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*Law, Language and Justice***

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Foreword

In this sunny and green early summer, you, experts and delegates from different parts of the world, come together beside the Qiantang River in Hangzhou, to participate in *The Fifteenth International Conference on Law and Language of the International Academy of Linguistic Law*. On the occasion of the opening ceremony, it gives me such great pleasure on behalf of Zhejiang Police College, and also on my own part, to extend a warm welcome to all the distinguished experts and delegates. At the same time, thanks for giving so much trust and support to Zhejiang Police College.

Currently, the law-based governance of the country is comprehensively promoted in China. As Xi Jinping, Chinese president, said, “during the entire reform process, we should attach great importance to applying the idea of rule of law and the way of rule of law to play the leading and driving role of rule of law”. Both law issues and jurisprudence issues are closely related to legal language; that is the basis of the construction of rule of law. In view of the continuous deepening of the process of rule of law and a good development momentum of studies on legal language in China, the International Academy of Linguistic law hopes that the annual meeting can be held again in mainland China and organized by Zhejiang Police College. By holding this international conference, we can learn from the advanced theory and practice abroad and conduct in-depth exchange with the experts here.

This is not only an opportunity for learning and communication, but also a get-together among friends. Just the other day, the Belt and Road Forum for International Cooperation was held in Beijing. Today, we have experts from Italy, Portugal, Algeria, Morocco, South Africa, Georgia and countries along the Belt and Road such as Cambodia. I believe the holding of this conference will certainly exert positive and far-reaching influence on enhancing the research abilities of studies on legal language in China and promoting the process of rule of law of China.

With a history of 67 years, Zhejiang Police College is the higher learning institute of full time academic education of policing and professional training of police officers. In recent years, having made abundant exploration in cultivating talents for policing with the support of higher authorities, we have made great contribution to promoting police education internationalization and international policing cooperation. Last month, the education and training base of The International Crime Police Organization National Central Bureau (NCB) for China was established in our college, which marks the close relationship established between our college and The International Crime Police Organization and also provides a significant platform and support for comprehensively participating in global security governance.

At the same time, we have benefited greatly from running the school openly, which has broadened our schooling ideas and enhanced the schooling level. What’s more, the international exchange and cooperation is unique to Zhejiang Police College with its clear thinking of school running and high-level training program. During the conference, your valuable suggestions on the development of our college would be appreciated.

Zhejiang Province is very prosperous in China. Hangzhou, as the capital of Zhejiang Province, gets its laurel of “Heaven on Earth” with a history of more than 2200 years. I hope, during the conference, all of you will enjoy the glamour and beauty, together with its profound historical culture, of such a wonderful modern city. Finally, I wish you each and every success for the conference and wish you good health and a pleasant stay in Hangzhou! Thank you!

Prof. Ding Hong
President, Zhejiang Police College, Hangzhou, China

Preface

Dear friends and colleagues, let me say at first that I am deeply sorry that I cannot be present physically at the 15th International Conference of the International Academy of Linguistic Law, which is held currently in Hangzhou, China. Some health reasons prevent me from being here with you. The same thing unfortunately happened to me at the time of our 11th International Conference which was held in Lisbon, Portugal, in July 2008.

In any case, be assured that I will be present with you morally and spiritually. I am convinced that thanks to the Chinese organizing and scientific committees and thanks to the Canadian scientific committee, Hangzhou 2017 will be a remarkable and successful international scientific conference. As in 2008, the Head Office of our Academy will be represented by our friend and colleague André Braen, Professor at the Faculty of Law of the University of Ottawa. Hangzhou 2017 coincides with the 33th anniversary of the International Academy of Linguistic Law.

Actually, the International Academy of Linguistic Law, the IALL-AIDL, was established as a scientific international multidisciplinary organization, in Montreal and Paris, in September 1984, by 100 founding members. The Academy brings together jurists, linguists, social scientists and all those worldwide who are interested, scientifically or professionally, in phenomena and problems pertaining to world linguistic diversity, to linguistic rights (or language rights) and to comparative linguistic law.

Two relatively recent historical phenomena, such as the democratization of education and the globalization of communications have made us think that the intensification of the linguistic contacts and linguistic conflicts around the world was to be a great scientific challenge for us, and that was indeed the case as the recent history of our world has proven. It was the first time that jurists, linguists and other specialists in the field of law and language were put really together. It was a “première” and we were aware and proud of that. We thought that it was normal that the Head Office of the Academy was established in Montreal, which was at that time, and still is, an alive laboratory in the field of linguistic diversity and linguistic rights.

I was, at that time, the Director of the Secretariat and of the Legal Services at the Commission de protection de la langue française du Québec. I accepted quite naturally to be the Secretary-General of the Academy. I said to myself: *Onus est honor!* Since our foundation, 33 years ago, the Academy has organized 14 international scientific conferences in the field of linguistic diversity and linguistic rights, in cooperation with other international scientific organizations of high learning and with many national universities. And we have published, with the concerned universities, about twenty scientific publications in the field of law and language. The published studies and research are publications of great scientific quality. We are very proud of our scientific publications.

Let me now present you a brief history of the 33 years of our Academy.

1. The First International Conference (“Law and Language” was held in Montreal, Canada, in April 1988, in cooperation with the Quebec University in Montreal. The Proceedings were published in 1989.
2. The Second International Conference (“Law and Language in Multilingual Settings”) was held in Hong Kong, in February 1990, in cooperation with the City Polytechnic University. A selection of papers presented at the Conference was published in 1994.

3. The Third International Conference (“Law, Language and Equality“) was held in Pretoria, South Africa, in April 1992, in cooperation with the Human Science Research Council and the University of Pretoria. The Proceedings were published in 1993.
4. The Fourth International Conference (“Law and Language(s) of Teaching“) was held in Fribourg, Switzerland, in September 1994, in cooperation with the University and the Institute of Federalism of Fribourg. The Proceedings were published in 2001.
5. The Fifth International Conference (“Law, Language and Autochthony“) was held in Havana, in April 1996, in cooperation with the Centro de Traducciones y Terminologia Especializada, at the CTTE-Capitolio Nacional Capitol of Havana, Cuba. The Proceedings are available on C.D. at the Cuban Section of the Academy.
6. The Sixth International Conference (“Law, Language and Multilingual Cities“) was held in Vaasa-Vasa, Finland, in September 1998, in cooperation with the Vaasa and Åbo Akademi Universities. The Proceedings were published in 1999. In October 1999, The Academy was among the organizing institutions of the International Conference of Pretoria (South Africa) on “Multilingual Cities and Towns in South Africa – Challenges and Prospects“. The First Version of the Summaries was published at the beginning of the year 2000.
7. The Seventh International Conference (“Law and Language – Language of the People and Language of the State“) was held in San Juan, Puerto Rico, in June 2000, in cooperation with the Ateneo Puertorriqueño and the national universities of the Island. The proceedings were published in 2002.
8. The Eighth International Conference (“Law and Language: The theory and the practise of linguistic policies“) was held in Iași, Romania, in May 2002, in cooperation with the “Mihail Kogalniceanu” University. The proceedings were published in 2003.
9. The Ninth International Conference (“Law, Language and the Linguistic Diversity“) was held in Beijing, China, in September 2004, in cooperation with the China University of Political Science and Law and the Institute of Applied Linguistics of the Chinese Ministry of Education. The Proceedings were published in 2006.
10. The Tenth International Conference (“Language Law and Language Rights: The Challenges of Enactment and Implementation“) was held in Galway, Ireland, in June 2006, in cooperation with the Academy for Irish-Medium Studies, the Irish Center for Human Rights, the National University of Ireland in Galway and the Irish Department of Community, Rural and Gaeltacht Affairs. The Conference has adopted unanimously the “Call to UNESCO for an International Convention on Linguistic Diversity – Galway, June 2006“.
11. The Eleventh International Conference (“Law, Language and Global Citizenship“) was held, in Lisbon, Portugal, at the Gulbenkian Foundation, in July 2008, in cooperation with the APP (Association of Teachers of Portuguese Language). The Proceedings were published in 2009. Since 2009, The International Academy of Linguistic Law is an Institutional Partner of the International Days on Linguistic Rights which take place every year, in May, at the University of Teramo, Teramo, Italy. The University of Teramo is now an important international scientific center on linguistic diversity and linguistic rights.

