be offered already today to legal institutions.

Legal-linguistic essentialism and constructivism

Conflicting approaches – Embeddedness of legal-linguistic research in other sciences – Advantages of broad embeddedness

Approaches to law and to its language are numerous. Already in past centuries, some scholars realized problems connected to diversity of legislation and to linguistic diversity. Blaise Pascal mentions in the fragment 294 of his *Pensées* (first edited 1670) a feature of law that he perceives as essential:

> Three degrees of latitude reverse all jurisprudence; a meridian decides the truth. Fundamental laws change oft, after a few years of possession; right has its epochs; the entry of Saturn into the Lion marks to us the origin of such and such a crime. A strange justice that is bounded by a river! Truth on this side of the Pyrenees, error on the other side. (Transl. W. F. Trotter)

Also Julius von Kirchmann (1938) mentioned the same phenomenon, in a way that comes close to Pascal. Law is therefore clearly not in the rules but in the legal-linguistic operations and other discursive features. This means also that the research focus shifts from assertions to other modalities in which law is expressed. Such research exists already. Innovative Poznań projects on deontic modality may be illustrated by Joanna Nowak-Michalska's (2012) research into the language of the Spanish civil code (cf. also about deontic modality Batjushkina 2018). The Poznań project that stresses modality in law is another step to cope better with the realities of the use of language in the area of law. The embeddedness in legal logic and other social sciences is a new development in legal-linguistic studies. It shows legal language in all its complexity that all too often was reduced to legal doctrine.

Opening up the legal discourse

Legal discourse as a vast platform – Widening paradigms – Courageous approaches to legal language

The legal-linguistic experience with the legal discourse makes prudent at attempts at isolating and professionalizing the legal discourse. The legal discourse is not only the matter of jurists. Citizens at large, i.e. outside juridical institutions, have a stake in processes of formulating and applying law. The multifaceted structure of the legal discourse as we know it today shows that it can be reduced to a discourse of jurists only artificially (cf. Galdia 2014). The opening of the legal discourse should also correspond to the opening of the paradigm of legal science. It is time for it to become a social science in its full right among other social disciplines. In

linguistics, one can therefore expect more interest in the discourse of non-jurists about law as it is linguistically equally valuable.

Law is researched in legal linguistics in order to improve it. Already Cicero, who was interested in linguistic issues in law, dealt with the concept of the better law. Cicero attempted at developing the principles of better law for Rome in *De legibus*. The idea of better law presupposes a critical attitude to law and it is contrary to the affirmative legal discourse that prevents the evolution of law and the methodological renewal of all sciences that deal with it. Laws have never been perfect and no harm happens to society when this fact is stated openly in academic and other social discourses. What is more, legal institutions have always been vulnerable and deficient. Their decisions have been contested over centuries. Doubtless, also sound work was done in these institutions since their inception, yet to glorify them is not the task of a legal linguist. Legal linguistics can, as was shown at least implicitly in many examples analyzed in this book with the help of the legal-linguistic method, improve the quality of law in terms of language use and communicability. In addition, legal linguistics can also contribute, as whatever social science, to the material side of legal regulation. It could more courageously than is the case to date, support legislative goals that further the idea of a democratic and participative society. Among these goals, I may mention particularly the protection and expansion of human rights, especially linguistic and other cultural rights within the area of the law of linguistic communication and the globalization of law where the processes in which the language of the global law emerges will require legal-linguistic expertise and support. Jurists, for their part, never had any objections against their involvement in material problems of legislation, although their competence in many areas of legal regulation could be easily questioned. Therefore, there is no reason why legal linguists should hesitate to contribute also to the general discourse about law.

