1. Researching the language of law

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1. INTRODUCTION

Every area of knowledge has its past, its present and possibly also a future. Knowledge that concerns us in this chapter belongs to jurilinguistics, also called legal linguistics. Jurilinguistics deals with researching the language of law. Our main interest is to clarify the sources of this area of knowledge that are related to some basic questions such as: where does the interest in the research into the legal language come from?; why did closely related disciplines that are usually labelled “jurilinguistics”, “legal linguistics”, “legilinguistics”, “law and language studies”, “forensic linguistics”, etc. emerge?; what did this research achieve?; what could be expected from it in future? As so often, Greek dialectic suggests a first, preliminary answer to the question why we should research the language of law: when everything concerning man and the world in which he lives, is, at least potentially, the object of scholarly studies, why should legal language not be researched; there is no apparent reason to make an exception for it. This answer seems to convince immediately, yet it also includes a methodological problem that will be discussed later. What is more, our preliminary answer is not sufficient to justify the research interest in contemporary academic community. As a stronger argument is needed to establish our epistemic interest in the language of law, I argue therefore that while scrutinizing the legal language we discover advantages and disadvantages of the steering social mechanism that is law. While scrutinizing law methodically, we do not only understand it better, but we have also the possibility to structure our society better. Hence, we are also able to imagine, that is to say, to set up theories about a better law that would allow us to live in a better society. Meanwhile, this scrutiny is not unstructured and undetermined but shaped by methodological approaches that guarantee the increase in rationality in the scholarly discourse about law that is needed to achieve progress in every area of knowledge. Hence, researching the language of law is dependent on our answers to two main questions, why to research it and how to research it.

This chapter deals therefore with the emergence of a multitude of approaches present in the research into the language of law. It does not aim to provide a flawless description of jurilinguistic research. Instead, it focuses upon the diversity of views and approaches, also in its bibliographical references. It indicates also some possible future developments in this loosely defined and weakly institutionalized area of knowledge. Particularly, it clarifies the interest in researching the legal language as well as possible advantages for the legal science and other social sciences that follow from this research. Practical benefits from the research into the legal language as well as developing and exercising a profession of a legal linguist will be mentioned as well. Furthermore, the determination of epistemic perspectives in jurilinguistic studies will be perceived here as an advantage for the research before a more precise

and a better-defined profile emerges from the competition of existing research programmes. Meanwhile, methodological issues will be central in this chapter because of the diversity of approaches to the object of jurilinguistic studies. In these approaches, the research finds incentives for further extension of its scope of studies, and it shapes arguments that help justify the specific, jurilinguistic interest in researching the language of law.

2. ORIGINS AND PROBLEMS IN THE RESEARCH INTO LEGAL LANGUAGE

At the first sight, it may surprise that certain scholars predominantly research the language in law. Existing studies of law might suggest other, possibly more relevant topics such as power, conceptual structures or mechanisms of social engineering. And indeed, all traditional inquiry into the nature of law is dominated by these topics. Sociology conceptualizes law as an exercise of power, legal doctrine indulges in the scrutiny of impressively complex conceptual structures such as contracts and torts, political science examines steering mechanisms of law in society and asks which of them are the most efficient. Likewise, some legal philosophers may deal with justice expressed in or neglected by the law, some others may focus upon appropriate or just legislation. Broad research programmes based on these topics furnished impressive results about the nature of law. It might therefore be argued that all relevant knowledge about law could be acquired in researching these topics. Indeed, much was said in scholarly literature about the exercise of power in acts of the application of law and about the steering mechanism in law as the most efficient tool to guide society mainly due to the enforceability of judicial decisions by democratically sanctioned use of force. Finally, the legal doctrine offered us a multi-layered scaffolding of concepts allowing legislators to shape legal statutes and empowering judges to solve the most intricate and irregular legal problems that take a lifetime to study. Would not other perspectives upon law disturb this harmonious picture? Is there a need or even enough place in the scholarly landscape for the research into the language of law? And should this be the case, could jurilinguistic views compete with established perspectives in the legal research? Meanwhile, in all above approaches to law, language cannot be eliminated from the focus of the researcher, although it might be reflected upon indirectly, through the prism of other concerns such as justice, power or order in society. Legal linguists are aware of the linguistic existence of social phenomena, even if they might include moments of sheer exercise of power with physical means. For them, language is constitutive of all action in law, and it also prefigures whatever scholarly enterprise to understand it, including ideas characteristic of the traditional inquiry into law. Therefore, the systematic scrutiny of law through the prism of language is the most natural way of inquiry into it. Furthermore, when