12. The Twelfth International Conference (“Law, Language and the Multilingual State”) was held at the Black Mountain Center, near Bloemfontein, South Africa, in November 1010, in cooperation with the University of the Free State. The Proceedings were published in 2013.
13. The Thirteenth International Conference (“Language Rights, Inclusion and the Prevention of Ethnic Conflicts”) was held in Chiang Mai (Horizon Village and Resort), Thailand, in December 2012, in cooperation with the International Observatory on Language Rights of the University of Moncton, Canada, UNESCOCAT and Linguapax of Barcelona.
14. The Fourteenth International Conference was held in Teramo, Italy, on May 2015, with the First Worldwide Congress of Linguistic Rights, in cooperation with the University of Teramo. The University of Teramo has published on December 2016 the 1st volume of the Proceedings of Teramo 2015.

Today, is the beginning in Hangzhou of our 15th International Conference, “Law, Language and Justice”, in cooperation with the Zhejiang Police College of Hangzhou. After Hangzhou, we will have other international conferences on law and Language.

As Secretary-General of the International Academy of Linguistic Law, let me thank and congratulate Zhejiang Police College, the authorities, the Principal, Prof. Le Cheng of Zhejiang University and the Chinese organizing and scientific committees for having organized Hangzhou 2017 in a such perfect way. As I said, I am convinced that Hangzhou 2017 will be a remarkable and successful scientific international conference. We are now waiting with impatience for the Proceedings publication.

I wish to all of you a magnificent international conference in the field of law and language. It will be nice to meet you again at our next international conference.

Joseph-G. Turi
Montréal, May 2017

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Keynote Address I

Discourse, Interests, And The Law – Some Pragma-Legal Reflections

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[Abstract] The present paper discusses the evolution of legal discourse as it is happening in a number of well-publicized American cases. Discussions of the First and Second Amendments to the US Constitution in relation to freedom of the press and the freedom to carry and use arms are followed by a general discussion of what it means to have a legal text considered as binding across the centuries. It is shown that legal discourse is pragmatically oriented, that is to say, its application and evolution are subject to the general evolution of society and its members, the people interacting with, and interpreting that discourse; this evolution is, thus, a typical pragmatically relevant process. Over the course of the centuries and years, accumulative gradual developments have often ended up totally altering the interpretation of certain laws and statutes – sometimes to the advantage, sometimes to the disadvantage of underprivileged segments of society, such as the Black population and people of different sexual orientations. The paper will discuss some characteristic historic and contemporary cases of this development.

[Keywords] legal discourse; value, interest; First and Second Amendments; Michel Foucault; codification; James Comey; Hulk Hogan; Citizens United; time/space; newsworthiness; privacy; ‘thawable’ vs. ‘frozen’ discourse; ‘freedom from’ vs. ‘freedom to’; ‘stand your ground’; pragmatics

Introduction: The Law, Values, and Interests

The law has sometimes been identified as the embodiment of societal discourse: ‘jelled’, or ‘frozen discourse’, to use a Marxian-inspired expression¹. As to values, societal discourse is what makes the community of humans function: in discourse, we not only express our own values, but the values that are embodied in society’s institutions and reflected in our legal texts. This embodiment has two aspects: the one is the way it preserves the values that have been delivered through the generations; the other is the way it steers and inspires the competitors in the human struggle to ‘make a living’ in the respective societies they belong to.

As to interests, interest is commonly seen as what drives the individual to action. But interests cannot be exercised except in a common societal context; without society, our interests could only survive as curious objects, similar to the worthless bills issued by an entity like the central bank of a failed, no longer existent state. However, interests only realize an individual’s values inasmuch as they are sanctioned and supported by society; which is why they cannot be ripped out of “society’s fabric” (Mey, 1985, p. 221ff.) to exist in a kind of antagonistic vacuum – something which the US political journalist Evan Osnos recently has characterized, referring to then-US Presidential candidate Donald Trump’s multiple expostulations, as a state of affairs in which for Trump, “interests have no place for values” – a view that reinforces, even exacerbates, the familiar neo-liberalistic tendency to place individual interests ahead of whatever values society may represent (Osnos, 2016, p. 41).

¹ To characterize the transformation of human labor to value, Marx (1968, p. 64) uses the term ‘coagulated labor’ (in German “geronnene Arbeit”).

Further, as to values and the law, what are the values that the law can embody? Clearly, a simplistic value dichotomy along the lines of ‘True/False’ leads to the same antagonism that I alluded to above. What is needed for the laws, as ‘frozen’ but ‘thawable’ discourse, is to calibrate the individual interests against the values held by society-at-large, while at the same time allowing the former to interact dialectically with the latter, thereby making it possible to maintain stability in change by adjusting the values expressed in the legal text and relating them to the commonly accepted discourse of a society in constant evolution. (Poster case: The way legal definitions and juridical determinations concerning gay rights and gay practices have continuously evolved in many societies over the past half century).

Discourse and Society

In Foucauldian terms, discourse is the practice of making sense. This practice involves more than merely understanding and interpreting utterances; ‘making sense’ is an activity, an active creation of meaning, as a “practice that systematically forms the objects of which it speaks” (Foucault, 1972, p. 44). As to society, it is the natural ‘matrix’ of any discourse(s), inasmuch as the latter are societally founded and socially exercised. The ‘sense-making’ that discourse implies can only be practiced in a community of ‘discursants’: people who interact, using language and other communicative means. Society is the creative space in which Foucault’s ‘objects’ are constituted and transformed: the practice of discourse is the practice of society, the primordial discursive space (Foucault, 1972, p. 32).

Legal Discourse

The Latin word for ‘law’ is *lex*. As the other forms of this substantive show, the word’s root form is *leg-* (like in the genitive *leg-is*, and the word’s other cases). Hence the relation to the Latin verb *legere* (originally meaning ‘to collect, gather’ and then ‘to read’ (like ‘gathering letters to extract their meaning’) becomes clear.² From Latin to early French, the word emerged as (*la lei*, or *loi*; it is this latter form which is at the basis of the word, when finally adopted from the language of the Anglo-Normans into English, following the Conquest.

Legal discourse, in the sense of interpreting and commenting on the law, is this logical extension of the concept of law itself. In order to be practiced, the legal ‘readings’ (opinions and verdicts) had to be collected and codified, just like it had been done for collected corpora such as the Byzantine emperor Justinian’s Codex, incorporating the earlier Roman Civil Code into his *Corpus Iuris Civilis* of 529 AD; here, too, belong later compilations such as *Corpus Iuris Canonici* (‘canon law’, 1140 AD onward, and first codified in 1580 by Pope Gregory XIII), or the well-known, Napoleonic civil code of 1804 (‘*Code Napoléon*’, with its various legal subdomains such as the civil, penal, criminal, or commercial codes), which still is in force in many European countries that used to be under the sway of the French Emperor during his ten year reign.

An interesting further aspect of the importance of legal discourse is illustrated by the haste with which hopeful and incoming, power-greedy politicians have endeavored to influence the current legal discourse in their favor, often before, or otherwise immediately upon their access to power. Thus, whereas Napoleon I was crowned Emperor in December of 1804, his perhaps most important earlier practice of legal discourse as ‘First Consul’ has been to oversee the work on the ‘code’ named after him, and have it

² A further relationship is that to the Greek *légein* ‘to speak’ and its substantive counterpart *lógos* ‘word, reason’, with its common derivatives like ‘logical’, ‘syllogism’ or even the currently popular buzzword ‘logistics’, as it is used in a military or business context.

finally adopted in May 1804, six months before his official accession to the throne. Likewise, Adolf Hitler, made Chancellor of the German Reich on 30 January of 1933, started his discourse of legal terror by issuing the first anti-Jewish laws in April of that year, barring Jewish persons from the legal profession and continuing on to the infamous Nürnberg decrees, which effectively legalized the incipient de-nationalization (*'Ausbürgerung'*) of the Jewish German population, in September of 1935.

Truth, Pragmatics and the Law: The 2016 Comey Incident

In early November of 2016, during the last week of the US presidential election campaign, FBI director James Comey made an interesting announcement. He had presumably found further documentation of illegal use of email by (then) Secretary of State Hillary Clinton, one of the two forerunners in the current election. Earlier, there had been a lot of talk about how Secretary Clinton had been careless in handling classified information by having it on her personal email server; these discussions subsequently subsided (except in the ranks of the opposing candidate, Donald Trump), when in July, Director Comey published his conclusion that the law had not been broken, and there were no grounds for a further investigation. Even so, the opposition kept referring to the purported 'email scandals' as if they represented an incontrovertible truth.

