

Sprache und Medialität des Rechts
Language and Media of Law

Band 2

**Legal Linguistics Beyond Borders:
Language and Law in a World
of Media, Globalisation and
Social Conflicts**

**Relaunching the International Language and
Law Association (ILLA)**

**Edited by
Friedemann Vogel**



Duncker & Humblot · Berlin

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Herausgegeben von
Ralph Christensen und
Friedemann Vogel

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Preface

Creating Law with Language – Crossing Borders and Connecting Disciplines from the Perspective of Legislative Practice

By R. Alexander Lorz

Law works through language. At least, language is the beginning of all laws. Whatever messages the law is supposed to communicate to its citizens, they must be transported through language. When the language of laws is transformed into executive action, other means might come into play. But first of all, every such action has to be programmed and determined through language. And since laws must be formulated before any such action can take place, the process of law-making marks the beginning of it all – with language forming the core of this activity.

The process of law-making follows somehow ancient rules even in the most modernized democracies. Laws must still be formally introduced in Parliament, run the gauntlet of various plenary readings and committee sessions and finally be voted upon by the full House (in systems with two Chambers often both legislative bodies), only to be promulgated and eventually implemented by the Executive Branch. Globalization and social conflicts deriving from it certainly play an important role in framing the regulatory issues to be dealt with by law, but the legislative process as such remains largely untouched by these developments. And modern media, although they are of course employed in facilitating research, the access to documents and thus in a general enhancement of transparency, do usually not alter the process itself, but rather serve auxiliary purposes in its context – save for the most advanced countries in this regard.

Nevertheless, even though legislative practice seems less prone to take legal linguistics beyond the borders than many other fields of legal activity, there is ample room for legal linguistics to thrive. In order to look at this in more detail, a brief distinction of the three major stages of law-making seems appropriate: First of all, the decision must be made to create a law at all. Montesquieu is usually credited for a famous proverb: “When it is not necessary to make a law, it is necessary not to make one” – and this should still hold true for current legislatures. Second, of course, a law needs to be formulated – which can be an arduous task and take the legislators deeply into detail. Finally, since even the most carefully deliberated and worded law can entail undesired and unforeseen effects due to the general inadequateness of human beings, and also because the permanent change of circum-

stances can render a law inadequate in the course of time, it is indispensable to constantly watch the law at work and to evaluate whether it (still) serves its purpose or not.

Starting with the decision whether to make a law at all, four constellations are to be distinguished, two of which seem obvious: either no law is (yet) needed because conceivable changes can be performed without touching the law, or there is no way of going forward without a new law, so the law is really needed at that point. The other two are more interesting because they leave ample room for political considerations: a law may not be strictly needed, but still be desirable; this is particularly true for laws reinforcing the normative impact of existing rules. Or a law is not needed, but nevertheless considered politically helpful: then we often talk about a kind of “symbolic legislation”. Here legal linguistics can play an especially strong role because then it is necessary to achieve the political goal without giving up the determinative character of the law or falling into the trap of “legal lyrics”.

Once the decision to enact a new law is made, many contributors come into play when it comes down to formulating the law in detail. Even before the formal legislative process gets started, a lot of political preparations are indispensable: in discussions within the own ranks, be it just the own party or – the regular case in Germany – a coalition of governing parties, a general consensus must be formed on how to proceed with the law. Depending on the concrete political system, a lot of technical advice will also pile up: The Ministries, the State Chancelleries and/or the Parliament’s own legal service, all are supposed to provide support and formulations or simply to write the first draft of the law. Only then the parliamentary procedures will start – with hearings and deliberations in the competent committees or even debates on the floor (if the law is considered really important). It is apparent from this entanglement of various inputs that basically everybody who could somehow be concerned by the law will use the opportunity to chip in and try to influence the precise contents of the law – and at the end of the day, the final formulation of the law is the result of many more or less hard-fought compromises. A famous German saying according to which “many cooks can spoil the dough” seems like the appropriate description here.

But it is not just the necessity of compromise that can afterwards render working with the law difficult. Even in the case of (seemingly) greatest unity, every law is prone to (inevitable) misinterpretations. They can arise due to different (or lacking) perceptions of the factual background or can flow from different preconceptions of the termini used in the law – to provide an example: When the new curriculum for education in sexual matters was promulgated in Hesse, it used the word “acceptance” with regard to diverse sexual orientations. The idea behind it was to combat discrimination on the basis of sexual orientation. But many people read “acceptance” as a kind of official endorsement of specific sexual orientations and objected to that meaning. Eventually, even the best-formulated legal text will usually contain vaguenesses that may be the result of political compromise formulas, are de-

liberately inserted to avoid undesired effects or are brought about by implication of decisions of superior or co-ordinated institutions, such as the coordinating institutions in a federal state.