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3 With the help of a brief case study, I will illustrate this statement. In a court opinion from the US state of Michigan, *Price v. High Pointe Oil Company, Inc.* (828 N.W. 2d 660 Mich. 2013) the question had to be decided whether “noneconomic damages” are recoverable for the negligent destruction of real property. The question presupposes the difference between “economic” and “noneconomic damages” in law. How is such a notional distinction established in law? Does the economic science determine this distinction? And if not, how can jurists shape and apply such conceptual coinages that interfere in the life of citizens? As far as facts of the case are concerned, the plaintiff replaced her oil furnace with
language is inherent in all activity connected to shaping and applying law, why not make it the main concern of research activities. Studies that interest us in this chapter proceed exactly this way, that is to say, they readjust the perspective upon the investigated object that is law and they investigate the legal language as this is what law mainly offers us and where law becomes perceptible as power, justice or order in society. We can therefore argue that in the research of law the primary interest should be directed to its language because law is primarily a linguistic phenomenon.

3. APPARENT AND INSTITUTIONAL INFERIORITY OF LINGUISTICALLY FOCUSED INQUIRY INTO LAW

The mentioned multiplicity of views and perspectives upon law is particularly problematic in the relation between the research into the language of law and the established legal science. Legal science elucidates the structure of legal norms and the problems of their application. The biggest problem is that legal norms never appear directly, that is to say, in their logical form but manifest themselves in texts expressed with words. Hence, our language that transfers legal norms creates additional problems for jurists as it is not adapted to reflect logical relations directly, in the sense established by jurists who used to perceive law as a set of logically systematized rules related to logically determined legal concepts. Understanding logical structures that shore up the pyramid of legal rules equalled for jurists understanding law. Jurists hastily set on this illusionary hypothesis and got on the wrong track that led them to positivist and neo-positivist conceptions of law. In the past, not much contention was brought against such views, with the exception of sociology of law that viewed such understanding of law sceptically. Meanwhile, in the aftermath of philosophical approaches developed around Ludwig Wittgenstein’s intellectual heritage, it became easier to see our language for what it is and research problems of legal communication directly, that is to say, primarily as problems of language, and not of formal logic. This finding applies to law as to whatever other object of social studies. From the jurilinguistic perspective, legal science defined by jurists appears as an area where legal concepts are created, in analogy with philosophy that also deals with concept creation. Concepts belong to larger legal constructs that jurists create when dealing with legal regulation. Legal constructs such as statutes, articles in laws, judgments, doctrinal writings are among main texts that shape the legal language. Generally, therefore, we can

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claim that jurists mainly create language and then deal with the language that they authored. The main weakness of the legal science in this respect is that it does not research this language that constitutes the very essence of law, or it investigates law with methods that do not reflect the theoretical achievements in linguistics. Research into the language of law that is undertaken by non-jurists appears under such conditions as an epistemic necessity. This research is exercised under unequal conditions as traditional legal subjects enjoy a high level of institutional anchorage while jurilinguistic research is sporadic and largely unsystematic due to the lack of institutional support for it. Therefore, problems with institutionalization of research activities in this area, which legal scholars usually do not experience may impede its further development.

4. METHODOLOGICAL CHALLENGES AND CHOICES

When it becomes apparent that legal language needs to be researched systematically, mainly for reasons described above, the subsequent question, that is to say, how to research it, imposes itself. This is a question of method that is unavoidable as the research interest alone does not solve the problem of how to research the language of law. The first methodological step in the research into the language of law is the determination of the concept of law and of the concept of language. As both central concepts are defined differently in the respective disciplines, the future research depends on the choices that the scholar exercises in respect of both concepts. Another challenging methodological question when the researcher’s choice to look closer into the legal language was accomplished, is, whether a misunderstanding might have occurred that blurred the research perspective. As indicated above, some social scientists argue that law is a mechanism of the exercise of power in society and that therefore “power” and not “language” should be the focus of primary scholarly interest. They would criticize legal linguists for dealing with an epiphenomenon like natural scientists who, when confronted with the wave in the sea, concentrate on analysing the foam on the wave in the first place. Yet this view is rooted in the misunderstanding of the function of language and in a widespread view upon language reflected by school grammar. Meanwhile, language is a tool with which power is exercised in society, or to put it in different terms, law is power expressed with the means of language. Therefore, while analysing the language of law we simultaneously clarify power relations in society. Yet this means also that methods that do not include the analysis of power structures are less helpful in the scrutiny of the legal language. In the way of an example, one can mention purely etymological research, for instance about the origin of the common law term “promissory estoppel”. This type of research stops halfway as it does not allow us to understand the language of law, instead it explains the origin of words.