In this context, the new 'findings' by Comey (which he a few days later had to retract) proved to be an invaluable boost to the Trump campaign, to the degree that many pundits, in their post-election comments, attributed Clinton's defeat in large measure to the timing of these alleged 'new' findings of her carelessness in fulfilling her duties as Secretary. In other words, even though the Comey findings turned out to be untrue, they were not irrelevant to the issue of who was worthy to be the next President of the United States.

While the debates about the Comey findings turned mostly on the question whether they were 'true' or not, from the viewpoint of pragma-legal discourse the 'truth value' of the allegations is of minor importance; the relevant features of the Comey intermezzo were first of all, its timing and placement. In the heated atmosphere of the final pre-election days, almost 'anything went', as long as it was strategically apposite. What Comey uttered was probably neither true nor false; he just intimated that he had found something that could be of interest. What the public lashed on to, however, was whether there was any 'truth' in what these findings were about. That there was none, did not diminish their pragmatic effect.

From a legal-discursive point of view, one could argue that disseminating a finding which is neither true nor false until proven, is of no legal interest. Pragmatically speaking, however, the timing of divulging the findings falls under the domain of legality: spreading unfounded rumors, for instance, is forbidden by the laws, and can be punished by the courts. Which shows (and this is the main point of relevance here), that in a pragmatic view of discourse (including legal discourse), the (intended) 'perlocutionary' effect of one's 'locutions' is indeed a measure of their legality. Pragma-legally speaking, any utterance has to be considered in relation to the space and time in which it is located; in addition, its *value* has to be determined, both subjectively (in relation to the interests of the utterer) and objectively (in relation to the recipients' interest). Value is intimately related to the question of interest; this will be discussed in the next section.

The Discourse of Interest

The term ‘interest’ itself goes back to a Latin verbal expression (*mei*) *interest* ‘[something] is of value, is interesting (to me)’. The valued item may be a thing, a person, an institution, as in *rei publicae interesse putavi* ‘I considered it to be a concern (‘interest’) of the Republic’ (Cicero, in his apologetic essay *De domo sua*); it can even be an abstract notion like ‘the law’. Here, it behooves us to remember Roger Fowler’s remark that “all objects, all knowledge are constructs” (Fowler, 1981, p. 33) in the Foucauldian sense referred to above; in particular, discourse is a practice, constructed by the social and political world (Fowler, 1991). The important thing here is to identify those ‘constructors’ of our common discourse, as it appears in its various guises: political, commercial, mediatized, medical, legal, and so on.

Here, a further glance at the Latin expression provides a hint. The original construction of *interest* is with the ‘objective genitive’ *mei* (and not with the ‘dative of interest’ *mihi*, as one might expect). Behind this grammatical distinction, a ‘real world’ difference may be detected: the constructor of my interest has me as his *object*, I am being ‘objectified’ by this interest. Rather than just being an ‘interested’ person, I am subdued to the interest of the constructors. Which boils down in plain talk that also my discourse is an ‘object’, a construct, made up by the constructors of the societal discourse at large.

This discourse of society is eminently expressed in the language of the media. Media discourse is not a mere conveyor of ‘news’; it expresses the views and intentions of the institutions and organizations that support and control the media discourse of our society. As Statham points out, following earlier work by Machin and van Leeuwen (2007), we have to “relate textual effects back to their institutional, and essentially ideological, foundations. It is recognized that organizational procedures that are prevalent in the media have more than just practical effects[,] but also wield significant influence over language, and in this way contribute to the maintenance of constructed ideologies through established discourse practices.” (Statham, 2016, p. 26)

Media and ‘Fitness’

The famous New York Times slogan “All the news that’s fit to print”, which first appeared on the paper’s masthead in 1896, could even today serve to characterize the discourse of the media (and not only the printed kind). The question naturally emerges what (or who) determines the ‘fit’; an obvious first answer, that it is the newspaper’s editor, covers only part of the issue. Newspapers survive by their circulation; and a paper’s circulation is dependent on its buyers and subscribers in the same way that another of the media, television, is dependent on its performance, as rated by the ‘Nielsen index’, an audience measurement system first applied to television in 1950, and ever since accepted as the universal indicator of a televised program’s success or failure.

With respect to the printed media (which will be the focus of the present section), the Nielsen ratings (though actually in vogue for many years after their first appearance in the domain of TV), are no longer of great interest; in particular, newspapers’ national circulation rates are now determined with unique attention paid to the numbers themselves, not to the content of the media – with one exception, the ‘fitness’ alluded to above and further commented on in the following.

What is ‘fit to print’ is determined by a number of factors, some of which are shrouded in complexity and a bit of mystique, just like the one called ‘newsworthiness’. It is said that a good journalist has a ‘nose’ for what’s newsworthy; while many authors have tried to formulate criteria for what specifies this ‘instinct’, none have quite succeeded (for an enumeration, see Statham 2016, p. 27ff). What is more important is that in our capitalist society, ‘fitness’ (or newsworthiness) is mostly relevant in relation to

circulation: ‘good news’ is what is good for sales figures, ‘bad news’ is bad – but note that what we usually call ‘bad news’, like stories about environmental catastrophes or terrorist attacks, ironically seems to boost a paper’s sales figures. As an early analysis by Galtung and Ruge shows, “bad news almost inevitably contains more newsworthy factors than positive stories” (Galtung & Ruge 1965, p. 71; quoted Statham 2016, p. 28). But what, in addition to newsworthiness, provides a newspaper with the necessary quid pro quo to keep it alive?

As Statham points out, “[n]ewspapers cannot cover their costs without the input of advertising revenues and would run at a loss if they relied on cover price alone” (2016, p. 32; and never mind the dwindling support from subscriptions). Newspapers need advertisers, and advertisers choose the newspapers that are in line with their own preferred ideology; which excludes news and newspapers that support ‘alternative’ ways of looking at the world. As a result, Statham concludes, “the unwillingness of advertisers to prop up publications that are different to their own corporate ideology effectively renders untenable the position of a publication that attempts to operate as left-wing newspaper” (2016, p. 32). And, it should not be forgotten that newspaper concerns are among the biggest commercial operations that the world has seen, with budgets in the tens of billions of dollars; this alone would preclude any openings to ideologies critiquing the capitalist system that has created them, and this supports the current media discourse and its societal preconditions.

Newsworthiness and Legal Discourse

The next question to discuss is how newsworthiness relates to the law. Specifically, what kind of legal discourse covers newsworthiness, and how does it impinge on the personal freedom of the citizens (journalists and the general public), the users (and partly creators) of this discourse? (This is where pragmatics comes in).

In the USA, the discussions usually take their point of departure in the First Amendment to the US Constitution (adopted and ratified by Congress in 1789). The First Amendment states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; ...”

While this amendment does not prescribe (in the sense of the law), it makes certain actions of Congress unlawful; and by extension, it is liable to be invoked as a guideline for how to interpret the various ‘freedoms from’ (rather than ‘freedoms to’) that are enshrined in the Amendment. With respect to the press (and the media in general), this is where notions such as ‘fitness to publish’ and ‘newsworthiness’ come in.

Importantly, these notions are not in themselves legally binding; they are principles on the basis of which the judiciary enforces the application of the laws. In our case, therefore, this application is subject to the interpretation by the judges of, and their rulings on, matters dealing with the First Amendment. Especially relevant in this connection are the situations in which the potential impact of a news item (its ‘newsworthiness’) conflicts with another right (a ‘freedom from’), namely the right to privacy and the right to have one’s reputation unsullied by libelous attacks from one’s adversaries.

Whereas the laws concerning ‘libel’ are very specific, both in the US and in the UK (albeit with different emphases and practices), as to the tricky and diffuse matter of ‘privacy’, considered in relation to ‘newsworthiness’, there has been a remarkable shift in practice, following the advent and expansion of the internet as the prime locus of ‘newsworthy items’ (including scandalous tidbits from celebrities’ personal

lives, shady financial dealings by moguls, intimate details of famous people's mental and physical properties, and so on). The case of Hogan vs. Gawker proves an instance in point.

The Hogan Case

Hulk Hogan was a well-known figure in the entertainment world, famous for his exploits as a wrestler and self-styled "egomaniacal celebrity" (Toobin, 2016, p. 96). For publicity and other, more obscure reasons, Hogan and a friend decided to swap partners in an 'open marriage' set-up; what Hogan did not realize, was that his friend secretly had taped Hogan's encounters with the friend's wife, and later 'leaked' the tapes to third parties, among others a media network called Gawker. The site's owners specialized in what they called 'radical transparency'; as the American lawyer and legal analyst Jeffrey Toobin remarks, "in less high-faluting terms, Gawker liked to show people having sex" (2016, p. 98).