Law is not a matter of nuances – struggle for law

Pedantic attitudes in positivist conceptions – Power in law – Knowledge in law

Methodically, it is important to keep in mind that law, against frequent claims to the contrary, is not a pedantic search for hidden semantic nuances in cases and statutes. Meaning in law emerges in complex legal discourses that are steered by other than philological or terminological considerations. This finding is a challenge for the analysis of legal language by linguists who still prefer to delegate the dealings with the power-related elements of the legal discourse to other specialists such as sociologists, political scientists and legal theoreticians. Yet, powerless legal language is a fiction not worthwhile researching.

Legal-linguistic knowledge as such is valuable. Meanwhile, more important than pure, theoretical knowledge is the application of knowledge. In academia and

in society it is not clear who is actually in charge of transformations of theoretical knowledge into practical results. The contemporary problem of legal linguistics is its limited impact upon state and society as well as related areas of knowledge, mainly linguistics and law.

Finis jurisprudentiae?

Legal constructs and legal sciences – Conceptualizations – Terming – New legal science

The inquiry into the nature and the role of legal constructs in law was incorporated passim into this book. We found out that legal constructs appear as concepts and terms, speech acts with reference to law, and other professionally and non-professionally structured texts. They represent, in fact, legal arguments, that due to the development of legal science show some of their facets in some specific speech acts, yet they also have the tendency not to manifest themselves explicitly in their semantic and pragmatic entirety. For example, the justification of a court opinion will, as a rule cover only a part of the argument, and, to make it even more confusing for its recipient (especially when he or she is not a jurist) it will not mark this circumstance explicitly. This is typical of hierarchical speech acts and court opinions are specimens of this kind of speech. Legal constructs represent law in the legal discourse. They are the domain of jurists, for whom legal constructs equal legal language and they are perceived as the quintessence of their professional knowledge. Conceptualization as such is of course not limited to legal science; it is a linguistic operation that enables the evolution of semantics. Abstraction, systematization, and classification (cf. Daube 1969: 11) are its particular forms of appearance in language. They, also, by the nature of things manifest themselves in the legal reasoning, i.e. in our reflection upon law since the writings of the ancient Roman jurists. Modern law and modern legal science could emerge after their reformulation according to legal-linguistic methodology as an area of knowledge beyond the proverbial 'heaven of legal concepts'. Law would still be law, yet it would appear linguistically like whatever communicative situation of daily social practice that is expressed in ordinary language. Conceptualization, and specifically the process of terming, i.e. naming concepts, inherently includes the reification of ideas that may restrict their and our field of semantic manoeuvering in speech. Court practice is the best example of a situation where such risk becomes pertinent. In consequence, the fulfilment of the legal-linguistic agenda, which is far from being implemented, does not mean the end of legal science but a new beginning after its reformulation along linguistic and legal-linguistic findings. Contemporary legal linguistics marks the starting point of such a new beginning.

What is a legal question?

Importance of legal questions – Non-legal areas in legal discourses – Social discourse

Doctrinally, one might assume that an issue that comes up in litigation due to problems of statutory application is an example of a legal question. In addition, systemic tensions in conceptual analyses of law might also be perceived as legal questions. Discursively, however, whatever question that comes up in the community of speakers with reference to law is a legal question. Often non-professional discourse overtakes the professionals of law. Professionals are usually reactive to legal problems, while non-professionals, who are not bound by professional obligations, may anticipate and conceptualize legal problems proactively. For instance, the question whether robots are legal persons may be perceived as not truly doctrinal as it has, as of now, no real bearing upon the creation and application of our law. Yet, it may become relevant due to the development of artificial intelligence that in some time from now may create robots that at least partly would be able to make own decisions. The question of liability will emerge under such circumstances and it will require an answer to this question. It seems therefore that discursive approaches to law describe the totality of issues related to law better than doctrinal approaches.

