

THE PRAGMATIC DIMENSION OF COMPETENCE IN ESP IN CROSS- CULTURAL LEGAL CONTEXTS

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Abstract

Individuals operating in cross-cultural contexts between two or more languages require pragmatic competence in order to ensure understanding of what utterances mean in context. Pragmatic competence involves awareness of what the context consists of, being equipped to study what factors or forces lie behind utterances, highlighting those that can be seen, unearthing and examining those that may remain unseen. For ESP professionals operating between two or more legal languages or systems, this research is one of the tasks of the discipline of legal linguistics. Law has no separate existence of its own: it is not sealed off from the rest of the world and does not operate in isolation from people, events and ideas. These will inevitably be reflected in the framing and content of laws, as well as in the way they are expressed in legal language. This chapter explores the literature with a view to identifying some of the unseen factors and forces that make legal language what it is, with the aim of opening avenues for further comparative legal linguistic research in the field of legal ESP, as well as in legal translation and comparative law.

1. Introduction

Pragmatics is a subfield of linguistics that studies how context contributes to meaning. Put differently, “[p]ragmatics is the study of the relations between language and context that are basic to an account of language understanding” (Levinson 1983: 21). In pragmatics, transmitting meaning requires that those involved possess the following: structural and linguistic knowledge, such as grammar and lexicon; familiarity with the context of the utterance; pre-existing knowledge about each other; and awareness of the inferred intent of the speaker. Thus meaning relies on the manner, place, time and other factors of an utterance.

Pragmatic competence plays an important role in legal language, even within a single language and legal system. For example, lawyers operating in a narrow practice area may have difficulty in understanding a narrative about a different practice area, especially as regards procedural matters. To illustrate, a lawyer who deals solely or mainly with real estate might feel like a foreigner on hearing details from a colleague operating in the same language and legal system of a case involving arbitration or litigation in the field of shipping, and vice-versa.

It is thus not hard to see that such difficulties are compounded in an exchange between two law professionals from different legal systems, whether or not they share the same language. The same challenge is surely faced by translators and, by inference, as this paper initially seeks to show, teachers and learners of legal ESP (ELP) as well. As far as the latter group is concerned, the challenge would apply not only to English language in its 'home' common-law context but also, indeed especially, where English is the medium for expressing legal language from, or in, a non-common-law legal system associated with a language other than English.

In the following section, I will first identify what ELP teachers and learners need in order to acquire a degree of pragmatic competence in legal language. For the sake of brevity, I will, where appropriate, refer to all members of this diverse group as "ELP researchers".

I will then examine two knowledge areas with which ELP researchers need to be familiar in order to achieve pragmatic competence in legal language, i.e. knowledge relating to law and legal systems and knowledge relating to legal language.

The hypothesis is that different attitudes and perceptions towards law in different legal systems may be reflected in legal language, in particular in concepts and terminology.

The main innovation of this paper consists in bringing together strands from law, translation, linguistics and education, using a comparative law approach to mimic cross-cultural triangulation by providing a three-dimensional study of law, legal systems and legal language in an ELP context. The results may be of relevance in designing a course in the pragmatics of legal language for ELP researchers, either as a stand-alone course or as part of a wider programme such as legal drafting in English, legal translation, or law and language.

2. What pragmatic competence in legal language means for ELP researchers

As Boyne (2014: 133) notes, "[o]nly by shifting and sorting through the knowledge of how law operates on the ground level and building a thick description of practice can translators and researchers build the foundation for a real understanding of a foreign legal system". Additionally, any understanding of law necessarily involves an understanding of how law is expressed. This requires legal linguistic skills which, according to Galdia (2009: 84), include "legal logic, such as analysis of legal reasoning and argumentation, interpretation and justification".

According to Cao on modelling translation competence, pragmatic competence in legal language requires illocutionary competence and sociolinguistic competence in both source and target languages. For example, this would include an understanding of the importance of performative verbs, which may differ from one language to another (Cao 2007: 42-44). While Cao is writing in the field of legal translation, I would argue that the same would apply to the field of ELP. This is very much a linguist's approach and invites comparison with most of the authors cited in this chapter, who seem to adopt a more legal approach.

Perhaps more to the point and in line with the approach taken in this chapter is the view expressed by the Finnish comparatist and legal linguist Husa (2012: 166) according to which "reliable legal translation needs [...] an understanding of the deeper level of

legal language". In his work, Husa refers to "the legal-epistemic level of language" which "places concepts, doctrines and institutions in a legally conceivable order" (*ibid.*). He suggests examining "the hermeneutical significance of the *inner* world of law" (*ibid.* 177; emphasis original) and recommends "looking for explanations in trade methods, business practices" (*ibid.*: 222) as well as "history, economy, politics, culture, even geography" (*ibid.*: 224). Again, my contention is that the same principles would apply to teaching and learning ELP.

Also more on target with the aims of this paper is Boyne (2014: 124) for whom "[t]he translation of legal terminology [...] entails a transfer between two different legal systems, each with its own unique system of referencing". Words are "embedded in a particular structure of meaning" so that "the researcher cannot understand the meaning that particular key legal words carry without understanding the underlying normative assumptions of that legal structure" (*ibid.*: 126). And those normative assumptions "may be lost in translation" because they may be reflected in "ways of knowing and meaning" that are "[h]idden in the web of legal practice" (*ibid.*) so that "legal translation cannot be done in isolation, divorced from the practice of law" (*ibid.*). Again, I would argue that the same can be inferred as applying to teachers and learners of ELP.

Šarčević's profile of the legal translator begins by noting that, due to its interdisciplinary nature, legal translation requires practitioners to possess subject expertise as well as translation skills, while the need for legal-linguistic decisions requires those same practitioners to possess competence not only in translation but also in law (2000: 113). She adds that legal competence presumes "in-depth knowledge of legal terminology, and a thorough understanding of legal reasoning and the ability to solve legal problems, to analyze legal texts, and to foresee how the courts will interpret and apply a legal text" (*ibid.*) and that "[a]dditionally to these basic legal skills, translators need extensive knowledge of the target legal system and preferably the source legal system, along with drafting skills and a basic knowledge of comparative law and comparative methods" (*ibid.*: 114).