Interestingly, when Hogan threatened to bring suit against Gawker, demanding that the tapes be withdrawn, Gawker refused, invoking the right of the press to 'free speech', meaning: the uninhibited right to publish anything 'newsworthy', however scandalous or damaging to a particular person's privacy. And in 2012, a federal judge in Florida ruled in favor of the network by stating that the tapes were "a subject of general interest and concern to the community" (Toobin, 2016, p. 101); in other words, newsworthiness was judged to trump Hogan's right to personal privacy, in the name of the First Amendment.

However, on his appeal to the Florida State Court in Tampa, the jury reversed the federal judge's ruling and awarded Hogan damages to a total amount of \$138 million. As Facebook billionaire Peter Thiel (who had, for personal reasons, offered to underwrite the legal costs of Hogan's appeal)³ commented on the case, "publishing a sex tape, surreptitiously done in the privacy of someone's bedroom, and to hide behind the First Amendment, behind journalism – that is an insult to journalists" (Toobin, 2016, p. 101).

Interest, Legal Discourse, and Pragmatics

Going back to our earlier discussion of 'interest' as the deciding value for newsworthy journalism, there seems to have occurred a marked shift in our attitude to 'fitness to publish' and what this entails. As late as 2001, Supreme Court Justice John Paul Stevens ruled in a case where a radio commentator had been accused of broadcasting a private conversation which had been obtained by illegal methods. Stevens' opinion expressed the view that prosecuting the broadcaster would "threaten the core purposes of the First Amendment because it imposes sanctions on the publication of truthful information of public concern" (quoted Toobin 2016, p. 102). Considering Thiel's comment quoted above, one sees how on a current view of newsworthiness, the main question is no longer whether or not the information in question is truthful, but to which degree it may be expected to infringe upon an individual's right to privacy, in particular when it comes to divulging a person's intimate activities (like having sex), unilaterally and without permission, on the internet. In other words, the notion of 'fitness to publish' has moved its needle from the 'truth' point towards the 'private' direction of the fitness compass.

In this respect, Jeffrey Toobin asks the eminently relevant question "whether the Law, instead of treating every publication as a newspaper [with its inherent, classical definition of 'fitness to print', JM], will start to treat all publications as Web sites" (2016, p. 105), thereby creating a legal environment where the discourse is less attuned to forgiveness of the media, when it comes to judging the printed press's

³ Gawker had revealed Peter Thiel's identity as a homosexual.

customary sources of information, and that information's newsworthiness, with respect to 'fitness to publish'.

As to the legal parameters of this and similar cases, my contention is that their time, space, and value are intrinsically *pragmatically* determined. By this, I mean that they must be seen in relation to the users, whose collective societal consciousness is expressed in the laws and their interpretation. Laws, despite our incessant efforts at codification, are in no way an eternal codex, valid for every space/time constellation. To take an example, the chronotope in which consuming one's enemies is a noble activity, places the modern anthropologist, acting as a participant observer, in a serious dilemma: 'To eat or not to eat' (which, given the circumstances, may translate as 'to be or not to be'). But even less outlandish scenarios occur right under our eyes. Here is a case illustrating recent US legal discourse and its 'limitations'.

An act of sexual nature involving a minor is in most countries legally defined as 'rape', that is, forced sexual contact, either physically or verbally. The difference between various legislations is mostly in the age of the persons involved: a 'rape' is considered 'statutory' in the US, if e.g., in a state such as Massachusetts or Florida, the sexually assaulted person in question is under the age of 16; by contrast, the District of Columbia imposes a stricter limit, namely 17 years. Consequently, in this respect both space (where the act was committed) and time (the age of the plaintiff) are of relevance, as it became prominently visible when a few years ago, a then US Representative (Mark Foley, R-FL) was accused of having made sexual overtures to a White House page boy who was under age at the moment of the alleged offense. The congressman, appealing to the 'space' aspect, defended himself by saying that in his home state, Florida, the particular case would not fall under the legal sanctions valid in the District of Columbia (where the US Congress is located). As to the 'time' aspect, the criterion of 'under age', he claimed, was also crucially different in the two locations.

Leaving aside the outcome of the case (Rep. Foley resigned his seat in the House "in disgrace", as the newspapers had it, on September 29, 2006), I want to concentrate on the *temporal* and *spatial* aspect of the alleged sexual act in order to determine its legal *value*. If Rep. Foley had just waited a few months before sending his notorious 'over-friendly' email messages to the young man in question, there would have been no offense. Due to the progression of time (as enshrined in the locally valid 'statutes of limitation'), the act would simply have lost its moral status as a transgression; this is why it is so important to pinpoint the exact time when a crime is perpetrated or an arrest is made.⁴

'Thawable Discourse'

As the Foley case shows, both the police and the judiciary know that space and time play an all-decisive role in the evaluation and interpretation of certain acts; which is why legal discourse can be said to be essentially pragmatic. Above, I drew attention to the fact that legal discourse is dependent on this temporal and spatial context for deciding its values; it is also subject to that universal aspect of the human condition, the 'law' of evolution.

Compare the following two statements (also quoted above):

- (1.) "the courts defer to the press for what's newsworthy" (Supreme Court Justice J.P. Stevens, as quoted by Jeffrey Toobin, in 2012)

⁴ The other possible line of defense, claimed by Foley, is more risky: it would involve assigning responsibility in accordance not only with the location of the act, but also of the alleged perpetrator's juridical domicile.

(2.) “interests have no place for values” (Presidential candidate Donald Trump, as quoted by Evan Osnos, in 2016)

I read the first statement as reflecting the quoted opinion of Federal Judge James D. Whittemore in the first Hogan trial: the controversial “[v]ideo [sic] is a subject of general interest and concern to the community”; Toobin, 2016, p. 101). In a more unpolished version, this comes out as “celebrity sex tapes – impossible to think of it as anything other than news”, as Gawker co-defendant Albert J. Daulerio has it in his deposition in, and comments to, the Hogan case referred to earlier (see Toobin, 2016, p. 99).

The legal question is, of course, not only if publication of ‘true stories’ is always permitted, but also, and mainly, whether such publication is advisable, according to the rules of common decency – rules that, though not explicitly stated by the courts, still are consonant with current societal norms of public behavior. It is these latter features that seem to have fallen by the wayside in the recent debates, and generally, in much of current thinking and feeling. When Donald Trump says that “interests have no values”, he may be tapping into a reservoir of protest against the essentially defined, quasi-total freedom of speech that long has been the hallmark of liberal legal discourse (as also defended by Justice Stevens). As it is, the balance between ‘freedom from’ and ‘freedom to’ may always be hard to strike; in the current debates, the equilibrium seems to have been lost, at least for the time being. As Toobin remarks, “the new President will certainly welcome a legal environment that is less forgiving of media organizations” (2016, p. 105); while many may see this as a way to curb the excesses of sensation journalism, it carries also the ever-present possibility of a return to a dictatorship of the press.

A parallel example is that of the legal discourse covering the penalization of certain human behaviors like acts of homosexuality. It requires no big stretch of imagination to assume that the original US legislators, the Founding Fathers, never would have ruled, for instance, as their descendants did in June of 2015, that same sex marriage is legal, thereby effectively legalizing gay marriage everywhere in the United States.⁵ When one compares the evolving legal discourse preceding and surrounding this ruling, one is struck by the enormous discrepancies that existed both in the actual legalizing and in the attitudes of the general public.

Recall that two decades earlier, in 1996, Congress had passed a ‘defense of marriage act’ (DOMA), in an effort to prop up the shaky foundations of traditional marriage by (“for federal purposes”) defining marriage as “the union of one man and one woman”; and even though the act was repealed in 2015, many other laws were still on the book, nationwide excoriating and condemning sexual attitudes and practices that were commonly accepted across a wide swath of the American public. What we see here is not just an ‘undoing’ of certain legal statutes and measures, but an evolutionary development in legal discourse, from sticking to a strict reading of the original texts to a more lenient interpretation, and eventually a rewriting, of the laws.