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Another methodological challenge is how to identify jurilinguistic phenomena and develop research methods that would transform it into an area of knowledge in its own right. Historically, jurilinguistic research comprised the analyses of the legal style, legal terminology and legal translation.\(^\text{11}\) While largely following the interests of jurists, legal linguists focused for a time almost exclusively on legal terminology assuming that legal language can be reduced to or be described as research into the terms or the concepts of law.\(^\text{12}\) While legal terminology in the strict or enlarged form is definitely part of legal-linguistic research, it is by far not exhaustive in terms of legal language.\(^\text{13}\) Legal language is often inconspicuous, and it conceals its semantic potential like in the sentence “This is an issue of first impression for this court” that in the parlance of US courts means that there is no precedent in the jurisdiction of the deciding court to which this court could refer.\(^\text{14}\) Likewise, common law term “legal power” and the EU term “legal competence” that sound like synonyms may differ substantially.\(^\text{15}\) Terms and their linguistic extensions become therefore meaningful only within broader linguistic structures such as discourses. Therefore, the contemporary research reflects these advanced linguistic structures in law while trying to integrate the traditional research that dealt with disparate lexicological and lexicographic issues. It also has to integrate methodically the process of shaping legal language that is particularly important as a correlate to the application of law. Researchers in our area are privileged because they can regularly identify the (institutional) author of the emergence of legal language unlike general linguists who depend on reconstructions of ordinary language that is shaped spontaneously and anonymously. For instance, when the term “patently offensive” appears in a court decision, it can be usually traced to an earlier and initial use and its process of shaping can be fully elucidated.\(^\text{16}\) Related processes concerning terminological coinages such as “presumption of innocence” used also in the form “presumed innocent”, “unindicted conspirator”, “Miranda rights”, “to Mirandize someone” that entered the language of the larger public and the associated commercial cultural production, especially films, can be scrutinized in a similar vein.\(^\text{17}\) What is more, globalized


\(^{14}\) In the court opinion *Advanced Dental Care, Inc. v. Sun Trust Bank* (816 F. Supp. 2d 268 D. Md. 2011) this legal phraseologism appears in a sentence: “*In this case of first impression*, the Court must determine whether section 3–420 of the Maryland UCC displaces common law negligence when a payee seeks to recover from a depositary bank that accepted unauthorized and fraudulently endorsed checks.” (italics added)


\(^{17}\) Language may be also applied provocatively in legal discourses, for instance when “presumption of innocence” is mentioned in so-called “post assassination determinations of innocence” in Noam Chomsky’s *Who Rules the World?* (New York: H. Holt, 2016), p. 95, or “crime against humanity” used by Herbert Marcuse in *L’homme unidimensionnel* (Paris: Les Éditions de Minuit, 1968), p. 13 in reference to the existence of capitalism as a social system: “Le système dans son ensemble se révèle être ce ‘crime contre l’humanité’ qui est localisé particulièrement au Viet-Nam.” (transl. “The system in its entirety appears to be a ‘crime against humanity’ particularly present in Vietnam”). The above examples witness to the elasticity of legal terms that is responsible for the emergence of legal discourses.
terminology is increasing, for example “right to be forgotten” and the German “Recht auf Vergessen”. Shaping this type of legal language is a task of legal linguists as is its analysis in comparative legal linguistics. Therefore, jurilinguistic methodology cannot be limited to investigating isolated legal terms or legal concepts but has to cover multiple areas of language use in law.

