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LANGUAGE AND THE LAW

BERNHARD GROSSFELD*

INTRODUCTION

LANGUAGE HAS ONLY recently become a factor of major interest in comparative law.¹ This is astonishing in view of the fact that knowledge of a foreign language is a prerequisite for most comparative law and that the language is the jurist's most important instrument. But the subject "language" has even wider implications and leads us to ask whether, and to what extent, a particular language may exert influence on a particular law. This question has recently been discussed with regard to changes in legal systems of developing countries, formerly a part of the British Empire, when, upon gaining independence, the native language replaced the English language.² In addition, some European authors have researched the relation between language and law in more general ways.³

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¹ See generally Hiller, *Language, Law, Sports and Culture: The Transferability or Non-Transferability of Words, Lifestyles, and Attitudes Through Law*, 12 VAL. U.L. REV. 433 (1978).

² See Marasinghe, *Some Problems Associated with a Language Switch-Over in the Third World*, 10 VERFASSUNG UND RECHT IN ÜBERSEE 507 (1977).

³ See E. FORSTHOFF, *RECHT UND SPRACHE* (1940); H. NEUMANN-DUESBERG, *SPRACHE IM RECHT* (1949). See also K. ZWIEGERT, *Einige Überlegungen zu Recht und Sprache*, in *FESTCHRIFT FÜR R. SCHMIDT* (1976); VAN DEN BERGH/BROEKMAN, *RECHT EN TAAL* (1978).

A further investigation conveniently starts with the observation of Roscoe Pound, following Kantorowicz, who called jurisprudence a "Wortwissenschaft," meaning a science of words.⁴ What could he have meant by this? We come close to an answer when we consider how important rhythm,⁵ rhyme,⁶ and verses were for the old European laws.⁷ Another clue is provided when we consider the importance of technical legal language in evaluating the reception of foreign laws. Maitland provides a good example of this by referring to the "law French" in England, the language used by courts and lawyers in the Middle Ages.⁸ The "English law was tough and impervious to foreign influence because it was highly technical, and it was highly technical because English lawyers had been able to make a vocabulary to define their concepts, to think sharply as the man of science thinks."⁹

We should also consider the close relations between rhetoric and law in the beginning of the modern European legal culture.¹⁰ Two books, one by James B. White, *The Legal Imagination*,¹¹ and one by William R. Bishin and Christopher D. Stone, *Law, Language and Ethics*,¹² lead us in a similar direction. This brings us to the central problem: What is the influence of language on law? Is the structure of the law a function of the structure of our language? Or, more precisely, does a particular language create a particular law?

⁴ POUND, *Some Thoughts About Comparative Law*, in: FESTSCHRIFT FÜR ERNST RABEL 7 (H. Dölle ed. 1954).

⁵ Liebs, *Rhythmische Rechtssätze*, 36 JURISTENZEITUNG 160 (1981).

⁶ G. DILCHER, PAARFORMELN IN DER RECHTSSPRACHE DES FRÜHEN MITTELALTERS (1961).

⁷ Freiherr von Kunssberg, RECHTSVERSE, NEUE HEIDELBERGER JAHRBÜCHER 89 (1933).

⁸ MAITLAND, 17 SELDEN SOCIETY REPRINTS xxxvi (1903), reprinted in J. WHITE, THE LEGAL IMAGINATION 6 (1973).

⁹ *Id.*

¹⁰ OTTE, DIALOG UND JURISPRUDENZ (1971); GROESCHNER, DIALOGIK UND JURISPRUDENZ (1982).

¹¹ See *supra* note 8.

¹² See *supra* note 8; see also W. BISHIN & C. STONE, LAW, LANGUAGE AND ETHICS (1972).

LANGUAGE AS A CREATIVE FORCE

In order to tackle these provocative questions, let us first consider the status of language in human thinking in general. This evaluation takes us back as far as Adam and Eve. The Bible tells us that in the beginning "Adam gave names to all cattle, and to the fowl of the air, and to every beast of the field."¹³ Thus, man recognizes the world around him through the medium of language, and language enables him to grasp and to define reality. Through language he attains power. The Bible makes similar statements with regard to God, albeit in reverse direction: God cannot be named, cannot be grasped, cannot be subordinated.¹⁴ We find similar ideas in the ninth song of the *Odyssey*. When the Cyclops, the "cruel and tempestuous one," asked Odysseus his name, Odysseus answered, "Nobody is my name; everybody calls me Nobody." The same theme can be heard in Richard Wagner's "Lohengrin:"¹⁵

Nie sollst Du nich befragen,
 Noch wissend Sorge tragen,
 Woher ich kam der Fahet;
 Noch wie mein Nam' und Art.