‘Freedom from’ vs. ‘Freedom to’: ‘Stand your ground’

From another angle, the historic differences in legal practice and discourse could be characterized as one between ‘freedom from’ and ‘freedom to’. While the US Constitution, in a strict legal discourse interpretation, explicitly protects the inhabitants from coercion (a ‘freedom from’, hence the expression ‘free speech’), this protection gradually has carried with it a belief that one is free to say anything that comes to mind (a ‘freedom to’). An evolution similar to what is happening to the interpretation of the

⁵ Usually, the seven Founding Fathers are considered to be the following: John Adams, Benjamin Franklin, Alexander Hamilton, John Jay, Thomas Jefferson, James Madison, and George Washington.

First Amendment with regard to the freedom of the press can be seen to occur in other areas as well, in particular as regards the Second Amendment, which states that “the citizens right to bears arms shall not be infringed” (a ‘freedom from’); however, current interpretations often contend that this ‘right’, a typical ‘freedom from’, implies a ‘freedom to’, allowing citizens to not only to bear and display one’s guns openly in public places (as per the recently passed ‘Open Carry’ law in Texas, making it the 31st state in the union to allow this), but if needed, use this right to ‘stand one’s ground’, as Floridian legal discourse has it).⁶

Free Speech and the Case of ‘Citizens United’

In its landmark decision of 21 January 2010, ‘Citizens vs. Federal Election Commission’ (USC 08-205), the US Supreme Court in a 5-4 majority opinion stated that there is no such thing as “too much free speech”.⁷ One of the dissenting members of the Court, Justice John Paul Stevens, argued in his dissent that this was a ‘straw man argument’; he noted that even under the First Amendment, ‘free speech’ never included the ‘freedom to’ say whatever one had in mind (there always had been restrictions on matters such as obscenity); furthermore, the appropriateness of speech (in relation to time, place, and manner) places additional restrictions on this ‘freedom to’.

The main focus of the dissent was whether free speech included not just physical persons, but also ‘legal persons’ such as corporations, unions, and ad-hoc associations like ‘Citizens United’, a gathering of physical persons “united” in an effort to extend ‘speaking rights’ to entities other than the original persons the Founding Fathers had in mind. In order to secure free speech for what is called ‘legal persons’, one precisely had to consider them as ‘persons’, that is, on line with *real* people.

Remarkably, in the discussions no one seems to have addressed the purely metaphoric character of the term (legal) ‘person’ when applied to e.g. a corporation. What Justice Stevens did, was to place emphasis on the difference between regular persons (‘people’) and legal ‘persons’ (such as corporate entities). Among other things, he maintained that the unique qualities of corporations and other artificial legal entities made them a danger to democratic processes such as elections. These legal entities, Stevens argued, have perpetual life, the ability to amass large sums of money, limited liability, no ability to vote, no morality, no purpose outside profit-making, and no loyalty.

Compared to the persons comprised by the classical expression “We, the people ...”, and whose voices are heard through the centuries in the *Preamble to the US Constitution*, as adopted in September of 1787, any modern corporation, when considered legal people, with a right to free speech, will be able to drown out the voices of the real people. The super-rich corporations, through their money, speak louder, and with more frequent timing than what private persons are able to. The corporate voice is heard always and everywhere on the media, in contrast to the feeble output of private individuals and their less endowed entities.

Conclusion

In a fair legal discourse, we should allow the courts to regulate corporate participation in the political process. Minimally, ‘free speech’ for corporations should not include the freedom to divulge their opinions at times or in manners not appropriate, e.g. by publishing propaganda material for a candidate

⁶ The Florida “Stand Your Ground” law, implemented in 2005, gives widespread legal immunity to people who use lethal force in self-defense. According to the American Medical Association, the number of homicides in Florida has risen by 31% since the passing of the law (Source: *Time* magazine, November 14, 2016).

⁷ Source: *Wikipedia*; accessed 15 January 2017.

during the 30-day period preceding an election, as it had been decided in an earlier Supreme Court decision with regard to ‘people persons’ (cf. the *Bipartisan Campaign Reform Act* of 2002, the so-called McCain-Feingold bill; Baldino & Kreider, 2011, p. 308).

What we have seen happen, however, over the past six years, is an unbridled proliferation of corporate sponsoring, either directly to the interested persons or entities, or (especially in the case of so-called ‘dark [read: unaccountable] money’) through huge donations to so-called PACs, ‘political action committees’, created with the unique, specific purposes of furthering the candidature of one particular, supposedly corporate-friendly candidate. The immediate results of this development are there for everybody to see, following the 2016 US Presidential election, in which a candidate with a majority of the popular vote was denied victory, thanks mainly to the skillful manipulations of the now legally voiced, corporate ‘persons’.

Considering those most often quoted, prime instances of US legal discourse, the First and Second Amendments to the Constitution, it is striking how often the discussions turn around what the original legislators may have meant when they wrote their opinions, as embodied in the Constitution and its later Amendments. In a pragmatic view of legal discourse as not cast in iron, one that is not ‘frozen’ but ‘thawable’, it may not always seem uniquely relevant what the Founding Fathers may have thought or intended when they drew up their statutes and amendments. What we are dealing with in current terms is how this legal discourse has developed over time and relative to the spatial context: many of the views and opinions embodied in those hallowed texts have either lost their relevance or are today interpreted differently, in accordance with the current interpreters’ (locally and temporally) different points of view – in other words, we are looking at a truly *pragmatic* issue within legal discourse.

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Biography

Prof. Jacob L. Mey has studied medicine, philosophy, Dutch philology, comparative, general, and computational linguistics at the universities of Amsterdam, Nijmegen, Copenhagen, Helsinki, Oslo, and Prague. He acquired a Phil. Lic. degree in philosophy in 1951 and a Ph.D. in linguistics in 1959; he was created Dr. Phil. H.C. in 1993 (Zaragoza) and in 2006 (Bucharest). In 1970, after six years at the University of Oslo and another six at the University of Texas at Austin, he was appointed Professor of Comparative Linguistics at Odense, from where he retired in 1996, to be named professor emeritus. Since then, he has been holding numerous guest appointments at universities world-wide, i.e. in Germany, the U.K., Japan, China, Brazil, Israel, Kuwait, Austria, and Hong Kong.

Jacob Mey is the author of numerous articles on pragmatics and other linguistic subjects, i.e. a textbook (Pragmatics, 2001; 2d ed., Blackwell) and a study on literary pragmatics (*When Voices Clash*, 2000, Mouton de Gruyter). His main interests include the pragmatics of language, especially as they concern oppressed groups; in his view, pragmatics should be an 'emancipatory' science. Currently, his focus is on further developing the notion and applications of the *pragmeme*, defined in his 2001 and later works in order to capture the manifold manifestations of human pragmatic acting (including speech).

Keynote Address II

A Pragmatic Turn in the Interpretation of Court Judgments

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[Abstract] *This article aims to unravel the continuous development of a pragmatic turn in the interpretation and reasoning of court judgments through reviewing the studies on court judgments at lexico-grammatical level and discourse level. Moreover, as one type of legal instruments, the court judgments are of semiotic feature, that is, the feature of temporality and spatiality and need to be interpreted and understood in particular contexts as well as under specific historical and legal backgrounds.*

[Keywords] *court judgments; interpretation and reasoning; pragmatic turn; semiotic*

As the written recording of the trial process and results, court judgments are not merely the carriers of the results of litigious activities but also the only certificates used to ascertain and allocate parties' rights and obligations by the People's Court. As the final focus of the whole procedural acts, court judgments should be representative of judges' judicial thinking, logical deduce, evidence verification and case fact so as to make the procedural justice well realized and accepted. Conceiving of court judgments as a specific written form of judicial discourse marks that it is mainly concerned with "judicial thinking" (Cheng, 2010). As opposed to "legislative thinking", "judicial thinking" can be referred to as a chain of thoughts in judicial writing in a broad sense, which reflects how judges think, in particular, how they apply the principles and methods in judicial proceedings by way of adjudication, including case entertaining, trial and decision making (Cheng, 2010). Therefore, the studies on court judgments can enhance the overall qualities of judges so as to make the judgments more reasonable and acceptable. Therefore, it is of great significance to probe into the interpretation and reasoning of court judgments from various perspectives and with distinctive approaches.