5. DEEP ROOTS OF LINGUISTIC INQUIRY INTO LAW

While systematic research into the language of law is relatively recent, the history of linguistic inquiry in legislative and judicial matters has deep roots. Already old Babylonian laws were enacted, published and finally codified in a way that shows the awareness of their authors about the linguistic component in legislation. Codification, that is to say, putting legal provisions together, shaped a new textual genre of a code in Ancient Mesopotamia. Some scholars oppose the use of the term “code” for these collections of provisions as they are not systematic in terms of the legal doctrine. Meanwhile, the textual genre “legal code” remains productive until this very day. Furthermore, many terms with legal connotations that we encounter in ancient texts cause problems in their full understanding nowadays. For instance, in the Biblical narrative Job (42: 15b) we read in the English language versions of the text: “… their father gave them an estate among their brethren” but also “… their father granted them an inheritance along with their brothers” and other translational varieties on this issue. The Hebrew original uses the term “nahala” where translators speak about “estate” or “inheritance”. Researchers tried to clarify what exactly Job gave his daughters, an estate, an inheritance or something different. Meanwhile, fundamental to the development of our domain were the ancient Greeks who shaped rhetoric figures of our speech in courts. They also paved the way to developing contemporary methodology in the research into the legal language. Ancient Romans initiated a more systematic understanding of law. Their law forms today the basis of legislation all over the world. European Middle Ages impeded the development of legal inquiries in that they imposed an ideological straitjacket upon jurists in form of a theologically restricted legal doctrine. All later intellectual movements which were rooted in national laws were focused...
upon critically founded understanding of law that was more and more understood in positivist terms, that is to say, primarily concerning a conception of law that is made and not received. Such conceptions inevitably forced jurists to ask how such a law was structured and what were its main structuring components. Historically, logic was stressed in this context, yet also language, although rather sweepingly. Legal doctrine still favoured logic over language although both represent two sides of one coin in law. Legal positivists viewed law as an amalgam of concepts that needed to be precisely stated, or “defined” in the positivist parlance to be applied more or less mechanically in legal institutions. Legal positivists underestimated the nature of language and its functioning as a tool of social communication. Theoretically, their views upon language failed on the indeterminacy theory of language. In fact, our language is as precise as needed in daily communication; mathematical precision is not achievable in ordinary language. Neither can an artificial or technical language be created because its definitional precision will always be a matter of interpretation, which in turn would need to be re-interpreted infinitely. Beyond this intricacy, the question who would have the right to define legal concepts validly becomes obvious as an aporetic part of positivist understanding of law and language. In sum, the attempt to preserve the doctrinal character of law as a teaching subject and as a research object is contrary to the discursive nature of the phenomenon law that is an argumentative social practice. This is one of the lessons that we learn from the past of our domain, other lessons from history are less bitter and they enabled the emergence of the research into the legal language as we know it today.

6. NAMING PROBLEM

Not even the name of this new discipline that we try to characterize in this chapter is assured. H.E.S. Mattila and G. Cornu refer to the French legal scholar François Gény who used the term “linguistique juridique” already in 1921 in his work *Science et technique en droit privé positif III.*25 In French-speaking Canada the term “jurilinguistique” and its English equivalent “jurilinguistics” are in use,26 also Polish and Russian denominations “juryslingwistyka” and “pravovaya lingvistika” (правовая лингвистика) are in use respectively. The Polish legal theorist Eugeniusz Bautro used the term “lingwistyka prawnicza” in his philosophically founded outline of this new area of knowledge.27 In the Czech research, the term “právní lingvistika”, in Ukrainian the term “juridichna lingvistika” (юридична лінгвістика) are in use. In Greek, “νομική γλωσσολογία” is applied. In Latvian, the term “juridiskā lingvistika” is well known. In Italian, the term “linguistica giuridica” is occasionally applied. In Spanish, the term “jurilinguística” is in use, in Catalan “llengua i dret” is used as well, for instance in the name of the scholarly journal *Revista de Llengua i Dret.* In Norwegian “rettslingvistikk”, in Swedish “rättslingvistik”, in Danish “retsligvisitiik” and in Finnish “oikeuslingvistiiikka” are

largely applied in scholarly studies. In German, the term “Rechtslinguistik” is used for various theoretical approaches which cover also general philosophical and critical studies about the relation between the language used in law and the dominant ideology. In Chinese, the term “falü yuyanxue” (法律语言学 / 法律語言學) is used both for legal linguistics and forensic linguistics as apparent equivalents. The English-speaking world is problematic in the sense of name giving for our undertaking. There, mostly foreign authors apply in their works the term “legal linguistics”. The terms “law and language” or “language and law” seem to dominate the professional language usage in the English-speaking academia. Meanwhile, the problems of naming are not only academic because problems of method follow regularly from naming issues. None of the above choices are methodologically neutral. In a micro-comparative perspective, Canadian “jurilinguistique”, “law and language studies”, and the French “linguistique juridique” could also be contrasted and different methodological facets be identified in them. We can therefore speak about the interrelation between linguistic and legal-theoretical methods in processes in which such denominations emerge. Methods and limits of the described approaches are less clear than is often assumed, therefore the clarification of approaches and methods in the research into the language of law is necessary. What is more, the very tendency to give a name to an area of knowledge signals the need to systematize the existing knowledge along certain structuring points of interest. This situation is reflected in the contemporary research that is described below.