I would also assert that "extensive knowledge" of the legal systems concerned would include familiarity with how the relevant communities served by those legal systems see law in the sense of attitudes and approaches to law and its purpose within those communities, the values of those communities and the role and functions of law (and other mechanisms) within them, for example, in organizing the community, as described in more detail below. This assumes that legal systems differ: a different situation arises when all texts derive their meaning from the same legal system (Šarčević 2000: 68), as occurs, for example, when laws are translated in Switzerland, with three official languages, and Finland, with two.

Two implications appear clearly to follow from the above. Firstly, for ELP teachers and learners, no less than for lawyers and translators operating in two or more languages between two or more legal systems, "[l]earning about each other's legal mentalities [. . .] and ways of solving concrete legal problems, is [. . .] of crucial importance" (Van Gerven 2004: 123). Secondly, this process, if done also from a comparative legal linguistic standpoint, as illustrated in this chapter, might explain conceptual and terminological differences, with a view to reconciling them at least within the EU, where a shift in terminology (and therefore in conceptual approach?) is discernible, for example, from the common law 'tort' and the civil law 'delict', especially

in the field of public liability towards ‘non-contractual liability’ or, simply, ‘liability’ (Aalto 2010: note 46).

A good example of the necessity to learn about each other’s legal mentalities is the issue of attitudes to crime and punishment. The EU has emphasized the fight-against-crime approach in criminal justice policy whereas, for example, Finnish objectives are more nuanced and formulated as follows: (1) to regulate or minimize the sum total of the social cost (including human suffering) caused by crime and by society’s response to crime; and (2) to distribute these social costs fairly among the parties involved, i.e. offenders, crime victims and taxpayers (Törnudd 1996: 15).

The Finnish example seems to reflect a legal system geared towards social problem solving, more likely based on ideas of (re)conciliation and reward compared with a legal system geared towards social control, which would more likely be based on ideas of coercion and sanctions¹. These differences might well be “embedded in the language of the law” (Boyne 2014: 124).

From the viewpoint of ELP researchers, what is needed is deeper and broader comparative legal linguistic research that examines the aspects mentioned above in different communities, in order to give them the pragmatic competence they need. In short, this would involve studying how the characteristics, elements and functions of a legal system develop over time so as to influence development of associated legal language: put differently, why the legal system – and the legal language – of a community is as it is. Clearly, this kind of indirect familiarity with legal systems increases pragmatic competence among ELP researchers.

This paper aims to give examples of what this kind of research could mean in practice. It highlights factors that indirectly shape legal language, in particular the hidden influences that lie behind the concepts on which terminology is based. In this way it aims to prepare the ground for further comparative legal linguistic research into reasons for similarities and differences between legal systems and, especially, legal languages.

From the point of view of the pragmatic knowledge of ELP researchers, two knowledge wholes are of specific importance: on the one hand, knowledge relating to law and legal systems and, on the other, knowledge relating to legal language. The next part of this paper (Section 3) focuses on law and legal systems and the following part (Section 4) on legal language.

3. Knowledge relating to law and legal systems

This section begins by examining law as the body of rules forming a system with a purpose, a purpose that may differ from one community to another, each with its own attitude to law, an attitude that may be reflected in legal language that in turn develops over time along with development of the particular legal system, its characteristics and functions. In the second part, this section takes a look at developments in the classification of legal systems.

¹ See also section 3.1 below.

3.1. *Law and legal systems*

Law itself is a contested concept beyond the scope of discussion here. However, for the purposes of this study, we shall consider law as a rule or body of rules forming a system that governs or guides social and other aspects of life within a particular cohesive entity or grouping ('community'), and which members of that community are required to observe, on pain of sanction. This definition, which assumes some interpenetration between social and legal rules, also covers rules in other fields since while "[l]aw is certainly unusual in being system-bound [it] is not unique in this respect: religion and political science, which are historically related to law, are inseparable from the notion of systems" (Harvey 2002: 180). Again, this would suggest the rules of a particular community, as opposed to the rules of the exact sciences such as mathematics, physics and chemistry, with their universal concepts and terminology. It is clear, though, that law does not exist in a vacuum.

Digging deeper into what law is, the supposition arises that, assuming a body of rules governs or guides aspects of life within a particular community, these presumably serve some purpose. As Somek (2010: 712-713) puts it:

[l]egal science needs to [...] confront the question of what we actually mean by "law" [...]. Do we think that the law is a means of social control? If we do, we may have reason to distinguish law from other forms of control. Alternatively, the law might be conceived of as one method of social problem solving among others, which is continuous with other forms of human co-ordination.

Somek's analysis resonates with the observations above on criminal law in Finland and gives a further clue as to the existence of different attitudes or approaches to law, in the sense of what law is and what it is for. That in turn suggests that different attitudes and approaches to law and its functions may influence the language of law, for it is a reasonable supposition that language associated with the function of control might well differ from language associated with the function of problem solving. In other words, a legal system geared towards social control would likely be based on ideas of coercion and sanctions, whereas a legal system geared towards social problem solving would more likely be based on ideas of (re)conciliation and reward, each with its own language thesaurus in the shape of concepts and terminology. As Boyne (2014: 124) puts it, "[b]ecause a legal culture represents a distinct way of viewing the role that law plays in organizing society, these ways of understanding the law are embedded in the language of the law". The role of law is also reflected in other ways.

The case for law being essentially a cultural construct has been repeatedly made by a number of legal theorists. Well-known writers have been rehearsing this claim for decades and have also made this argument (e.g. Cotterrell 1992, 2006; Nelken 1997, 2002a, 2002b), along with legal academics (e.g. Kahn 1999; Chase 2005; Tamanaha 2008), not to mention a host of comparatists (e.g. Riles 2001; Legrand 2011; Ruskola 2009). My contribution to the discussion is to offer a specific focus on language by grounding this study in a specifically language perspective. In particular, the reader is taken through a series of practical, mainly language-focused examples, chosen to illustrate some of the main points discussed in this paper.