We may add the beginning of St. John's gospel: "In the beginning was the Word."¹⁶ Also remember that in all religious mythologies the "word" has the highest position in the order of creation.¹⁷ This gives us a feeling for the power of language.

We find many other examples to illustrate the power of language in the Bible. According to the Bible, *creation* of the world was performed by the spoken word of God. "And God said, let there be light."¹⁸ Then God said, "let

¹³ *Genesis* 2:20.

¹⁴ *Genesis* 32:30; *Exodus* 3:14.

¹⁵ *Parzival*, II-16-825-18, reprinted in B. GROSSFELD, *MACHT UND OHNMACHT DER RECHTSVERGLEICHUNG* 157, n. 34 (1984).

¹⁶ *John* 1:1. See also DÜRR, *DIE WERTUNG DES GÖTTLICHEN WORTES IM ALTEN TESTAMENT UND IM ANTIKEN ORIENT* (1938).

¹⁷ CASSIRER, *SPRACHE UND MYTHOS* 44 (1946).

¹⁸ *Genesis* 1:3.

there be a firmament in the midst of the waters.”¹⁹ God had to *speak* the “fiat.” It fits into this context that the “creator spiritus,” the Holy Spirit, on Pentecost revealed himself in the “miracle of language”²⁰ and that all Christian churches of Lutheran denomination regard themselves as founded on the “word” of the Scriptures.

Considering this, it is no longer astonishing that while the expression “verb” literally means “word,” it stands for activity. It also fits into this line of thought that the Greek expression “poet” stands for “creator.” All this links beautifully with what the linguists tell us about creativity as the core of language: Even the very young child is able to form and understand sentences which he has never heard before. We are able to build and comprehend a practically unlimited number of sentences.²¹

THE MYTHS OF THE NAME

As already indicated, the power of language is most closely associated with the use of names. To call someone by his name makes him or her present. Let us begin again with the Bible: “I have called you by your name - you are mine!”²² Catholics make the sign of the cross saying, “In the name of the Father,” and Christ himself admonished his apostles “[f]or wherever two or three of you come together in my name, I will be present among them.”²³ The name creates the actual existence, the name is the person himself.²⁴

¹⁹ Genesis 1:6.

²⁰ Acts chs. 2, 3 & 4.

²¹ N. CHOMSKY, LANGUAGE AND MIND (1962), reviewed by Skinner, 35 *Language* 26 (1965). For a survey, see generally J. LYONS, NOAM CHOMSKY (1970).

²² Isaiah 43:1.

²³ Matthew 18:20.

²⁴ G. DILCHER, *supra* note 6, at 30. This concept is also revealed in the poem:

Everyone has a Name
 Everyone has a name
 given to him by God
 and given to him by his
 parents

Zelda, [an Israeli poet] (M. Falk trans.), reprinted in BERGMAN & JUCOVY, GENERATION OF THE HOLOCAUST 316 (1982).

We find many other hints of this in religious ceremonies. The words used for transubstantiation in the Catholic mass ("*hoc est corpus meus*") even became *the* magic word "hokus pokus".²⁵ Other examples can be found in day to day language. For example, "nameless fear" is a fear beyond our control. We say, "don't talk about it," "don't touch it," etc.

Language is not only a means to comprehend the world: it is even a means to recognize it. It is a mental device to enable the mind to comprehend what it sees.²⁶ This brings us back to the Bible again where the first divine word created light ("*fiat lux*").²⁷ Language enables us to see the world.

LAW AS A PRODUCT OF LANGUAGE

The creative and comprehending power of language is of special importance for the law. There is practically no existence of legal notions outside language. One commentator has stated that, "It is on the loom of language that all law is spun."²⁸ At least the positive law is bound to language because its legal notions exist only in language and through language.²⁹ Law is expressed in a "verdict" ("*verum dicere*") and is connected with "jurisdiction." Nevertheless, one should not go so far as to conclude that there is no law outside language. The existence of customary law contradicts such a statement. Customary law is often not expressed in words, but expresses itself in particular situations.³⁰

The intimate connection between law and language is confirmed when looking into the etymological roots of

²⁵ H. NEUMANN-DUESBERG, *supra* note 3, at 24.

²⁶ Goble, *Nature, Man, and Law*, in LANDMARKS OF LAW 24, 36 (R. Henson ed. 1960).