7. CONTEMPORARY RESEARCH INTO THE LANGUAGE OF LAW

Today, research into the language of law under its different denominations covers many, largely complementary areas oscillating between interdisciplinary and strictly linguistic perspectives. They comprise, first of all, fundamental or basic research that like this chapter deals primarily with issues that structure this area of knowledge. It investigates the question whether the language of law should be researched as a separate object of studies and how this research should be carried out. Next to it, formal research that uses methods borrowed mainly from logic deals with the formalization or parametrization of the language used in law following achievements of the deontic logic. Mainstream research is represented by traditional areas such as the scrutiny of the legal style and of the legal terminology that includes diachronic and synchronic aspects of the development of legal terms that this approach, at least in its classical form, perceived as central to the language of law. Likewise, legal translation studies are connected to this area as they emerged as a prolongation of the analysis of the legal style and

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the discovery of incongruent legal terms in different legal systems in the traditional legal lexicology. They can be integrated into the broader perspective that deals with the language of law as legal discourse.32 The discursive perspective has two opposite and irreconcilable branches, the critical legal discourse that is bound on terms of academic ethic and the affirmative legal discourse that is close to power structures and that supports their interests.33 The very existence of the affirmative legal discourse that has the function of legitimizing legally relevant action of governmental bodies that is expressed linguistically means for us that we know about the legal discourse more than we say about it. Otherwise, this type of research can be perceived as negligible in jurilinguistic studies. Discursive approaches can be strictly pragmatic, that is to say, focusing upon the language use.34 They can also be normative/pragmatic, combining both sides of the legal language, that is to say, the language of law as it is expected to function from the point of view of the theory of law and the linguistic reality of its use.35 With respect to the newer research, A. Wagner and A. Matulewska36 distinguished two levels of interest in the language of law: the epistemic, focusing upon the content of law, and communicational, that is, how law is communicated to persons concerned by it as a result of a heuristic shift in the interest of researchers. The above-named approaches can be easily classified along this epistemic dichotomy.

Furthermore, research into the language of law develops in diachronic and synchronic perspectives, monolingual and multilingual (mainly bilingual) approaches as well as within a particular approach called comparative legal linguistics.37 As of now, no approach, with one negligible exception of the affirmative legal discourse truly contradicts the attempts to elucidate the role that language plays in law. Some of the approaches differ only in labelling, for instance “legal linguistics”, “jurilinguistics” or “legilinguistics”. Others, for instance “forensic linguistics” may either coincide with those named when they view the language of law in a broader perspective or be complementary when they deal with practical issues connected to assistance provided by linguists to authorities on issues related to author’s identification or other linguistic expertise relevant to criminal investigation or private litigation.38 There are also strictly linguistic approaches such as corpus linguistic studies of the language of law that lack the element of juridicity and therefore belong rather to linguistic than jurilinguistic research.39

35 Maria Teresa Lizisowa, Komunikacyjna teoria języka prawnego (Poznań: Contact, 2016).
For some authors the element of juridicity that methodically includes the internal view of law determined by jurists is central to the research into the language of law. Occasionally, when advice is provided by linguists about the meaning of linguistic expressions some resemblance to forensic linguistics imposes itself. Strictly linguistic approaches stress different aspects, yet all of them finally refer to discursiveness of law and to the structure of legal discourse. Meanwhile, it is evident that purely linguistic analysis of legal texts can be perceived as a legitimate concern of researchers as is the case with whatever linguistic analysis of texts.

Likewise, the level of interdisciplinarity is different in the perspectives upon the legal language. Some publications put together results of deliberations of jurists and linguists on questions of their specific interest that are often called “law and language studies”. They remain methodologically anchored in their respective disciplines. Others try to establish a research perspective in its own right. For instance, legal semiotic studies form a broad spectrum of research that approaches law as a cultural and a social phenomenon. Within legal hermeneutics that makes part of general legal theory some research also supports perspectives represented in jurilinguistics/legal linguistics. While analysing the diversity of research interests and methodological approaches also the shape of a more explicit research into the legal language becomes clearer. It may be assumed that in future some of the discussed areas of research could merge to form a truly comprehensive and better-defined new discipline which might receive a new denomination or be simply called, for instance, legal linguistics.