Laws, and systems of laws – or legal systems – do not exist in a vacuum: moreover, they are also not set in stone. The autonomy of law is relative and the legal system is in

constant interaction with the other normative, economic and political systems of a society. As a result, the picture of a legal system at any point in time is a snapshot of that system at a stage in a journey that started at some earlier point, a journey as yet unfinished and whose future course and destination remain unknown. It is a picture of a legal system at a given moment, the result of social, political, economic, and other factors. All or some of those factors, perhaps together with or substituted by others, can be expected to exercise a continuing influence on the development of that system and, presumably, on the language employed by that system.

Among the basic values that lie behind legislation are general principles of public policy, protection of morality, human dignity, and privacy concerns. Moreover, these may be closely tied to the communal cultural, moral and religious context. However, the extent to which these values are protected may vary between communities. To illustrate, freedom of speech and privacy may enjoy significantly different levels and degrees of protection from one community to another, while morality can be perceived behind tax judgments and attitudes to what amounts to tax optimization, tax planning, tax avoidance, tax evasion and tax fraud (Sage-Fuller and Lippe 2014: 173-207).

Thus one community would see a certain level and degree of regulation as an excessive restriction on freedom of communication, while another would see the same regulation as acceptable. Even a slight difference in approach may result in significant differences. For example, different communities might share agreement in principle on protecting consumers in dealing with businesses or children from pornography (see Kohl 2007: 262-265). However, differences might exist in areas of detail such as levels of protection or means of implementation. Moreover, unwillingness or inability to see a matter as a social issue requiring legal measures might be mutely manifest in an “inherent resistance to making an external legal commitment” and lie behind ultimate failure to achieve mutual accord (*ibid.*: 265).

Here we have, in somewhat over-simplified form, the basic context of differently functioning legal systems in which legal language operates. However, other factors are likely to affect the context in which rules are to be understood, even changing that context over time. According to Maduro and Azulai (2010: xiv-xv), “[a] rule only makes sense in its context, the context of the legal system to which it belongs but also [...] [t]he economic, social and political context are necessary to understand how the rule was adopted and compare its intended effects with the effects that its different possible interpretations may generate in the present context”. The words “the present context” suggest that the economic or social situation may have changed by the time a rule is interpreted, in which case “the rule should be set into the economic and social situation, the context, at the time of its interpretation, as opposed to the situation at the time of its adoption” (Kutscher 1976: I-1-I-50). To that extent economic, social and political (and other) factors could be said to be situational variables within the basic context, neutral until activated.

To add spice to the pot, in each community exists a host of social issues and values (and again presumably economic, political and other issues and values), with opinions about them differing, open to debate and changing with time (Galdia 2009: 57-58). These, too, are variables, though of a different kind in that they are independent, active variables. It is easy to imagine that active, independent variables could influence (activate) neutral, situational variables and, individually or in combination, the basic context, in this case the legal system of a given community, which thus becomes

dynamic. The same influences may, by extrapolation, be likely to influence the legal language of that community's legal system – and its development. Moreover, if law aims at organizing society in a specific way, then presumably adjudication also functions on the basis of a particular understanding of how that society should be organized. This understanding would consequently influence judges' reasoning (Van Hoecke 2002: 61, 126).

By now, not one but several pictures are emerging of how different legal systems and their associated languages may develop over time. To draw an analogy from the art world, the development of a single legal system can be compared with Paul Cézanne's many paintings of the Montagne Sainte-Victoire²: the same subject painted from different views at different seasons, times of day and weather conditions. In contrast, other legal systems would present different landscapes even if some of their features were similar. From this analogy, the challenges facing ELP researchers begin to show themselves, like clouds gathering on the horizon. Before going on to examine these linguistic aspects, to complete the picture of legal systems I will now look at them in more detail: their characteristics, elements, functions and classification.

Features of a legal system reflect how the law addresses social, political, economic, and other issues that arise within the system's frame of reference. In research into a specific legal system, this statement might be framed as a question: 'How does the law address social, political, economic, and other issues that arise within the frame of the legal system?' (Örücü 2004: 25). However, in comparative legal research between two or more legal systems, answers based on the same question tend to produce a flat, one-dimensional view, a review rather than an analysis. To obtain a truly comparative analysis, an in-depth multi-dimensional view, one would have to widen the focus of the question and change the angle of approach: 'How does this community (society or other grouping) use law *or other means* to address social, political, economic, and other *institutions* within its framework and social, political, economic, and other *issues* that arise within that community?'³ This approach goes beyond the merely legal, to include matters that might constitute a legal issue (and therefore an object of law) in one grouping but not in another. It is that kind of information that I suggest helps form the pragmatic awareness required by ELP researchers. The view thus obtained of a legal system would better be understood in proper perspective by comparative studies involving two or more legal systems and languages.

Characteristics of a legal system are a set of substantive and procedural rules with a frame of reference, or jurisdiction, operated by a community, typically represented as a society within the borders of a country or state. However, that need not be the case. For example, the frame of reference might equally be an interest group, such as traders (law "merchants"), professional athletes (International Olympic Committee; *Fédération Internationale de Football Association* – 'FIFA'), creators and innovators (World Intellectual Property Organization), Internet coordination (Internet Corporation for Assigned Names and Numbers – 'ICANN') or groups of states (the European Union, the

² Known throughout the art world as "Mont Sainte-Victoire".

³ According to Esin Örücü (2007: 51-52), an alternative to or variation of the 'functional-institutional' approach is the 'sociological' approach, which asks how a specific social or legal problem encountered in the societies concerned is resolved by their respective systems, legal or otherwise.

United Nations). These specific frames of reference are also relevant when it comes to classifying legal systems.

Elements of a complete legal system typically include a legislative or rule-making body, an executive, administrative and judicial bodies, such as tribunals, to oversee and ensure member compliance with rules or laws, and means of enforcement, not forgetting membership, whether states or other groupings, down to individuals. A brief look at how the legal systems of Finland, Bulgaria, France and England (Holdsworth 2006) present themselves at once reveals similarities and differences. For example, England has no formal written constitution, whereas the other three countries do; Finland has a constitution but no constitutional court, and so on.

These differences are largely, though not entirely, the result of social, political, economic, and other forces that lie behind the history of law, which in turn helps to explain why laws, and legal language, are as they are today. While this study does not suggest “the possibility of identifying a full correspondence between the languages of law and economics” (Legrand 2014: 212), this is not to say that economic (and other elements) are not reflected in the language of law.