²⁷ *Genesis* 1:3.

²⁸ C.G. WEEREMANTRY, *THE LAW IN CRISIS* 133 (1975).

²⁹ H. NEUMANN-DUESBERG, *supra* note 3, at 27.

³⁰ L. FULLER, *ANATOMY OF THE LAW* 44 (1968).

both expressions.³¹ A first impression is derived from the fact that the Latin word "*lex*" means "law," but in the combination "*lexicon*" it has the meaning "word." Now let us compare "*lex*" and its genitive "*legis*" or its nominative plural "*leges*" with the Greek word "*logos*," which stands for "word" but also, as in logic, for "idea."³² Indeed, the common word is "*legein*," which means among others, "to speak."³³ When we put the words "*lex*," "*logos*," and "*legein*" together, we realize immediately how law, language, and thought interrelate. Finally, the word "right" shows the same characteristics when compared with the German word "*Rede*" (speech) and the old English word "wright" which means "constructive workman."³⁴

These common roots can probably be explained by the fact that in prehistoric times the development of language was a condition for the development of norms.³⁵ Therefore, it can be argued that positive law is nothing more than an idea created and expressed through language.

LANGUAGE AND MIND

Having seen the importance of language to human thinking in general and to the law in particular, we now have a firm basis for approaching the question of whether a particular language determines the structure of a particular law. Here again, we will first discuss in general terms the impact of language on our thoughts.³⁶ An affirmative

³¹ A few hints can be found in WENGER, *Sprachforschung und Rechtswissenschaft*, in 1 WÖRTER UND SACHEN 84 (ed. 1909).

³² THE OXFORD ENGLISH DICTIONARY 404 (ed. 1909).

³³ *Id.* at 113, 233.

³⁴ THE OXFORD ENGLISH DICTIONARY 369 (ed. 1928). See also B. Grossfeld, *supra* note 15, at 166.

³⁵ Dux, *Der Ursprung der Normen*, 66 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 53 (1980).

³⁶ J. BURCKHARD, ÜBER DES STUDIUM DER GESCHICHTE 276, n.3 (Ganz ed. 1982). Burckhardt refers to the Roman writer Aulus Gellius (2d century A.D.) from whom the sentence originates: "Quintus Eumius [Roman poet, 239-169 B.C.] tria corda habere sese dicebat, quod loqui Graece et Osce et Latine sciset." *Id.* at 494; SNELL, DIE ENTDECKUNG DES GEISTES 218 (4th ed. 1975). See also H. VON KLEIST, *Über die allmähliche Verfertigung der Gedanken beim Sprechen*, in 2 SÄMTLICHE WERKE UND BRIEFE 319 (6th ed. 1977); B. CARDOZO, *Law and Literature*, in SELECTED WRIT-

answer to our question was first given in the eighteenth century by the German philosopher and poet Johann Gottfried Herder in his book *Abhandlung über den Ursprung der Sprache* [Discussion on the Origins of Language],³⁷ and again in the nineteenth century by Wilhelm von Humboldt in his book *Über die Verschiedenheit des menschlichen Sprachbaus und ihren Einfluss auf die geistige Entwicklung des Menschengeschlechts* [On the Differences of Human Languages and their Influence on the Intellectual Development of the Human Race].³⁸ In von Humboldt's eyes language is a means not only to describe reality, but also to discover reality. The differences in languages indicate a different "Weltansicht" (view of the world). Language draws our thoughts into particular patterns.³⁹

Following Edward Sapir,⁴⁰ Lee Whorf, in what has been termed the "Whorfian Hypothesis," stressed the importance of language structure in relation to the structure of our thoughts.⁴¹ He noted the linguistic background of all human thinking.⁴² Every language constitutes a kind of logic - an expression in which law, language, and thought come together - that has a strong, although not inevitably determinative, influence on our thoughts.⁴³ According to Whorf, human thinking is largely directed by unconscious language mechanisms, "[a]nd every language is a vast pattern-system, different from others, in which are culturally

INGS OF BENJAMIN NATHAN CARDOZO 339, 340 (1947); E. FORSTHOFF, *supra* note 3, at 9.

³⁷ J.G. HERDER, *ABHANDLUNG ÜBER DEN URSPRUNG DER SPRACHE* (1772).

³⁸ W. VON HUMBOLDT, *ÜBER DIE VERSCHIEDENHEIT DES MENSCHLICHEN SPRACHBAUS UND IHREN EINFLUSS AUF DIE GEISTIGE ENTWICKLUNG DES MENSCHENGESCHLECHTS* (1836).