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41 This perspective is unavoidable in the research into the legal language and its necessity is easy to prove. In footnote 64, the *Budapest Memorandum on Security Assurances* is discussed in the translational context. The text of the Memorandum can be grasped only discursively, for instance when it provides that its signatories (i.e. US, UK and Russia) “reaffirm their commitment to Ukraine in accordance with the principles of the CSCE Final Act, to respect the independence, the sovereignty and the existing borders of Ukraine.” No dictionary and no textbook of international law can uncover meaning alternatives present in this text as part of the legal discourse.


In the recent years, numerous publications were dedicated to the issue of this chapter. In these studies, a multitude of approaches and research programmes were discussed or proposed. The diversity of approaches to the research of the language of law might appear confusing. Yet also a less strict determination of research interests could be envisaged and perceived as an advantage. Whether the time is ripe to claim methodologically restrictive choices is debatable. Jan Engberg and Anne Lise Kjær called for a stricter definition of the scope of jurilinguistic studies due to the mentioned multitude of methodical approaches and material analyses published often under one label. This is a legitimate request as scholars in an academic discipline should be interested in differentiating studies in English or Chinese philology or history of language from the research into the language of law. Meanwhile, in times when the discipline is still in the process of methodological search, it seems to be possible to understand this multitude of studies that refer to the relation between language and law as a chance rather than as a disadvantage. It might be therefore premature and counterproductive to insist today upon a strict definition of jurilinguistics/legal linguistics or even a uniform or precise name for this domain of studies. One may wish however that future developments would clarify the scope of jurilinguistic studies in contradistinction to other areas that also deal with the language of law in one way or another. Incidentally, the process of emergence of new knowledge in the shape of a new discipline is often more exhilarating than the phase of crystallization and paradigmatic stability of already institutionalized knowledge that follows upon it. Regrettably, academia has the tendency to develop mindless orthodoxy and to form controlling hierarchies in processes where knowledge is shaped and stated. Another danger that always threatens all academic subjects related to law is their potential submission under governmental structures that turn every scholarly inquiry into affirmative discourse that is complacent with social institutions dealing with law. Enlightenment and inquisitive research reaches its outer limits under such circumstances.


9. LAW AS DISCURSIVE PRACTICE

From the above it follows clearly that the connection between the daily work of jurists and the analysis of language is closer than many jurists assume.48 One could even argue that the work of jurists is mainly linguistic,49 especially when they apply law, that is, when they interpret it. Interpretation is an argumentative practice.50 We interpret when we use arguments and language is their material. L. Wittgenstein showed how language games engender meaning in the ordinary language. Legal arguments of different sort work exactly in the same way. Statements about law expressed with the help of language are ideological statements. They cannot be true or false but only valid or invalid. And only valid statements apply. Their application equals the exercise of power with linguistic means. And power is applied discursively. Legal discourse as an overarching concept for the research of the legal language enables to cover the totality of our speaking about law.51 It includes the professional and the non-professional discourse alike. It covers approaches that are critical or affirmative of existing law and institutions in charge of its shaping and its application. Alternative legal discourse makes part of its sphere of epistemic interest as well as the discourse rooted in mainstream legal doctrines that form the ideology of legal institutions. The dominating form of this discourse, that is, opinions of highest courts in respective jurisdictions are equally valuable as is media discourse about law.52 Erroneous views about law, criticism of legal institutions and their decisions, disrespect of law that is expressed linguistically, for example hate speech, as well as views hostile to the state of law make also part of the interest in researching discursive forms of legal communication.53 Investigating these facets of the legal discourse allows to define the phenomenon law better, at least better than is the case in legal sciences that eclipse the linguistic perspective upon law.54