As pointed out in the introduction, knowledge about these differences constitutes an important element in the totality of pragmatic competence. However, it must necessarily be completed with knowledge about the communicational vehicle of law, i.e. legal language.

Functions of a legal system (its aims) may have little to do with its functioning (how it operates) or its objectives. Typically, the functions of a legal system include resolving disputes (to maintain and restore social order); facilitating planning (to project consequences of actions); educating (to instil and reflect values of society); ‘legitimizing’ (to reflect lack of other social institutions). Objectives may include justice, speed, economy, flexibility, stability and predictability. However, if law fulfils certain functions, then presumably the way in which these functions are met not only develops over time but may also differ from one place to another. If this assumption is correct, then it would follow that law may only be one of two or more ways to achieve a specific societal goal or a desire of private actors, as implied by Somek’s comment cited above on distinguishing ‘law from other forms of social control’. Similarities and differences between the functions of different legal systems would again be of interest to ELP researchers.

3.2. *Classification of legal systems*

Conventionally, classification of legal systems involves arranging the legal systems of the countries of the globe into major legal families. This is mainly a matter of convenience for teaching purposes and as a quick reference for ELP researchers who need information on ‘comparative law’, itself a comparison between legal systems. The classic works on comparative law, originally written in German (Zweigert and Kötz 1998) and French (David and Brierley 1985), differ in some respects but both stress the dominance of two legal families: law based on the English tradition (‘common law’) and law based on the Roman tradition (‘civil law’ or ‘Continental law’ or ‘Romano-Germanic law’). History of law is an essential component of detailed comparative law studies, as it can explain the comparative development of legal systems over time.

The conventional classification of legal systems has been challenged on the basis that it overly stresses Western law or that other methods of classification are available (e.g.

Örücü 2008: 3; Mattei, Ruskola and Gidi 2009). At the same time, it is undeniable that over the last few centuries Western law has exercised an overwhelming influence on legal systems throughout the world, so that all modern legal orders are strongly based on it. As a result, the common law-civil law distinction remains valid, at least for the time being⁴.

However, as already noted, national legal systems are not the only legal systems. In particular, systems of law that are not tied to the nation state are gaining momentum, in the shape of EU law, international law and legal systems of other interest groups, as we have seen. Additionally, the rise of Asia, in particular China, may impact on classification of legal systems, or even on existing dominant legal systems. Moreover, as Teubner (1998: 16) puts it: “Globalising processes have created one world-wide network of legal communications which downgrades the laws of nation-states to mere regional parts of this network which are in close communication with each other”.

In addition to the decline of State sovereignty and the emergence of new sites of authority and forms of law-making, existing divisions within legal systems are also evolving. For example, the division of public and private law⁵ can be seen as a remnant from establishment of the nation State as a modern reference point but now under challenge. This suggests a need to re-define ideas of community or communities through legal pluralist lenses (Cotterrell 1997: 12, 75). Other examples include the rise of new practice areas of law to respond to need, such as the concept of access to justice, as we shall see. Another example is environmental protection, which Paunio (2011: 104-105) explains as follows: “development of environmental protection in the EU serves as an interesting example because it highlights the existence of a connection between a system of beliefs and law.” If all this amounts to legal hybridity, then perhaps the need arises to step outside the box linked to state-sovereignty and traditional distinctions and to reconceptualize, to resystematize approaches to law (Tuori 2012: 73). This process would be of interest to individuals operating between two or more legal systems and languages, as well as to LSP researchers. The background or contextual information thus obtained would be of use in understanding how law is expressed in language.

Differences occur between legal systems, for example the French, German and English, in the role of rights, strict liability and liability for lawful acts (in particular of public bodies) in civil liability claims. To illustrate, even despite direct effect of the European Convention on Human Rights, the English courts, unlike their French and German counterparts, remain reluctant to acknowledge rights. This may require some mental gymnastics, such as interpreting a right to privacy as the equitable wrong of ‘breach of confidence’, thus presenting the right to privacy as a duty for others (Van Dam 2013: 142-144; 2007: 57-80). Again, over the last century strict liability has developed in France and Germany more than in England (Van Dam 2013: 139-141).

The same applies with liability of public bodies (*ibid.*: 530-583; Aalto 2010). Whereas France operates the principle of ‘*égalité devant les charges publiques*’ (Van Dam 2013: 537) (‘equality before public burdens’: the equality principle, or the obligation of the state to make amends for harm caused by its activity or that of its agents) and Germany the

⁴ It is important here to point out that several countries have a mixed system, i.e. common law + civil law + customary law + religious law.

⁵ For more on this see e.g. M. Horwitz 1982. The history of the public/private distinction. *University of Pennsylvania Law Review* vol. 130: 1423-1428.

'*Sonderopfer*' ('special victim') rule (*ibid.*: 540) (the obligation of the state to make amends for a special burden to which the claimant is subjected through a measure taken for the public good), England, with its insistence on duties rather than rights, in addition to its reluctance towards strict liability, operates a system of *ex gratia* payments through compensation schemes, implying a moral duty of the public body rather than a right of the suffering citizen (Fairgrieve 2003: 244-251). The explanation for the English attitude may perhaps be found in an aversion to general rules and principles and a strong preference for a pragmatic approach in the shape of case law and precedent (Van Dam 2006: 607). This could affect relevant concepts and terminology and thus be of interest to ELP researchers.

4. Knowledge relating to legal language

This section looks beyond law as language in the form of terminology and concepts to examine the influences that shape development of legal language in the communities and their respective legal systems in which legal language is used (4.1). It then (4.2) discusses specific examples of how different attitudes to law can affect legal language in different communities and continues with a brief study of judicial influences (4.3), in particular judicial treatment of social issues and values.

4.1. Overview

With some exceptions (Mattila 2013: 43), law is expressed through language: law is language. Others put it in much the same way: "[l]anguage is the medium through which law acts" (Bix 1993: 1); "[l]anguage is the form that law – one's own as well as foreign – takes" (Husa 2011: 217). We might also say that legal language is the principal means of communication between interlocutors in legal contexts, where "[l]egal language means 'legally relevant aspects of language use'" (Galdia 2009: 138).