Non-doctrinal legal science

Social discourse and legal science – Doctrinal reasoning – Ideological approaches in law

Language used in the social sphere reflects the speaker's form of life. Yet, forms of life differ also in terms of their propensity to contribute to social progress and to individual development. At least in societies of the antagonistic type no homogeneous social discourse that reflects one specific form of life can be expected. More often than not, one may have the impression that "we are living in a bygone century" when confronted with the social discourse of our time (cf. Dewey 1999: 5). John Dewey identified the contradiction between thought and language that threatens the rationality of the social discourse.[133] Indeed, communication does not make sense when reality and language fall apart. Our interest in this sort of communication is therefore limited. Meanwhile, such communication is not rare. For instance, parts

[133] John Dewey (1999: 5) wrote: "It is becoming a commonplace to say that in thought and feeling, or at least in the language in which they are expressed, we are living in some bygone century, anywhere from the thirteenth to the eighteenth, although physically and externally we belong to the twentieth century."

of the political discourse are steered by this confusing phenomenon and society, in general, seems to be tolerant of meaningless types of communication. Academic approaches to communication are different as they stress rationality as the goal and the basis for any communicative exchange. This requirement was stressed in the modern philosophy of language most distinctly by Ludwig Wittgenstein who insisted upon the conclusion of his meticulous logical and linguistic investigations that one has to remain silent in a situation when nothing can be said meaningfully. Yet, in the social discourse, academic postulates are not binding as the social discourse develops largely independently from the academic world. Therefore, social discourse has to be taken for what it is, even if it is in most cases not satisfactory in the light of academic approaches to social reality.

Legal discourse as a type of social discourse shares all named structural features of the social discourse. These structural features engender social problems that cannot be solved independently of it. Strictly speaking, they cannot be solved at all, as they are inherent in the type of society in which most current legal discourses take place. Law reflects society and it cannot be more democratic or rational than society that it represents. Exactly the same finding applies to the judicial apparatus. Every society has a justice system that it deserves. Happily, these disappointing conclusions concern sociology and other sciences that research directly state institutions rather than legal linguistics. Legal linguistics, when analyzing the legal discourse, only identifies and demonstrates areas where the mentioned problems manifest themselves linguistically in a particularly striking way.

Most problematic in the sense of the above is doctrinal reasoning. Typical of doctrinal reasoning are arguments such as: the relation between the child and its parents belongs to the area of private law as it is family law. Meanwhile, it concerns a relation of subordination that is characteristic of public law. As doctrinal thinking is a sort of systematic reasoning, i.e. it consists of inferring conceptual relations within a given assembly of accepted legal arguments, it will not lead to another thinkable and more convincing conclusion that the relation between child and its parents is legally a part of public law as family law could be perceived due to its anchorage in public law mechanisms as belonging to this area of law.

The misery of doctrinal reasoning in law forced some jurists to think about alternatives to this sort of reasoning. Typological alternatives to this reasoning were searched in traditional laws that had fallen into desuetude or are binding only on members of religious groups. Yet, these laws are also expressed normatively and can be applied only under generally known conditions imposed by legal argumentation. They, therefore, represent an archaic period of legal development, yet definitely not a type of law that could be perceived as typologically different from modern laws. Another alternative concerned the socialist law that already from its inception pretended to differ fundamentally from other types of law. Karl Marx viewed law mainly negatively as a tool of oppression that the bourgeoisie imposed upon the working class. For him, the future communist state would be

a formation without law. Meanwhile, no socialist state that was formed with explicit reference to classical Marxism was able to abolish law. Instead, a conception of the law of the whole nation that would be applicable in a non-antagonistic society was prepared by legal theorists in socialist states, especially in the Soviet Union. As far as the existing legislation of the now extinguished socialist states is concerned, no fundamental difference in the structure of the socialist law can be identified in them, as also they are clearly following the path trodden by the ancient Roman jurists. Socialist law is not a law of another kind, but a version of a simplified application of legal provisions along the line of an ideologically strictly determined set of social interests, favoring the interests of the state and classes that compose it against all others (cf. Grasemann 1997). Law is generally construed and applied in this way, yet all other legal systems are less explicit on the issue of sets of values and commitments used in the acts of formulating and interpreting law. The above alternatives to doctrinal reasoning in law failed to replace the legal doctrine apparently due to their ideological character. They did not propose any viable methodological alternative to doctrinal reasoning. It seems that legal linguistics that is steered by the project of the linguistic turn in law is able to function as an alternative to doctrinal reasoning in and about law. It is, however, an open question for me, whether legal linguistics, in some point in time from now, will be able to become truly operative in law due to its methodological quality alone.