Plenty of scholars at home and abroad have devoted themselves to the study of court judgments. In this article, the previous studies on court judgments will be expounded from the following two levels (lexico-grammatical level and discourse level) with the application of the following theories and methodologies (semiotic approach, genre analysis, corpus-based or corpus-driven, legal rhetoric and comparative approach). Based on the studies of predecessors, it is summarized that a pragmatic turn in the interpretation and reasoning of court judgments is continuously driven and realized, which echoes the viewpoint illustrated in Giltrow and Stein's (2017) *The Pragmatic Turn in Law: Inference and Interpretation in Legal Discourse*.

Studies on the Lexico-Grammatical Analysis of Court Judgments

As noted by Khalifa (2015), to understand a specialized text is to try to know its linguistic characteristics. In other words, the textual meaning though a close and accurate linguistic analysis is required first and

foremost. Khalifa (2015) adopts the lexicometric approach to probe into the phraseology of legal discourse through the study of lexical and grammatical collocation. Masiulionytė (2014) examines the expression of evaluation in German and Lithuanian court judgments in civil cases in order to analyze lexical and grammatical devices used by the court in its judgments to express its opinion towards certain objects of evaluation. Based on Masiulionytė's (2014) study, it has been found that in the analysis of court judgments, the objects are evaluated in terms of success, merits, admissibility, veracity, reasonableness, persuasiveness, suitability, extent, probability etc. Furthermore, it has been noted that in this text type, lexical devices are also employed to indicate that the particular issue is not relevant in this lawsuit and is not going to be evaluated. Additionally, this paper investigates the optional elements of the evaluative construction: motivations, intensifiers and de-intensifiers.

In recent years, the lexical-grammatical analysis has concentrated on judges' use of personal-opinion-loaded "hedgies" and "boosters" (Hyland, 2005, p. 53). Hedgies and boosters are items that writers use to modify their claims and expressions of doubt and certainty, which is a phenomenon Low (1996) calls the "Lexical Invisibility Hypothesis". On the basis of empirical linguistic data extracted from some judgments of the Supreme Court of United Kingdom, Toska (2012) provides unique insights into the epistemic hedgies and boosters as stance markers in the process of legal argumentative discourse, which demonstrates that hedgies and boosters are used as part of the evaluation process of the context, as items which facilitate interaction between participants and as devices which convey justices' attitude to utterance prepositions and express their stances on disputed issues.

With regard to the grammatical level, studies on court judgments focus on modality and concessive studies. Many studies on modality in court judgments have been conducted by domestic and overseas scholars. However, "it's still difficult to arrive at a clearer understanding of modality" (Cheng & Sin, 2011, p. 123). Modality is preliminarily defined to be related to the speaker's opinion or attitude by Lyons (1977). Palmer defines modality as "a valid cross-language grammatical category that can be the subject of a typological study" (Palmer, 2001, p. 21) and it is "concerned with the status of the preposition that describes the event" (2001, p. 1). He also claims that "Modality is a wider grammatical category including mood as a subtype" (Palmer, 2003, p. 2). Using authentic Chinese court judgments, Cheng & Sin (2011) examines the formal, semantic and functional approaches to the core modality and its different manifestations in legal settings. The cases listed by Cheng & Sin (2011) show that different discourse communities may have divergent understandings of the same word so it's of great significance to understand the value of modality in context. Furthermore, even though the functional approach seems to properly solve all the issues related to modality in legal settings, when we are faced with various understandings of the same modal exponent, whether in classification, orientation or in value, a semiotic interpretation serves as a better solution to such difficulties (Cheng & Sin, 2011). The epistemic modality in court judgments of civil cases in Hong Kong and Scotland is also investigated by Cheng and Cheng (2014). Specifically, they examined the variation in the orientation of epistemic modality. Their findings suggest that "legal discourse in Hong Kong reflects its strong roots in UK legal system" (Cheng & Sin, 2011, p. 25).

By analyzing the decisions of different judges in a single case, Huisman and Blackshield (2004) discuss the realizations of tenor in legal discourse in the context of the High Court of Australia. Furthermore, this article shows the important role of modalities in judicial reasoning, which should be largely concerned with issues of RIGHTS and POWERS. In addition, from a Systemic Functional Linguistics perspective, this article analyzes the field, tenor and register of legal documents.

Szczyrbak (2014) attempts to study the realization of concession in the discourse of judges from the perspective of genre analysis. It investigates the way in which the concessive relation is deployed by last-instance courts, as revealed by an examination of EU and Polish judgments. Szczyrbak (2014) breaks away from the traditional view of written legal discourse seen as a static and monologic communication. Instead, she probes into the linguistic construction of judicial argumentation, seen as a mute dialogue with the addressee, highlighting recurrent argumentative schemata and related discourse signals and functions (from the publisher's website). It can be concluded that the dialogic model of concession that is designed as a tool for an examination of talk-in-interaction, can be successfully applied in an investigation of written data.

From the above mentioned studies, on one hand, the interpretation and understanding of lexical or grammatical issues of court judgments is not independent from contexts but rooted in the interrelationship of social networks; on the other hand, lexical or grammatical issues of court judgments should be interpreted in a dynamic manner rather than in a static way, and in a particular context rather than in a universal context.

Studies on the Discourse Analysis of Court Judgments

The discourse analysis of court judgments mainly concentrates on reasoning, acceptability and rhetoric of court judgments with the comparative, corpus-based or corpus-driven approaches. Many scholars have attempted to study the court judgments from the discourse-centered perspective, which will “enable us to have an evidence-based understanding of judicial thinking encoded in Chinese court judgments” (Cheng, 2012, p. 28).

Reasoning of court judgments has also been focused at the discourse level. The reasoning process of court judgments is the process to convince audiences with legal language, which is also a necessary process to realize procedural justice (Huang, 2015). After the online openness of Chinese court judgments, the studies on its reasoning have been paid great attention in terms of the drafting and reasoning problems and their solutions. The main problems lie in the poor judges' professional qualities (Lian, 2005), the lack of system compared with the *stare decisis* in Anglo-American legal system (Huang, 2015; Lian, 2005), the lack of the independent status of Chinese courts (Lian, 2005), the lack of post-trial feedback mechanism and question-answer mechanism (Su, 2010).

Some scholars (Hou, 2012; Hong & Chen, 2003; Li, 2011) have also conducted studies on the acceptability of court judgments from the perspective of legal rhetoric whose cores are speakers or audiences and consensus. As noted by Hou (2012), in order to be correct court judgments, rhetoric must be applied so as to convince the disadvantage side to give up some interests and accept the final results. The reasons why legal rhetoric can promote the acceptability and reasonability of court judgments lie in the following two aspects: First of all, it can make up the lack of logical function; secondly, communication can be made between the speakers and audiences since they are valued in legal rhetoric. The use of positive rhetoric and negative rhetoric in court judgments is also examined so as to enhance its language standardization and overall quality (Lin, 2010). Therefore, it can be seen that the reform of online transparency of court judgments has made new demands on its interpretation and reasoning because the audiences the court judgments should persuade become the public on the whole.

The court judgments are written in various ways based on distinctive legal systems and legal culture. For example, in Anglo-American legal system, cases can be decided based on the *stare decisis* doctrine. One particular feature of American court judgments is that the opinions of different judges will be

included, which means that the audiences the court judgments would like to persuade are not only the plaintiffs and defendants but also the judges with dissenting ideas. The combination of jurisprudence and human sentiment represented in the reasoning of Taiwan court judgments is also a distinctive feature. The citation of traditional Chinese culture is very common so that the simplification of classical Chinese language can make the judgments detailed reasonably (Liu, & Sun, 2002).

By comparing the cross-strait court judgments, it can be evidently seen that human sentiment is well implemented in Taiwan court judgments (Yi, 2013). As a medium between judges and social communication, the rich emotion represented by the human sentiment in court judgments can achieve the reasonable combination of profession and popularity, which can make the reasoning of court judgments more acceptable and reasonable. Many scholars (Tang, & Wang, 2016; Cheng, 2010; Cheng, & Cheng, 2014; Li, Cheng, & Cheng, 2016) have made great contributions to the comparative study of court judgments in different areas and countries, which can shed meaningful insights to the reform of Chinese court judgments.

Regarding the theories applied to the studies of court judgments at discourse level, scholars mainly study from the perspective of genre analysis. As Cheng (2010) notes, as one of the approaches to the textual analysis of a discourse, genre analysis regards “textuality and reading as functions rather than things” (Thwaites, et al., 1994, p. 92). In addition, genre analysis can make us look at similarities and differences across the actual realizations of a genre. Moreover, the “routine and formulaic nature” (Fairclough, 1995, p. 86) can be well demonstrated by it.