Additionally, according to Galdia (*ibid.*: 52): "[l]aw is predominantly a linguistic phenomenon because it is created and applied in linguistic operations". Boyne (2014: 124), for her part, observes that "[l]egal language conveys meaning beyond the words on a page. It is a highly structured system of language that reflects the legal culture in which it has been born". According to Rubel and Rosman (2003: 1), "in its broadest sense, translation means cross-cultural understanding". This makes sense and is coherent with the discussion above under the section on law and legal systems if we understand legal culture broadly as the way law is used within a community to reflect and support the values of that community in addressing social and other issues and the attitude and approach of that community towards law and its functions. This proviso is necessary bearing in mind problems with using the term 'legal culture' due to multiple definitions (Nelken 1997: 2; Goddard 2011: 124-127).

While noting that "[l]egal language is much more than terminology" (2009: 138), Galdia (*ibid.*: 329) observes that "linguistic operations in law developed around legal speech acts" form the focus of legal linguistic studies, qualifying legal speech acts as "qualitatively different in that they reach from simple utterances like a promise to complex argumentative and interpretive structures", adding that "[l]egal terms that represent legal concepts function as focal points for these complex structures". This paper underlines the need to look behind terminology and concepts for a more general

view of the development of legal systems and, consequently, for a better understanding of the language they employ and the contexts in which they do so. Such a study helps forge pragmatic competence in use of legal language.

4.2. *Illustrations concerning legal language*

Visitors to Germany may be surprised, impressed, amused or irritated if reproached by local inhabitants for minor administrative infractions⁶. The legendary respect for the law among Germans appears to have some basis in fact. According to Rueschemeyer (1973: 275), “[t]here is little question that the value placed on law-abiding behaviour in German normative culture is very high indeed”. One explanation for this is the intermediation between state, people of the church and civil organizations in “Germany, where a limited number of major federations and the churches with high memberships gather a large share of the population under their wings. Through their cooperation with the state in preparing and implementing legislation, they use their influence to bind the state to the interests of their members, and their members to the laws of the state. One outcome of this model is the proverbial law-abidingness of the Germans” (Münsch 1993: 517).

From the legal-theoretical aspect, this appears to correlate with H.L.A Hart's (1994: 55-61) comment on individuals who accept and cooperate in maintaining legal rules (‘internalizing’) as opposed to those who do so for the sake of form but reject them (‘externalizing’).

Compare this with the strong Finnish tradition of legalism, a respect for proper legal forms characteristic both of the role of the authorities and of the behaviour of citizens. The attitude that the law binds the authorities as well as the people traces its roots to the ‘Russification’ period (1899-1905), when Finns used their own legal order to maintain their autonomous position (Nousiainen 2007). Thus the tempting conclusion – that respect for the law in one legal system has the same explanation in another – would be misleading.

At the same time, it seems plausible that different attitudes and approaches to law could be generated by the values of the community, that is, what the community shares in common that prompts them to unite in the first place and subsequently to remain united. In turn, community values could be linked to what the community sees as social (or other) issues to be addressed by law (or other means). Might these, too, play a role in influencing the language of law? According to Galdia (2009: 53, 239), “[l]egal language [...] is value-laden and transports convictions and views about the social practice [...] fundamental for the society in which it [is] emerged [...] values manifest themselves in legal language as an inherent part of it”.

In an article on differences in basic concepts and terminology between English and German, Sack (1987: 63) notes “It is ironic that English, the language of the common law, with its emphasis on judicial precedent, should have adopted the word ‘law’, in the sense of rule, to denote the entire field of law, whereas German, as one of the languages of codified civil law, uses the word ‘*Recht*’ in the sense of right, for the same purpose”. Interestingly, Cao (2007: 57) points to the different conceptual and semantic field covered by the French ‘*droit*’ and the English ‘law’. Legal history may play an important

⁶ German-speaking Switzerland is exactly the same.

contextual role here. As Teubner (1998: 20) notes: “it is inconceivable that British ‘good faith’ will be the same as *Treu und Glauben* German style which has developed in a rather special historical and cultural constellation”.

A contrast appears between German (and Germanic) key words in the legal sphere and the Latin-derived words that prevail in common law. This is especially so, again bearing in mind the historical context, which refers to Roman law being received in Germany (Sack 1987: 64). Could this imply a legal-linguistic gap of historical causes and effects in approaches to interrelationships between law, government and the state? As Sack (*ibid.*: 66; emphasis original) points out: “The ‘rule of law’ ideal, which fits the English language like a glove, goes against the grain of German. ‘Law’ in the sense of ‘right’ *cannot* rule; ‘*Recht*’ can never be a form of government; the holy trinity of the English legal system – ‘law’, ‘rule’ and ‘order’ – is linguistically unavailable in German”. The reader may be interested to see how the European Commission for Democracy Through Law (Venice Commission) dealt with the challenge of equivalence between ‘rule of law’, *État de droit* and *Rechtsstaat* (European Commission for Democracy Through Law (Venice Commission): 2011).

A picture seems to be emerging of the relevance of the social facts that lie behind the law (*Rechtstatsachenforschung*) or, broadly speaking, sociology of law (e.g. Ehrlich 1936; Lotmar 1941; Friedman 1975; Luhmann 1985; Cotterrell 1992, 2006; Coutu 2006: 173). Moreover, “the relation between society and law and the role of law in societies as an organised way to solve certain societal needs of human communities (e.g. administration, economy, inheritance)” falls within the remit of comparative law (Kahn-Freund 1965: 31; Bogdan 1994: 66-77). It seems reasonable to suppose, too, that community values would be reflected not only in legal language but in morality and other standards. These would likely feature among the hidden influences on law, and thence themselves on legal language as well.

The way that factors of this kind influence legal language can be illustrated by examples from various fields of law. One could mention, for example, legal treatment of gifts (Hyland 2009) and security rights in movable property (Juutilainen 2007). Another example is the field of patent law, where differences in attitude survive even in the EU, as we shall now see.