³⁹ H. NEUMANN-DUESBERG, *supra* note 3, at 69; WEZEL, *SPRACHE UND GEIST IV* (1935); WEISGERBER, *1 VON DEN KRÄFTEN DER DEUTSCHEN SPRACHE, 2 GRUNDZÜGE DER INHALTSBEZOGENEN GRAMMATIK, DIE SPRACHLICHE GESTALTUNG DER WELT*, (3d ed. 1962); SAUSSURE, *COURS DE LINGUISTIQUE GENERALE* (1916).

⁴⁰ E. SAPIR, *The Status of Linguistics as a Science*, in *SELECTED WRITINGS OF EDWARD SAPIR IN LANGUAGE, CULTURE, AND PERSONALITY* (1949).

⁴¹ Whorf, *Language, Mind and Reality*, in *LANGUAGE, THOUGHT & REALITY* 252 (J. Carroll ed. 1956).

⁴² *Id.*

⁴³ *Id.*

ordained the forms and categories by which the personality not only communicates, but also analyzes nature, notices or neglects types of relationship and phenomena, channels his reasoning, and builds the house of his consciousness."⁴⁴

Examples

The influence of a particular language on a particular law can readily be discovered by comparing German and English law. German law uses inflected words with the consequence that in many cases the ending of the preceding word relates to the following word, defining it in advance. Another characteristic of the German language is that the past participle stands at the end of the sentence, as does the verb in subordinate sentences. These features require advance planning, and most sentences are constructed in such a way that the listener is able to discover early the meaning of the words in the latter part of the sentence. The German language, therefore, is a constant training in linguistic constructions. It is a small wonder that German law is more "constructed" and "technical" than the Anglo-American law.

Following this discussion, it is not astonishing that the Japanese Noda, in his book *Introduction to Japanese Law*,⁴⁵ discusses the structure of the Japanese language as a way to explain Japanese law. He makes the point that the Japanese language is not particularly well suited to express logical relations and that this colors the Japanese law.⁴⁶ Other authors say more bluntly that "[l]ogic has no place in Japanese thought."⁴⁷

⁴⁴ *Id.*

⁴⁵ Y. NODA, *INTRODUCTION TO JAPANESE LAW* 9-13 (1976). See also Angelo, *Thinking of Japanese Law: A Linguistic Primer*, 12 *COMP. & INT'L L.J. OF S. AFR.* 83 (1979).

⁴⁶ Y. NODA, *supra* note 45, at 12.

⁴⁷ Kim & Lawson, *The Law of the Subtle Mind: The Traditional Japanese Conception of Law*, 28 *INT'L & COMP. L.Q.* 491, 496 (1979).

CONSEQUENCES FOR COMPARATIVE LAW

These results are alarming to the comparative lawyer. What happens to law that exists through and in language if it is transferred into a different language? If the structure of a particular language plays an important role in defining our thinking, it may well be that a particular language can only express certain legal ideas and that the limits of our particular language are the limits of our legal reasoning.⁴⁸ There is at least a suspicion that certain basic legal rules undergo a change when they are transferred into another language. The farther apart the language structures are from one another, the greater might be the change in the law. This results from the fact that when a legal rule is implanted into a different language context, the linguistic dynamics of the language might drive it in an unexpected direction.⁴⁹

So far, we do not know exactly how strong the influences of language are on the law.⁵⁰ Language certainly cannot explain the whole of the law, as the dimensions of law exceed any single explanation and any single cause.⁵¹ Language is only one factor among many, and all these individual factors may well be weakened by the common nature of all human beings.⁵² The "principle of relativity," therefore, makes comparative law more difficult, but not impossible.⁵³ It is inevitable, however, that legal linguistics be taken seriously by any comparative lawyer who

⁴⁸ WITTGENSTEIN, TRACTATUS LOGICOPHILOSOPHICUS, propositum 7 (1933).

⁴⁹ According to Frege, DIE GRUNDLAGEN DER ARITHMETIK 73 (1884), words only have a meaning in the whole of a sentence. See also Bentham, *Essay on Language*, in ESSAYS ON BENTHAM 10 (H. Hart ed. 1982); WITTGENSTEIN, *supra* note 48, propositum 3.3 & 3.3.4. That principle may be transferred to the connection between legal notion and language.

⁵⁰ For the range of the theory, see Henle, *Language, Thought and Culture*, in LANGUAGE, THOUGHT AND CULTURE 1 (1958).