Moreover, even if at the beginning of a law no such discrepancies can be discerned, the practical day-to-day work with it will inevitably produce changes in the meaning and in the end necessitate *ex-post* adjustments. This is especially true when dependent authorities like administrative agencies start to explain the law through administrative norms and internal directives. In addition, there are independent players which usually do not get involved in the process of formulating the law, but come in at a later stage when the focus turns on implementation. In a state with an independent judiciary, this role is mainly filled by the courts; but an institution like the Court of Auditors can also point to problems in the implementation of a law that might require formal changes. In a state with a strong tradition of local self-administration or with more than one legislative chamber, dissents between municipal and state authorities or the various legislative chambers might also call the precise meaning of a law into question and call for formally touching it again.

What role can legal linguistics play in these diverse regards? There are certainly lots of contributions that linguistics can make, starting with putting the necessary legal formalities into a shape that satisfies the demands of linguistic precision or even aesthetics. Moreover, especially precision can be helpful to clearly define the realm and limits of legal certainty and thereby to facilitate the role of the courts or generally all interpreters of the law. And in principle, legal linguistics can come in at any stage of the legislative process, thereby ensuring a high quality standard of the law throughout its creation. However, a considerable amount of water is to be poured into that wine, to use another favorite German proverb in literal translation: For there are so many different actors representing so many divergent interests involved in that process – as could be seen from the remarks above – that very often considerations of linguistic precision or aesthetics will have to give way to symbolic terminology, vested political interests or simply the call for compromise. Thus, despite all possible support from the linguistic side, it is hardly imaginable that this kind of advice will convince in most cases or even prevail throughout. But this should not discourage legal linguistics from getting engaged: it is better at least to know the aspects that might be disregarded or perhaps integrate them into the formulation of the law than not to know what could have been made better at all.

And at this point, the role of the International Language and Law Association (ILLA) becomes pivotal: only an institutionalization of linguistic counselling can ensure that no chances are missed in this respect. Otherwise, the integration of linguistic expertise in the process of law-making will be dependent on happenstance and the personal interest and engagement of the concrete actors involved. The same is true for the establishment of the necessary systemic approach to linguistics as a part of legal education and training. And only an international association of this

kind can facilitate a transnational exchange for the benefit of enhancing the quality of legal practice across national borders. Thus, good luck for ILLA in taking on these tasks!

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Introduction

By *Friedemann Vogel*, Siegen

Before I began to discover the fabric of language and law in my own research about ten years ago, I remember, law was a bit strange to me: I did not understand it or – in the context of social engagement and student protests – I was afraid of it. Law seemed to be only a subject of dominance, of restriction, and of its own esoteric self-protective and self-important insulation. You do not like letters from legal officials or courts consisting of strict deadlines, peculiar clinical words and a misleading syntax. I think this is a typical experience of most people in Germany. Law is like a problem, you don't like to get in touch with. If at all, in school you had to memorize the fundamental rights of the constitution, some nice sentences, but you do not really understand the idea behind them, the history of this important text as a fortress of humanity to prevent a second Nazi-Germany. You do not understand the coherence of constitution, other statutes and their interpretation in courts. – But you know judge Barbara Salesch from the TV, the humorous woman, fighting with bandits and murderers every day at lunchtime.

This was my impression of law when my Phd supervisor and colleague in Heidelberg, Ekkehard Felder, asked me in 2007 to do something within the research field of legal linguistics. He and the Heidelberg Group of Legal Linguistics – established by Friedrich Müller, Ralph Christensen, Dietrich Busse and Rainer Wimmer in 1984 – showed me a new way to understand law from a text pragmatic perspective.

From this perspective law or legal work is a work within texts and language. When lawyers work with norms they actually work with many different texts. They connect a text with other texts, for example statutes with prior court decisions, texts from the legal scientific community, legal commentaries, texts of external opinions of legal experts, and of course, texts describing the controversial “real facts”. The modern constitutional state establishes an intertextual structure (Müller / Christensen / Sokolowski 1997; Vogel / Hamann / Gauer 2017). This is not just another attribute among others. The constitutional state is indeed a text structure in itself. Jurisprudence is a “science of text-based decisions” (Morlok 2015: 88, own translation).

The relationship between the legal system and text is rooted in two functions of language: First, language is the most important medium to share and negotiate legal and other social norms. Furthermore, and from my perspective more important, language-based constitutional democracy transforms the brute force of social conflicts into due process and a semantic struggle for arguments.

Such a pragmatic view on law draws the attention to concrete human actions and interactions, and to the responsibility of those interpreting and creating legal texts. It focuses on the active process of norm construction considering signs and media. Law, then, is neither only an abstract logical system of norms nor only words on paper, but a specific style to communicate about and to negotiate the fundamental organization of society.