Despite the introduction of Art. 69 European Patent Convention (EPC) regulating the scope of patent protection in the EU context, differences persist between the German and UK patent systems due to historically different philosophical approaches to the role of patents. In Germany, patents are seen more as a tool to reward the patentee. On the other hand, in the UK a patent is seen as an exception to the general prohibition on monopoly. This results in a broader interpretation in Germany and a narrower interpretation in the UK.

This difference in philosophical approach has been reflected in other areas. For example, in Germany patent applications had to conform to specific language and form prescribed by the Patent Office. In contrast, the freer choice of language employed by UK patent claim drafters reflects their concern to prevent design around the invention and maximize the scope of protection by manipulating the intrinsic scope of the patent. However, the narrow requirements of the German Patent Office may be reflected in wider interpretation of claims by German courts, whereas the more relaxed requirements of the UK Patent Office as to the form of claims were curbed by courts’ narrower interpretations (Fisher 2007: 226).

Comparative legal linguistics asks the following question: to what extent are these differences reflected in legal language? The question is interesting both from the point of view of legislative language and from that of judicial language: unfortunately, space limits do not allow detailed text analysis in this study.

4.3. Illustrations concerning judicial language

As Boyne (2014: 125) points out: “[a]lthough we may think we know what a ‘judge’ is, our understanding of how a judge operates in another legal system is filtered through our knowledge of the role that judges play in our legal home”. Again, as Boyne (*ibid.*: 134-136) observes, the different approaches of adversarial and inquisitorial systems in establishing the truth in criminal cases affect the self-perception of those involved, such as prosecutors. While the former sees the process as essentially a contest, with lawyers as feudal-style champions, the latter sees the process as an objective investigation, with lawyers (at least, prosecutors) as objective investigators. This might explain the comment in *The Economist* on investigations into former German president Christian Wulff: “Overzealous prosecutors ready to do anything for victory are usually seen as an American phenomenon” (20 April 2013: 35)

Examples are legion of court decisions that, according to different viewpoints, reflect changing social and other values or stand as examples of judicial activism. In the EU context, the cases of *Van Gend en Loos* [1963] and *Costa v. ENEL* [1964] are early examples of landmark cases from the European Court of Justice (now the Court of Justice of the European Union). In the latter case, for ELP researchers a point of interest would be to know who was responsible for the contested rendering of the French *primauté* into English as ‘supremacy’ (Avbelj 2011: 744-763).

Indeed, the Court has played a prominent role in developing (some might prefer ‘clarifying’) certain areas of EU law, not least the concept of European citizenship, converting it from mere words into a set of rights, covering such areas as free movement and equal treatment, in numerous cases (e.g. *Martínez Sala* [1998], *Baumbast* [2003], *Bidar* [2005], *Grzelczyk* [2001], *Rottmann* [2010], *Boukhalfa* [1996], *Zhu & Chen* [2004], *Garcia Avello* [2003]). Another instance of contested translation could be in the rendering of ‘*a vocation à être*’ as applied to EU citizenship as ‘destined to be’ in some cases and in others as ‘intended to be’ as study of the cases shows e.g. *Grzelczyk* (para. 31), *Baumbast* (para. 82) and *Rottmann* (para. 43). The French original has remained unchanged, which suggests the difficulty lies with the court’s translation services. These cases illustrate the role that the Court has played in treatment of social issues and values.

In a narrower national context, though with strong international implications, the landmark English case of *Lubbe v. Cape* (2000)⁷ was a fierce battle in which the House of Lords (now the Supreme Court of the United Kingdom) employed the relatively new concepts of ‘access to justice’ and ‘piercing the corporate veil’ to oust the long established principle of *forum non conveniens*, enabling claimants in South Africa to proceed in

⁷ *Lubbe v. Cape PLC* involved claims by multiple claimants (all but one citizens and residents of South Africa and almost all of modest means) for personal injuries or death caused by exposure to asbestos while working in South Africa for the South African subsidiaries of Cape PLC, a UK-registered company. At first instance, the judge concluded that South Africa was clearly and distinctly the more appropriate forum for trial of the group action. The Court of Appeal agreed, as indeed did the House of Lords which, however, allowed the claimants to proceed in England, on the basis that justice would not be done in South Africa due to the claimants’ lack of means.

England against the mother company of a South African subsidiary which the claimants alleged had caused injury or death. The case illustrates a growing awareness of human rights considerations and a developing culture of human rights law enforcement which seeks to hold multinationals legally accountable for the health and safety of their foreign employees and their environment. Although the English court declared that public interest and public policy concerns were not taken into account, none the less human rights considerations, access to justice and piercing the corporate veil are arguably matters of public interest as well as factors that contribute to the making of public policy. In any event, this case reflects a change in public attitudes, as illustrated by the concepts of access to justice and denial of justice, so that the decision is at least coherent with current principles and policies.

Conclusion

The aim of this chapter was to discuss factors that mould legal language, especially influences that lie unseen behind legal concepts and their face in the shape of legal terminology. The goal was to determine whether familiarity with these factors might enhance the legal linguistic awareness and thus the pragmatic competence of individuals such as ELP researchers. The specific undertaking was to evaluate whether these factors could help pave the way for further comparative legal linguistic research into reasons for similarities and differences between legal systems and legal languages, the hypothesis being that different attitudes and perceptions towards law in different legal systems may be reflected in legal language, in particular in concepts and terminology.

At this stage, the author can claim no more than that, from the viewpoint of ELP researchers, what is needed is deeper and broader comparative legal linguistic research which examines the aspects mentioned above in different communities. To summarize, these are:

- approaches and attitudes to law (e.g. law as social control);
- the functions of law in the community (e.g. to solve problems);
- situational/contextual factors (e.g. economic, social, political (dependent variables));
- community values (e.g. morality, privacy);
- social or other issues (active, independent variables);
- how the community deals with social or other issues by law or other means along with their influence both on each other and on the language of law.

This would involve more detailed studies on how the features, characteristics, elements and functions of a legal system develop over time so as to influence development of associated legal language: put differently, why the legal system – and the legal language – of a community is as it is.

References

Books and articles

Aalto P. 2010. *Public Liability in European Union Law Transformed*. Turku: Uniprint.