Conclusions

Legal linguistics develops dynamically. Its goals and the range of the researched linguistic phenomena are constantly expanded and formulated more convincingly. Meanwhile, the impact of the legal-linguistic research upon other academic disciplines such as legal sciences or general linguistics remains very limited. Its influence upon legal institutions and society at large is weak or non-existent. This lack of impact constitutes the biggest deficit of the legal-linguistic undertaking as it is defined in this book and it also puts in danger the realization of the main legal-linguistic project that is the rewriting of law from the perspective of language use. Would legal linguistics be taken more seriously by academia and citizenry, then it would be able to deliver research results that would engender profound transformations in social sciences, in the governmental legislative action, in the application of laws by courts, and in the attitudes of citizens to law.

Summary of Parts I to IV

Legal linguistics deals with the language of law in all its linguistic facets and socially relevant aspects of use. Legal-linguistic methodology ascertains that research into legal-linguistic topics can be exercised meaningfully. This task is difficult and simple at the same time. We have seen that legal linguistics uses many existing methodological approaches. Meanwhile, in order to cope with the specifics of the legal language it has to adapt to the goals of research and to the specifics of law. When all this is done, law appears in the legal-linguistic perspective as a discursive practice. This may not be perceived as a great result, yet when we consider that the majority of jurists still perceive law in the (neo-) positivist perspective and that even some linguists believe in the conception of legal-linguistic research that deals with the analysis of isolated legal terms, then our result appears in another light.

The sense of our dealing with the elements of the legal language, which are more complex than single terms, is the expectation to understand law within a broader context of the universal discourse. We do not know any broader concept as the universal discourse, which would provide the matrix for our approaches to language, in casu to legal language, i.e. our speaking about law. Therefore, legal discourse is fundamental to any dealings with law and its language. Whatever other phenomena, for instance legal norms and concepts, have their role to play in legal linguistics where they are approached toward the background of legal discursiveness. Legal discursiveness states a fundamental matter for every legal linguist. It maintains that law is a discursive practice. Legal propositions about the content of law are therefore not deducted from legal norms, legal concepts, or broader structures such as legal texts but constructed in social discourses about the valid law.

Legal linguistics can be approached and characterized by its method. The legal-linguistic method is neither legal nor linguistic, it is legal-linguistic. The description of the legal-linguistic method enables a more precise characterization of legal linguistics, its range and its scope. What is more, the legal-linguistic method is a tool that tolerates diversity of views about the researched subject matter. Monolingual and comparative approaches, strictly and implicitly semiotic analyses, views upon the legal language that are closely or loosely connected with contemporary legal theory, approaches that are grounded in different linguistic schools (poststructuralism, cognitive linguistics, pragmalinguistics, critical and affirmative discourse analysis, etc.) coexist in it due to the elasticity of the legal-linguistic method. It also includes ethical determinations that force the legal linguist to work not only as a brilliant researcher but also as a responsible citizen. The legal-linguistic methodology has to teach a lesson that fundamental choices among concepts of law and of language are unavoidable first steps toward legal

linguistics. These fundamental choices also determine what contemporary legal linguistics is and what it will be in the future.

Legal-linguistic studies are best developed within the holistic approach to law. This approach presupposes a paradigmatic commitment of the researcher and a broad research agenda. Legal-linguistic research can, of course, also focus upon particular phenomena, yet in this case it will be less informative and it will explain less about the use of language in the area of law. Therefore, the most ambitious research project is the attempt to rewrite law in line with the rules of language use in contemporary society. This project has many facets that can be scrutinized simultaneously. Some of the examples of such facets such as legal-linguistic gender studies, legal translation studies, or history of legal linguistics were mentioned above to show that the main goal of rewriting law in embedded in broader social contexts and particular research projects. Legal-linguistic orientations, i.e. the set of postulates that steer the research, are the methodical prerequisite for every legal-linguistic research undertaking.