⁵¹ Gödel, *Über formal unentscheidbare Sätze der Principia Mathematica und Verwandte Systeme, I*, 38 MONATSSHEFT FÜR MATHEMATIK UND PHYSIK 173 (1931).

⁵² N. Chomsky, *supra* note 21.

⁵³ GIPPER, GIBT ES EIN SPRACHLICHES RELATIVITÄTSPRINZIP? UNTERSUCHUNGEN ZUR SAPIR-WHORF-HYPOTHESE 248 (1972); B. WEINSTEIN, THE CIVIC TONGUE - POLITICAL CONSEQUENCES OF LANGUAGE CHOICES 19 (1983).

wishes to study more intensively the relation between language and law.

CONSEQUENCES FOR THE THEORY OF LAW

The relation between language and law is not only a matter of concern for comparative lawyers; it is also of great importance for all who wish to know more about the functioning of law in general. This becomes apparent when we consider Chomsky's theory concerning the deep structure of human languages.⁵⁴ According to Chomsky, this deep structure of language is genetically transmitted; it is "proto-human-grammar."⁵⁵ The question that immediately follows is whether similar deep structures can be found in law. This is indeed the idea of Perrott.⁵⁶ He suggests that there might be genetically transmitted legal perceptions - "a natural law in DNA-Code."⁵⁷ "All positive legal systems may be merely surface manifestations of a single deep structure to law, universal to all mankind, knowledge of and facility with which is genetically transmitted to all humans, and which imposes on us a range of fundamental duties."⁵⁸ We cannot elaborate on Perrott's theory in detail or discuss all the pros and cons of the theory; nevertheless, such an elaboration is not necessary. If language has a genetic structure, the same is true for the law, at least in part, because of the influence of language on law. The genetic structure of a language is then transferred to law. This hypothesis might tell us something about the force of law on human behavior and why law is observed.

It is justifiable to assume that the language of the law attempts to correspond to our internal structures. The language aims to strike a chord in us. As the rhythm of

⁵⁴ N. Chomsky, *supra* note 21.

⁵⁵ *Id.*

⁵⁶ Perrott, *Has Law a Deep Structure - The Origin of Fundamental Duties*, in LASEK, JAFFEY, PERROTT & SACHS, *FUNDAMENTAL DUTIES* 7 (1980).

⁵⁷ *Id.*

⁵⁸ *Id.* at 12.

the music invites us to follow, as the sound of the drum makes the soldier march, so the language of the law, through its structure, its rhythm and its sound, stimulates us to internalize the law. The language uses a genetic-cultural sensibility for the purpose of the law. We follow the law voluntarily as part of ourselves; the law is observed not because we have to follow it but because we want to.⁵⁹ Instead of a "Sollensordnung" (external order) it constitutes a "Wollensordnung" (internal order).

CONCLUSION

This brings us back to the initial considerations. We understand why the old laws so often used rhyme and rhythm: law that is only orally transferred has to be and is much more sensitive to language. In addition, the lesser the power of authorities to enforce the law through external controls, the greater the emphasis on internalization. Law can only be effective if it is followed voluntarily, because of an internal stimulus.⁶⁰ We all know similar mechanisms from church songs. Their first purpose is not the confession of the creed, but rather they serve to internalize the creed and to lead the singers in the direction of the faith. The same is true with the law. A law that does not correspond to the linguistic sensitivities of our society is not regarded as "our law" but is seen as something foreign. Without a conducive language, positive law cannot create legal mindedness (*Rechtsgesinnung*).⁶¹ It is here that "language and law" become of central importance for modern legal systems and for the functioning and survival of legal cultures. The "magic" of language continues to be a central pillar of law. It is a decisive factor in the legal organizations of our Western societies.

⁵⁹ See A. HAGERSTROM, *INQUIRIES INTO THE NATURE OF LAW AND MORALS* 136 (1953); concerning poetry Burckhard states, "Wenn sie mit ihm eine wundervolle Sprache redet, wobei ihm zu Mute ist, als müsste dies einst in einem besseren Dasein die seinige gewesen sein." J. BURCKHARD, *supra* note 36, at 386.

⁶⁰ See G. DILCHER, *supra* note 6, at 32.

⁶¹ BYDLINSKI, *RECHTSGESINNUNG ALS AUFGABE*, *FESTSCHRIFT FÜR KARL LARENZ ZUM 80 GEBURTSTAG* 1 (1983).