In the last two decades, studies on legal discourse have developed on the basis of a variety of perspectives in which two approaches appear to be noteworthy. First of all, Anglophone scholars have dealt with legal language from a predominantly genre based perspective. Secondly, French studies have focused on argumentation in judicial texts, by considering the forms of reasoning involved in it and, albeit more rarely, its linguistic constituents (Mazzi, 2007). According to Swales (1990), “genre” has been defined as a set of communicative events characterized by common communicative purpose and parent discourse community as well shared structure, content, style and intended audience. Maley (1994) identifies a variety of genres embedded in legal discourse, such as acts of parliament, judgments, wills, lawyer-client and lawyer-lawyer consultation.

Taranilla (2015) attempts to investigate whether the textual features of the genre of court judgments are determined by the jurisdictional matter. Therefore, a corpus of criminal judgments with one of civil judgments is compared. The goal is to determine whether there are differences between the narratives of civil and criminal judgments in order to provide an increasingly accurate description of the Spanish judgment as a genre (Taranilla, 2015). Mazzi (2007) sheds light on the combination of genre and corpus analysis to study the argumentative discourse of judicial decisions through a corpus-based genre analysis on a sample of 40 judgments.

Some Chinese scholars have studied the Chinese court judgments from the perspective of genre analysis. Taking court judgments as one type of genre in legal settings, Cheng (2010) investigates and contrasts the genetic structure potential of judgments in three jurisdictions including Hong Kong, Taiwan and Mainland China. Besides, he unravels the variation of Mainland China’s judgments over time, which further proves “the semiotic nature of a genre, that is, the characteristics of temporality and spatiality” (Cheng, 2010, p. 89).

In addition, Cheng (2010) endeavors to “approach genre analysis from the different perspectives of various frameworks, an eclectic approach which draws on respective merits of their theories and

methodologies” (2010, p. 296). The analytical framework derives from that Bhatia’s (2004) multidimensional approach, Sinclair and Coulthard’s (1975) Discourse Analysis, and Halliday and Hasan’s (Hasan, 1984; Halliday & Hasan, 1989) concept of GSP (Generic Structure Potential), which together can provide a descriptive account of the generic structure of court judgments (Cheng, 2010). Through analysis of three corpora (court judgments of Hong Kong, Taiwan and Mainland China) consisting of randomly selected court judgments with the analytical framework mentioned above, it draws the conclusion that the contrast between generic diversification and integration is a reflection of power and control in judicial discourse of these three jurisdictions, which can be explained in the context of professional practice and social practice.

Adopting a corpus-based approach, Cheng (2012) deals with attribution in court judgments from three perspectives: the forms of appellate judgments, authorial voices in appellate judgments, and attribution to the sources of law. The results of this study are:

- First, all the appellate judgments from mainland China and Taiwan are the judgments of the court; both single-opinion judgments and multiple-opinion judgments are found in the appellate judgments.
- Secondly, only institutional self-references are found in the appellate judgments of mainland China and Taiwan.
- Thirdly, more divergent forms in terms of sources of law are found in Hong Kong in contrast with mainland China and Taiwan (Cheng, 2012, p. 27).

Through analysis of the results mentioned above, here, taking the authorial voices in appellate judgments as an example, Cheng (2012) argues that the individual judge’s power is foregrounded in Hong Kong (the use of both individual and institutional deixis to refer to the judges or the court) while only the voices of the court instead of those of the individual judge can be heard in mainland China and Taiwan judgments (the mere use of institutional deixis), which can be accounted for by the employment of institutional power and different legal systems in three jurisdictions. It can be seen that it is the “communicative practices that they employ and the functions they serve in legal and world contexts make them linguistically distinct” (Coulthard, Johnson & Wright, 2017, p. 16). Therefore, we cannot not simply interpret court judgments as texts, but rather need to consider their use in context; in other words, the interpretation of court judgments requires reference to the pragmatic rules since unique meanings exist in particular legal, historical and social contexts.

Overall, in some cases, the textual meaning of single words is concentrated due to the lexicogrammatical ambiguity. Nevertheless, “a court judgment as legal discourse includes text but goes beyond text” (Cheng & Sin, 2008, p. 280); it is a dialogue between judges, which can be regarded as “a social practice applying knowledge peculiar to a discourse community, or the linguistic realization of a social practice” (Cheng & Sin, 2008, p. 267). Thus, if we want to fully account for how court judgments work and what drafters are doing and thinking when using language, we have to take account of all the contextual variables that affect linguistic choices. As the primary canon, textual interpretation of court judgments is generally an important aspect of the text’s meaning. However, the pragmatic interpretation or reasoning may contribute to the more evidence-based, reasonable and acceptable court judgments and account for the divergences of court judgments in various jurisdictions.

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Biography

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Keynote Address III

Theories of Interpretation and Interpretations of the *Charter of the French Language*: Quebec Language Policy between Legislative Intent and Judicial Activism

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For several years, there has been a wide debate on the theories of legal interpretation in different countries¹. At the same time, one of the most important pieces of legislation ever adopted in Quebec, the *Charter of the French Language* (hereafter “CFL”)², has been the subject of opposing interpretations³. During our previous analysis of more than a hundred decisions relating to the CFL, we were struck by the contrast between the interpretations of this act made by certain judges and those made by other judges. In order to better our understanding of this contrast, and to take part in the debate concerning theories of interpretation, we propose an analysis of some of these interpretations in light of two of these theories.

It may seem strange to draw upon theories stemming from the academic world to deepen our understanding of the practice of field actors such as judges. Yet, in the context of a study on legal realism and constitutional justice in many regards comparable to our own, Michel Troper asserts that it is “by no means absurd to wonder whether a judge can adhere to a theory of law”⁴. Obviously, we do not pretend to probe the hearts and minds of magistrates, we simply ask whether the reasoning and interpretations they implement in their judgments can be associated with a theory of interpretation.

To do so, before turning our attention to judgments related to the CFL, we intend to outline two of these theories.

- Two antithetical theories of legal interpretation
- Judicial interpretations and the *Charter of the French Language* in light of theories of interpretation

Two Antithetical Theories of Legal Interpretation

Although there are several theories of interpretation, two of the most antithetical are, on the one hand, the official⁵ or traditional theory⁶, which we choose to call the classical theory of legislative interpretation,

¹This is particularly the case in France, where various authors oppose the Realist Theory of Interpretation. See for example, Otto Pfersmann, « Contre le néo-réalisme juridique. Pour un débat sur l’interprétation » *Revue française de droit constitutionnel*, 4/2002 (n° 52), pp. 789-836 and Étienne Picard « Contre la Théorie réaliste de l’interprétation juridique » *Revue juridique de l’USEK*, N° 10 (2009), pp. 21-110. Pierre-André Côté also mentions numerous debates in Quebec and elsewhere in North America around theories of interpretation: Pierre-André Côté, *The Interpretation of Legislation in Canada*, Toronto, Carswell, 2011, p. 12 et suiv.

² *Charter of the French Language*, CQLR, c. C-11.

³ Éric Poirier notes the existence of two case law trends, one in favor of a restrictive interpretation of the rights related to the French language, and the other in favor of a broad interpretation of these rights: Éric Poirier, *La Charte de la langue française. Ce qu’il reste de la Loi 101 quarante ans après son adoption*, Québec, Septentrion, 2016.

⁴ Michel Troper, « Le réalisme et le juge constitutionnel », *Cahiers du Conseil constitutionnel*, No 22, juin 2007. All quotes are translated from French, except those of Pierre-André Côté.

⁵ Pierre-André Côté, *The Interpretation of Legislation in Canada*, *supra* note 1, pp. 4-12.

and, on the other hand, the realist theory of legal interpretation. The classical theory of interpretation, or at least one of its main components, has been influential, even central, in all systems of law, including in Quebec and Canada⁷. The realist theory is also present in a very large number of countries, as illustrated by the existence of Scandinavian legal realism, American legal realism and a French legal realism, to name only a few. The realist theory also has an influence in Quebec⁸, though maybe not as much as the classical theory of interpretation.

The Classical Theory of Legislative Interpretation

The classical theory of interpretation was summarized in Pierre-André Côté's book *The Interpretation of Legislation in Canada*. The knowledge on the classical theory was refined by Jeanne Simard in her thesis and in her article on this theory⁹. Therefore, we will refer to these authors for the main elements of this theory – legislative intent, clarity and predetermined meaning of the text, dissociation between interpretation and application, Parliamentary sovereignty, separation of powers, legal certainty and stability – which are all related to legislative intent.