Legal linguistics develops dynamically. Its goals and the range of researched linguistic phenomena are constantly expanded and formulated more convincingly. Meanwhile, the impact of legal-linguistic research upon other academic disciplines such as legal sciences or general linguistics remains very limited. Its influence upon legal institutions and society at large is weak or non-existent. This lack of impact constitutes the biggest deficit in the legal-linguistic undertaking as it is defined in this book. It also endangers the realization of the main legal-linguistic project that is the rewriting of law from the perspective of language use. Would legal linguistics be taken more seriously by academia and citizenry, then it would be able to deliver research results that would engender profound transformations in social sciences, in governmental legislative action, in the application of laws by courts, and in the attitudes of citizens to law.

Summary in Chinese

當代法律語言研究方法各有不同。此等方法一般隱含在研究著作中，甚少見諸於論述。因此，本書《法律結構 — 反思法律語言學方法論》問世，旨在探索如何使用適當的法律語言學方法。本書分析現存的法律語言學典籍，辨識法律語言學方法的原理，並提出將法律語言學研究建立在語篇分析方法的基礎原理之上。書中設有專題，研究如「追訴時效」（即時效條文）等法律結構的辯論陳述。書中亦借鑒漢學方法，討論中文法律語言的整體體式，並以近年香港立法會選舉的宣誓風波為例，審視其中所採用的語言習慣。本書的主要貢獻，在作者於書中強調法律中語言學轉向的作用，即將系統語言學分析引進法律科學領域，視之為未來法律語言學最重要的方法論工作。

当代法律语言研究方法各有不同。此等方法一般隐含在研究著作中，甚少见诸于论述。因此，本书《法律结构 — 反思法律语言学方法论》问世，旨在探索如何使用适当的法律语言学方法。本书分析现存的法律语言学典籍，辨识法律语言学方法的原理，并提出将法律语言学研究建立在语篇分析方法的基础原理之上。书中设有专题，研究如「追诉时效」（即时效条文）等法律结构的辩论陈述。书中亦借鉴汉学方法，讨论中文法律语言的整体体式，并以近年香港立法会选举的宣誓风波为例，审视其中所采用的语言习惯。本书的主要贡献，在作者于书中强调法律中语言学转向的作用，即将系统语言学分析引进法律科学领域，视之为未来法律语言学最重要的方法论工作。

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Studies in Legal Language and Communication

Legal linguistics is still a paradigmatically largely undetermined area of knowledge. What is more, legal-linguistic subject matters and methodological approaches adopted in the research are considerably underexplored. Therefore, legal linguistics is scrutinized in this book from the perspective of its method. The author recommends adapting the legal-linguistic method to the fundamental characteristic features of law that follow from the finding that law is a discursive practice. The book shows how to build up legal linguistics upon legal discursiveness and how to integrate legal discourse into a broader conception of legal linguistics. It proposes a two-prong approach in that it proceeds with the material investigation of legal constructs such as 'statute of limitations' with the aim to clarify the legal-linguistic method. The scrutiny of legal constructs paves the way toward the understanding of the legal discourse. Methodically, the description of the legal discourse is also the final word in legal linguistics as this discipline is defined by the tasks of identification and characterization of the legal discourse in all its forms of linguistically relevant appearance.

Marcus Galdia has been Associate Professor of Law at the International University of Monaco since 2005. His teaching activities comprise public and private international law. He also works as legal advisor for international organizations in matters concerning international legal standards. The author's research interests cover legal globalization, comparative law, and theoretical aspects of the use of language in the area of law, especially the law of communication.

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