53 The legal discourse analysis reaches beyond the conceptual framework of legal doctrine. For instance, the aggressor of Salman Rushdie who severely wounded him on 12 August 2022 was charged with assault of the second degree. He pleaded non-guilty to this charge. He also requested being liberated on bail. His request may surprise as millions of people witnessed his action on TV screens. In terms of penal law, his request is irrelevant. The legal frame of reference in the legal discourse is regularly broader and transgresses the limits put by the legal doctrine. Unlike other approaches to law, the research of discursive forms of communication finds a place where to discuss these sorts of opinions about law. Meanwhile, it remains to draw consequences from such analyses.
54 Language is sometimes constitutive of crimes, or it may accompany them. Threats such as “Now you will die” or “No need to call the police, they will not manage to arrive on time” testify to the circumstance of the linguistic presence in crime. Further examples in Emilia Lindroos, Im Namen des Gesetzes (Rovaniemi: Lapin Yliopisto, 2015), p. 241.
Meanwhile, the main methodological problem of the legal discourse is related to non-positivist certainty of meaning determination in law. Society at large, and also many jurists still perceive certainty in positivist terms, that is, reaching a result that is uncontestably right. Meanwhile, there cannot be any such thing as utmost or final certainty in language due to the indeterminacy of meaning in language. And in law, this problem is amplified by changing social attitudes that constitute the background of interpretive processes. They cannot be stabilized and probably also should not be impeded in their dynamic. Researchers would have to focus in future on methods that allow to reach non-positivist certainty and that would enable to convince society that this is a better sort of certainty than positivist illusions of precise, unambiguous, and ideologically neutral law. Thus, law as a social phenomenon is a discursive practice that is rooted in argumentation. As a linguistic practice, it is elucidated in jurilinguistic studies and approaches to discourses. Their main focus is upon legal regulation, for example statutory law and court opinions as well as texts that accompany them in different areas of social interaction such as court and media discourse. This research has the task to identify discursively relevant practices in legal argumentation, legal interpretation, and in other legal-linguistic operations.

10. DISCURSIVELY RELEVANT PRACTICES

Discursively relevant practices in law are numerous. I will in the following mention some of them. Stating law in language is the main task of all activity centred on law. Therefore, the legal narrative is the main communicative form of law in society. Law creates a community interested in its functioning and the legal discourse offers rhetoric space for communication about law. Communication in law is creative, legal imagination is the basic condition of communicating about law. Hence, the knowledge of law is the acquired skill to be able to identify argumentative structures behind explicit legal texts (e.g. statutes and court opinions) as well as being able to apply them in argumentative speech acts that form the legal discourse. The knowledge of legal regulation stated in explicit legal texts is needed to develop legal arguments as explicit legal texts provide official reasons for their coming into being. They are also the starting point for the affirmative legal discourse, while the critical legal discourse emerges when explicit legal texts are scrutinized independently from institutional constraints. The critical legal discourse reconstructs the implicit texts of law.

Next to diverse linguistic utterances, also silence plays a role in legal discourses. Suspects or accused persons may remain silent; judges may tend to reservation in communication at trials. A judge may sit looking exasperated in a poised way; he may get involved or manifest impartiality. The question how to arrange one’s face during trials may bother judges, judges may also study faces of other participants while knowing that their faces are studied as well.

Judges may be nodding, nodding off, they may smile, suck up, or frown. Behaviour such as giggling or shouting in the audience also accompanies legal proceedings. Parties and witnesses may use language that comes close to the legal language, or they may remain within the register of the ordinary language. Meanwhile, the institutionalization of legal discourses sets limits to participation and to linguistic input and exchange in such communicative situations.

11. GENERALIZATION OF TRANSLATION PROBLEMS

Another specific discursively relevant practice is legal translation. The generalization of its problems is a component of all discursively oriented approaches to the legal language. Legal translation gained particular momentum in the studies of the language of law mainly due to its practical importance. It is one of very few areas of jurilinguistic studies, next to legislative drafting and certain forensic-linguistic tasks, where a practical profession can be exercised by a person who studies the subject systematically. Yet it also allows some deeper theoretical insights as it emerged within terminological studies culminating in the discussion about incongruent legal terms in different legal languages. Problems specific to legal translation may disappear on the stage of global law that is however a scenario for remote future.