- Avbelj M. 2011. Supremacy or primacy of EU law – (why) does it matter? *European Law Journal* 6: 744-763.
- Bix B. 1993. *Law, Language and Legal Determinacy*. Oxford: Oxford University Press.
- Bogdan M. 1994. *Comparative Law*. The Hague: Kluwer.
- Boyne S. M. 2014. Translating civil law “objectivity” with an adversarial brain: an ethnographic perspective. In S. Glanert (ed.), *Comparative Law: Engaging Translation*. Abingdon: Routledge: 123-139.
- Bulgarian Legal System 2006. Globalex at <http://www.nyulawglobal.org/globalex/Bulgaria.htm>.
- Cao D. 2007. *Translating Law*. Clevedon: Multilingual Matters.
- Chase O. 2005. *Law, Culture, and Ritual: Disputing Systems in Cross-Cultural Context*. New York: New York University Press.
- Cotterrell R. 1992. *The Sociology of Law: An Introduction*. Oxford: Oxford University Press.
- Cotterrell R. 1997. A legal concept of community. *Canadian Journal of Law and Society* 12: 75-91.
- Cotterrell R. 2006. *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory*. Farnham, UK: Ashgate.
- Coutu M. 2006-2007. Labour law, legal pluralism and state sovereignty. *Canadian Labour & Employment Law Journal* 13/2: 169-185. Also at <http://www.crimt.org/PDFs/Labour%20Law,%20Legal%20Pluralism%20and%20State%20Sovereignty%20-%20CLELJ%20-%20Michel%20Coutu.pdf>.
- David R. and J.E.C. Brierley 1985. *Major Legal Systems of the World Today: An Introduction to the Comparative Study of Law* 3rd ed. Stevens: London.
- Economist*, The 20 April 2013.
- Ehrlich E. 1936. *Fundamental Principles of the Sociology of Law*. Cambridge, MA: Harvard University Press.
- European Commission for Democracy Through Law (Venice Commission) 2011. *Report on the Rule of Law*. Available at [http://www.venice.coe.int/webforms/documents/CDL-AD\(2011\)003rev-e.aspx](http://www.venice.coe.int/webforms/documents/CDL-AD(2011)003rev-e.aspx).
- Fairgrieve D. 2003. *State Liability in Tort. A Comparative Law Study*. Oxford: Oxford University Press.
- Finnish Legal System 2001. At <http://www.llrx.com/features/finnish.htm>.
- Fisher M. 2007. *Fundamentals of Patent Law: Interpretation and Scope of Protection*, Oxford: Hart Publishing.
- French legal system 2005. Globalex at <http://www.nyulawglobal.org/globalex/france.htm>.
- Friedman L. M. 1975. *The Legal System: A Social Science Perspective* (New York: Russell Sage Foundation).
- Galdia M. 2009. *Legal Linguistics*. Frankfurt am Main: Peter Lang.
- Gessner V., A. Hoeland and C. Varga (eds) 1996. *European Legal Cultures*. Dartmouth: Aldershot.
- Goddard C. 2011. Fishing with new nets in familiar waters: a legal linguistic foray into comparative law, legal culture, and legal ideology. *The Lapland Law Review*: 122-143.
- Hart H.L.A. 1994. *The Concept of Law*. Oxford: Oxford University Press.
- Harvey M. 2002. What’s so special about legal translation? *Meta: journal des traducteurs / Meta: Translators’ Journal* 47/2: 177-185. Also at <http://id.erudit.org/iderudit/008007ar>.
- Holdsworth M. 2006. *Introduction to the English Legal System*. Citizenship & Teacher Education. At http://www.citized.info/pdf/commarticles/Oxford_Legal.doc.

- Horwitz M. 1982. The history of the public/private distinction. *University of Pennsylvania Law Review* 130: 1423-1428.
- Husa J. 2011. Comparative law, legal linguistics and methodology of legal doctrine. In M. Van Hoecke (ed.), *Methodologies of Legal Research*. Oxford: Hart Publishing: 209-228.
- Husa J. 2012. Understanding legal languages – linguistic concerns of the comparative lawyer. In C.J.W. Baaij (ed.), *The Role of Legal Translation in Legal Harmonization*. The Hague: Wollters Kluwer: 161-180.
- Hyland R. 2009. *Gifts: A Study in Comparative Law*. New York: Oxford University Press.
- Juutilainen T. 2007. Security rights and the lack of a priority debate: how to proceed with choice of law and harmonization. In T. Wilhelmsson, E. Paunio and A. Pohjolainen (eds), *Private Law and the Many Cultures of Europe*. The Hague: Kluwer Law International: 343-363.
- Kahn. P. 1999. *The Cultural Study of Law: Reconstructing Legal Scholarship*. Chicago: University of Chicago Press.
- Kahn-Freund O. 1965. *Comparative Law as an Academic Subject*. Oxford: Clarendon Press.
- Kohl U. 2007. *Jurisdiction and the Internet: Regulatory Competence over Online Activity*. Cambridge: Cambridge University Press.
- Kutscher H. 1976. Methods of interpretation as seen by a judge at the Court of Justice. Paper presented at Judicial and Academic Conference 27-28 September 1976, Luxembourg: Court of Justice of the European Communities: I-1-I-50.
- Legrand P. 2011. *Le Droit comparé*, 4th edition Paris: Presses Universitaires de France.
- Legrand P. 2014. Withholding translation. In S. Glanert (ed.), *Comparative Law: Engaging Translation*. Abingdon: Routledge: 208-219.
- Levinson S. 1983. *Pragmatics*. Cambridge: Cambridge University Press.
- Lotmar P. 2001, 1941. *Der Arbeitsvertrag* 2nd edition, M. Rehbinder edition, Berlin: Duncker & Humblot.
- Luhmann N. 1985. *A Sociological Theory of Law*. London: Routledge & Kegan Paul.
- Maduro M.P. and L. Azoulai 2010. *The Past and Future of EU Law*. Oxford: Hart Publishing.
- Mattei U. and T. Ruskola 2009. *Schlesinger's Comparative Law*. London: Foundation.
- Mattila H.E.S. 2013. *Comparative Legal Linguistics* (2nd edition), trans. C. Goddard. Farnham/Burlington: Ashgate.
- Münsch R. 1993. *Das Projekt Europa*, Frankfurt-am-Main: Suhrkamp; reprinted in V. Gessner, A Hoeland and C. Varga (eds), *European Legal Cultures*. Aldershot: Dartmouth Publishers: 157-158 (trans. John Blazek, Brussels).
- Nelken D. (ed.) 1997. *Comparing Legal Cultures*. Aldershot: Dartmouth Publishers.
- Nelken D. 2002a. Changing legal cultures. In M.B. Likosky (ed.), *Transnational Legal Processes*. Cambridge: Cambridge University Press: 41-58.
- Nelken D. 2002b. Comparative sociology of law. In R. Banakar and M. Travers (eds), *An Introduction to Law and Social Theory*. Oxford: Hart Publishing: 329-344.
- Nousiainen J. 2007. The Finnish system of government: from a mixed constitution to parliamentarism. Ministry of Justice, Finland. At <http://www.om.fi/21910.htm>.
- Örücü E. 2004. *Enigma of Comparative Law: Variations on a Theme for the Twenty-First Century*. Leiden: MartinusNijhof.
- Örücü E. 2007. View of legal families and of mixed systems. In E. Örücü and D. Nelken (eds) *Comparative Law: A Handbook*. Oxford, Hart Publishing, 2007: Chapter 8, 169-187.
- Örücü E. 2008. What is a mixed legal system: exclusion or expansion? *Electronic Journal of Comparative Law* 12/1. At <http://www.ejcl.org/121/art121-15.pdf>.
- Paunio E. 2011. *Beyond Words: The European Court of Justice and Legal Certainty in Multi-*