This seems to be self-evident. But in fact, from this holistic perspective law becomes a quite complex linguistic, social and cultural phenomenon, which needs to be explored interdisciplinarily. Legal linguistics has accepted this challenge and has become a broad research field around the world by now. In the last fifteen years the first introductions, handbooks and series have been published, several working groups were established in many countries, and more and more empirical – not only theoretical – studies have arisen.

Nevertheless, the world of law has changed in the last decades: it has become more globalized, multilingual and digital. And, although we know a lot about conflict resolution, the world has not become more peaceful, rather the contrary. In many so called “democratic” or “civilized” countries, in fact, constitutional democracy is in danger and/or fundamental rights are restricted. Law is not only text, law is also power. Law often consists of abuse of power and/or at least of non-transparent practices (cf. Vogel (Ed.) 2017). To understand the role of language, communication and media of law, with its multiple interdependencies and explicit as well as implicit power contexts better, it is important to bring different disciplines together. This is why we need a permanent international platform where legal linguists can learn from each other, where they can develop new international projects, exploring the relationship between local and global contexts and where they can cultivate constitutional democracy.

Legal linguists Peter Tiersma, Lawrence Solan and Dieter Stein originally founded the International Language and Law Association (ILLA) in 2007. Their initiative was to create a network of linguists and lawyers around the world, working on the language matrix of law. In that framework, language is not simply seen as a subject in the legal context or an object of forensic analysis, but as the central medium of modern constitutional states, as the mediator of social conflicts and the core of legal methodology. Until 2017, ILLA had been a network sharing information about important events or published papers regarding language and law. To also establish ILLA as a living organization with a sustainable structure the association had been relaunched during ILLA’s first international conference from September 7th-9th, 2017, hosted by Friedemann Vogel in Freiburg, Germany. Regarding the overall topic “Language and Law in a World of Media, Globalisation and Social Conflicts” there were 50 talks, keynotes and workshops discussing the constitution of law by language and media in the context of multilingualism, digitalization and social conflicts around the world. Among the 150 participants from 32 nations were also famous scholars and practitioners like Prof. Dr. Ninon Colneric, former judge of the Court

of Justice of the European Communities, and Minister of Education in Hesse (Germany), Prof. Dr. R. Alexander Lorz. At the last day of the conference, the plenary business meeting unanimously took the following decisions regarding the constitution and mode of operation of the society (chaired and recorded by Dieter Stein; see also <https://illa.online/index.php/about/short-description>, 6/14/2019):

- 1) “The society shall be governed by *two presidents and an executive committee*. One of the presidents shall come from linguistics, the other from law. One of the presidents is the conference director of a general meeting. Their term of office lasts from the end of one ILLA general conference to the end of the next one. The current presidents are the linguist, *Friedemann Vogel* (Freiburg [today Siegen], Germany), and the lawyer, *Frances Olsen* (UCLA, USA). Their term thus ends with the end of the next ILLA general conference in 2019.
- 2) In addition to the two presidents, the *executive committee* has another four members and shall consist equally of two linguists and two jurists. Every two years, at the end of the ILLA general meeting, one of the members of the executive is replaced by a scholar from the same respective discipline (i. e. either law or linguistics).
The current members of the EC are the two presidents plus the following: *Anne-Lise Kjær* (Copenhagen, Denmark), *Ralf Poscher* (Freiburg, Germany), *Lawrence Solan* (New York, USA) and *Dieter Stein* (Düsseldorf, Germany).
- 3) All officers must be *members* of ILLA.
- 4) The *finances* of the society shall be managed by the presidents. Any surplus from conference organization or other income shall be transferred to the next conference director.
- 5) There are *two types of meetings*: a general meeting and focus meetings. The general meetings shall have a broad range of topics, while being under a broad umbrella theme and shall take place every two years. The conference director is one of the presidents of ILLA. Focus meetings may be held ad hoc on a specialized topic. The linguistic forensics meeting is an established focus meeting of ILLA. The executive committee approves the program of the general meeting and the decision and program of focus conferences.”

According to the ILLA relaunch conference, this volume addresses three topics: First, the book gives a broad overview to the research field of legal linguistics, its history, research directions and open questions in different parts of the world. The contributions of *Lawrence Solan* (focusing the legal linguistics in the US), *Gatitu Kiguru* (legal linguistics in Africa), *Gianluca Pontrandolfo* (about the research areas in Italy and Spain), *Friedemann Vogel* (about Germany), *Emilia Lindroos* (about legal linguistics in Nordic countries) and *Svetlana Takhtarova* together with *Diana Sabi-*