Translation functions in discursive landscapes where texts and contexts confront each other. Legal terminology is all but homogenous and congruent. Correctness, adequacy and the like are standard problems in legal translation. Typical criticism concerns the translation of terms, for example “integrity” as “integritet” in the Swedish language version of the EU

64 Terminological inconsistency and interpretive ambiguity caused problems in the case of the so-called Budapest Memorandum on Security Assurances. This memorandum was signed at the OSCE conference in Budapest on 5 December 1994. The document aimed to provide security assurances by its signatories relating to the accession of Belarus, Kazakhstan and Ukraine to the Treaty on the Non-Proliferation of Nuclear Weapons. The memorandum was originally signed by three nuclear powers: the Russian Federation, the United Kingdom and the United States. It prohibited these countries from threatening or using military force or economic coercion against Ukraine, Belarus, and Kazakhstan, “except in self-defence or otherwise in accordance with the Charter of the United Nations”. As a result of the memorandum and of other agreements, Belarus, Kazakhstan and Ukraine gave up their nuclear weapons. In particular, the English-language text speaks about “assurances of security” provided to the concerned countries. While drafting the text, US diplomats distinguished between “guarantees” and “assurances” relating to security guarantees that were desired by Ukraine. According to US diplomats, the English term “assurance” should be perceived as weaker than “guarantees”. Meanwhile, the Russian text uses the term “меморандум о гарантиях безопасности” (“memorandum about the guarantees of
Insider-directive 89/592/EEG. For instance, Sandeberg proposed “tillförlitlighet” as a more adequate translation. Today, approaches that integrate translation into legal discourses propose a broader structure for the discussion of particular problems mentioned in this paragraph. As of now, legal translation is the best understood legal-linguistic operation. The structure of the research in this area could be used to systematize other, less well known discursively relevant practices in law.

12. REWRITING LAW AS THE MAIN PRACTICAL TASK OF JURILINGUISTIC STUDIES

Preliminary conclusions that might be drawn from the above sketch of perspectives and facets in the research into the language of law impose the first finding that law is a linguistic practice dominated by discursive forms of the exercise of power. Therefore, it has to be researched as such and not as something else, especially not as a set of presumably unambiguous rules that lead to one, right decision when the deciding jurist is competent, that is, when he truly knows the law. There is no such law, and there are no such jurists, therefore spending time upon this type of research would be an erroneous decision. What is more, law that is presupposed in the positivist legal doctrine is not thinkable in terms of linguistic theory because language works differently than positivist theoreticians of law assume. Instead of focusing upon the fiction of precise, clear and unambiguous language of law, especially when it is perfectly defined and then impartially applied, this research would better start with ambiguous, elliptic, metaphorical and ideologically prefigured language of law and research these qualities of the legal discourse, especially when it takes place beyond the limits of judicial institutions. When this first step is done, the second imposes itself as its epistemic correlate. When law in its contemporary linguistic dress is perceived as deficient mainly because institutions that shape and apply it underestimate the concept of language and the consequences that follow from this negligent attitude for the theory and the practice of law, then remedies should be addressed. Apparently, it is imperative to re-write our laws along the lines of linguistic theory while considering the findings of the research into the language of law. Re-writing law means implementing the rules of the use of language strictly, speaking in law as we speak in life. The practical goal to shape a better law is an ambitious vision that should be borne in mind as the main methodological precondition of all inquiry into the language of law. The future of jurilinguistic research depends on the decision to use it in the project of re-formulating or re-writing the law. Should this not occur, jurilinguistic research will be at best tolerated as a largely inconclusive inquiry into linguistic characteristics of law perceived by mainstream legal research as peripheral and therefore irrelevant.
13. CONCLUSIONS AND OUTLOOK

Studies of the language of law look back at impressive, although not very influential findings. These findings allow tracing perspectives for the conceptual expansion of this area of studies and designing new research programmes. Contemporary jurilinguistics/legal linguistics is dominated by research into particular issues that frequently treat the structure of the field only implicitly. Holistic approaches, that is, those that aim at describing the totality of problems in the research into the language of law are rare. It would be therefore welcome to encourage research concerning the conceptual framework and the material content of studies that would be treated in a broader perspective. The concept of discourse offers such a possibility without excluding alternatives. Terminological and translational studies, especially in their extended format that embraces contexts of use of terms, fit well into such framework. Additionally, researching the conception of language cherished by jurists also facilitates the structuring of the field and the identification of research needs as purely linguistic analysis of the language of law may not be particularly useful for them.\(^{67}\) Therefore, legal-linguistic and not purely linguistic analysis seems to be better adapted to social needs behind the research into the language of law and the project of re-writing law according to the rules of language use.\(^{68}\) Challenging tasks and promising projects await researchers in our area of knowledge. Will they be able to convince others about the relevance of their findings?

REFERENCES