- lingual EU Law*. Helsinki: Yliopistopaino.
- Riles A. (ed.) 2001. *Rethinking the Masters of Comparative Law*. Oxford: Hart.
- Rubel P. and A. Rosman 2003. Introduction: translation and anthropology. In P. Rubel and A. Rosman (eds), *Translating Cultures: Perspectives on Translation and Anthropology*. Oxford: Berg.
- Rueschemeyer D. 1973. *Lawyers and their Society*. Cambridge, Mass.: Harvard University Press.
- Sack P. G. 1987. Law and custom: reflections on the relation between English law and the English language', excerpt from *Rechtstheorie* 4: 421-436.
- Sage-Fuller B. and F. Prinz zur Lippe. 2013. Abuse of tax law as language of morality of modern times. In S. Glanert (ed.), *Comparative Law: Engaging Translation*. Abingdon: Routledge: 191-207.
- Šarčević S. 2000. *New Approach to Legal Translation*. The Hague: Kluwer Law International.
- Somek A. 2010. The emancipation of legal dissonance. In H. Koch, K. Hagel-Sørensen, U. Haltern and J.H.H. Weiler (eds), *Europe: The New Legal Realism. Essays in Honour of Hjalte Rasmussen*. Copenhagen: Djøf: 679-713.
- Tamanaha B.Z. 2008. Understanding legal pluralism: past to present, local to global. *Sydney Law Rev.* 30: 375-411.
- Teubner G. (ed.) 1997. *Global Law Without a State*. Aldershot: Dartmouth.
- Teubner G. 1998. Legal irritants: good faith in British law or how unifying law ends up in new divergences. *Modern Law Review* 61: 11-32.
- Törnudd P. 1996. *Facts, Values and Visions. Essays in Criminology and Crime Policy*. Helsinki: National Research Institute of Legal Policy.
- Tuori K. 2012. On legal hybrids. In H.-W. Micklitz and Y. Svetiev (eds), *A Self-sufficient European Private Law: A Viable Concept*, Fiesole: *European University Institute Working Paper* 31: 67-75.
- Van Dam C. 2013. *European Tort Law* 2nd edition. Oxford: Oxford University Press.
- Van Dam C. 2007. European tort law and the many cultures of Europe. In T. Wilhelmsson, E. Paunio and A. Pohjolainen (eds), *Private Law and the Many Cultures of Europe*. The Hague: Kluwer Law International: 57-80.
- Vanderveken D. with K. Macqueen 1990. Semantic analysis of English performative verbs" in D. Vanderveken (ed.) *Meaning and Speech Acts, Vol. 1 Principles of Language Use*. Cambridge: Cambridge University Press: 166-219.
- van Gerven W. 2004. The ECJ-Case law as a means of unification of private law? In A. Hartkamp, M. Hesselink, E. Hondius, C. Joustra, E. du Perron and M. Veldman (eds), *Towards a European Civil Code*, 3rd edition. The Hague: Ars Aequi Libri / Kluwer Law International: 101-123.
- Van Hoecke M. 2002. *Law as Communication*. Oxford: Hart Publishing.
- Wilhelmsson T., E. Paunio and A. Pohjolainen (eds) 2007. *Private Law and the Many Cultures of Europe*. The Hague: Kluwer Law International.
- Zweigert K. and H. Kötz 1998. *An Introduction to Comparative Law* 3rd edition (trans. T. Weir). Oxford: Oxford University Press.

Cases

Court of Justice of the European Union

- Case C-413/99 *Baumbast, R v. Secretary of State for the Home Department* [2003] ECR I-7091.

Case C-214/94 *Boukhalfa v. Bundesrepublik Deutschland* [1996] ECR I-2253.

Case C-148/02 *Carlos Garcia Avello v. État belge* [2003] ECR I-11613.

Case 6/64 *Costa v. Ente Nazionale per L'Energia Elettrica (ENEL)* [1964] ECR 583.

Case C-135/08 *Janko Rottmann v. Freistaat Bayern* [2010] ECR I-1149.

Case C-200/02 *Kunqian Catherine Zhu, Man Lavette Chen v. Secretary of State for the Home Department* [2004] ECR I-9925.

Case C-85/96 *María Martínez Sala v. Freistaat Bayern* [1998] ECR I-269.

Case C-184/99 *Rudy Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193.

Case C-209/03 *The Queen ex parte DanyBidar v. London Borough of Ealing, Secretary of State for Education and Skills* [2005] ECR I-2119.

Case 26/62 *Van Gend en Loos v. Nederlandse Administratie Belastingen* [1963] ECR 1.

UK House of Lords

Lubbe and Others and Cape Plc. and Related Appeals [2000] UKHL 41 (20th July, 2000).