The Legislative Intent. According to the classical theory, the goal of interpretation is to reveal the intent of the legislator who is the author of the text to be interpreted¹⁰. Legislative intent is “the intent being sought by that which might be attributed to a reasonable person drafting an enactment within the context in which the enactment was in fact drafted”¹¹.

In order to discover this type of intention, we must first examine the text carefully, since there is a presumption that what the author meant is what the law says¹². If the text remains obscure after this first examination, its meaning and therefore, the intent of the legislator must be determined by resort to principles of interpretation, beginning with those enshrined in the *Interpretation Act*¹³, which takes into account the context of the law, the legislative corpus and the overall context of enunciation¹⁴. In practical terms, we can then turn our attention towards other provisions of the law, the law as a whole, the provisions of other laws, the other rules of the legal system, parliamentary history, legislative history, the facts of common knowledge, the *ratio legis*, the general principles of law, equity, although the recourse to equity is controversial in the Civil Law tradition¹⁵, and pre-existing jurisprudence and doctrine¹⁶. The objective is always to discover the intent of the legislator through the text and never to dismiss them. This

⁶ Jeanne Simard, « L'interprétation législative au Canada: la théorie à l'épreuve de la pratique », (2001) 35 R.J.T. 549, pp. 555-604 and Jeanne Simard, *L'interprétation législative au Canada: la théorie à l'épreuve de la pratique*, [thèse] Montréal, Université de Montréal, 1998.

⁷ Harold C. Gutteridge, *Le droit comparé*, Paris, L.G.D.J., 1953, p. 137, quoted by Pierre-André Côté, *Interprétation des lois*, Cowansville, Yvon Blais, 1982, p. 3.

⁸ See for example: Mélanie Samson, *Les interactions de la Charte des droits et libertés de la personne avec le Code civil du Québec: Une harmonie à concrétiser*, [thèse], Québec, Université Laval, 2012, pp. 397-399.

⁹ Jeanne Simard, *L'interprétation législative au Canada: la théorie à l'épreuve de la pratique*, [thèse] *supra* note 6, and Jeanne Simard, « L'interprétation législative au Canada: la théorie à l'épreuve de la pratique », *supra* note 6.

¹⁰ Pierre-André Côté, *The Interpretation of Legislation in Canada*, *supra* note 1, p. 5.

¹¹ Pierre-André Côté, *The Interpretation of Legislation in Canada*, *ibid*, p. 6.

¹² Jeanne Simard, « L'interprétation législative au Canada: la théorie à l'épreuve de la pratique », *supra* note 6, p. 581.

¹³ *Interpretation Act*, CQLR c. I-16, *Interpretation Act*, R.S.C (1985), c. I-21 and Pierre-André Côté, *The Interpretation of Legislation in Canada*, *supra* note 1, p. 18 et 35-36 et

¹⁴ Jeanne Simard, « L'interprétation législative au Canada: la théorie à l'épreuve de la pratique », *supra* note 6, p. 570.

¹⁵ Pierre-Basile Mignault, *Le droit civil canadien basé sur les « répétitions écrites sur le Code civil » de Frédéric Mourlon avec revue de la jurisprudence de nos tribunaux*, t. 1, Montréal, Cé Théortet, Éditeur, Librairie de droit et de jurisprudence, 1895, p. 103 cited in Jeanne Simard, « L'interprétation législative au Canada: la théorie à l'épreuve de la pratique », *supra* note 6, p. 594.

¹⁶ Jeanne Simard, « L'interprétation législative au Canada: la théorie à l'épreuve de la pratique », *ibid*, pp. 583-594.

explains why one can go beyond the text to understand it better only if it is ambiguous, which is not always the case.

The Clarity and Predetermined Meaning of the Text. The meaning of a text may be clear¹⁷. If this is the case, it ends the comprehension process without having to resort to interpretation¹⁸. A text is clear “if the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense”¹⁹.

If after a careful examination of the text its meaning is still obscure, it does not mean that it has no meaning and that the interpreter must resort to inventing one. The classical theory postulates that the meaning of the text is predetermined and therefore that the interpreter must discover it, by resorting to principles of interpretation, rather than inventing it²⁰. The meaning being predetermined by the legislator, the interpreter cannot take into account the facts that have occurred after the adoption of the text when interpreting and then applying it.

The Dissociation Between Interpretation and Application. The interpreter determines the meaning and scope of a text before applying it to the facts. The results of application should not influence interpretation. Interpretation and application are dissociated phenomena²¹. If it were otherwise, if the judge could change the meaning or scope of a rule in light of the possible consequences of its application, he could substitute the legislator word by his own on the basis of his value judgment, which would go against the classical theory and the political or legal principles underlying it.

The Sovereignty of Parliament, the Separation of Powers, the Legal Certainty and Stability. The classical theory of interpretation is based on these four principles²². The sovereignty of Parliament, because since it insists on the intention of the legislator, it postulates that the interpretation is done in compliance with the norms established by Parliament which voted the law, itself an expression of the general will of the people²³. The separation of powers, because this theory implies a clear separation between the legislative function of making the law, on which the legislator has a monopoly, and the judicial function of applying the law, which imply a high level of deference exerted by the judiciary in regard to the legislator and its non-interference on the political level. Legal certainty and stability, because once the text is adopted, the meaning is determined and cannot be changed unless an amendment of the text is adopted by the legislature (generally, such an amendment has no retroactive effect). Thus, as soon as an act is adopted, citizens know its meaning and the consequences of not respecting it²⁴. Even in order to avoid abnormal results or unfavourable consequences in a given case, a judge cannot change the meaning of a text after its adoption.

Such is the classical theory of interpretation: a coherent theory which is firmly based on strong principles. Nevertheless, since it is difficult to imagine that all judges can systematically conform to a theory even when conforming to it would lead to unfavourable consequences, this latter element may raise doubts on the ability of this theory to reflect reality...hence, the relevance of tackling another theory.

¹⁷ Pierre-André Côté, *The Interpretation of Legislation in Canada*, *supra* note 1, p. 8.

¹⁸ Jeanne Simard, « L'interprétation législative au Canada: la théorie à l'épreuve de la pratique », *supra* note 6, p. 577.

¹⁹ *Sussex Peerage Case*, (1844), 11 C. & F. 85, 8 E.R. 1034 cited in Jeanne Simard, « L'interprétation législative au Canada: la théorie à l'épreuve de la pratique », *supra* note 6, p. 579.

²⁰ Pierre-André Côté, *The Interpretation of Legislation in Canada*, *supra* note 1, p. 7.

²¹ Pierre-André Côté, *The Interpretation of Legislation in Canada*, *ibid*, p. 8.

²² Pierre-André Côté, *The Interpretation of Legislation in Canada*, *ibid*, p. 9.

²³ Jeanne Simard, « L'interprétation législative au Canada: la théorie à l'épreuve de la pratique », *supra* note 6, p. 597.

²⁴ Pierre-André Côté, *The Interpretation of Legislation in Canada*, *supra* note 1, p. 9-10.

The Realist Theory of Legal Interpretation

Considering its great influence in many French-speaking countries including Quebec²⁵, we will now focus more specifically on Michel Troper's realist theory of interpretation. This theory can be summarized in three essential assertions: the interpreter as the ultimate author, the interpretation as an act of will on a text lacking a predetermined meaning and the interpretation being subjected to constraints²⁶. There are also some political arguments in support of this theory, namely, the different representation provided by the judge, his willingness to abide by reality, his will to contribute to high standards of law and his status as a balance to the legislative power, all made possible due to his power as an interpreter and therefore as an author.

The Interpreter as the Ultimate Author. According to Troper, a norm exists only when the meaning and scope of a text have been fixed and hence when it has been interpreted²⁷. Thus, the true author of the norm would be the interpreter, usually the judge, and not the author of the text, the legislator, whose real or supposed intention could be rejected. As Troper puts it: "When the interpretation comes from a competent authority, which is not necessarily a judge, and the decisions of that authority are final, it produces legal effects regardless of its content, even if it runs counter to common sense, to the intention of the author of the text interpreted or to the rules of ordinary language"²⁸. This means that the interpreter can exclude not only the intent of the legislator, but also the ordinary meaning of the words of a statute.

Summarizing the thought of Troper, Étienne Picard writes that "All the statements that may have been made in advance of the final decision do not have any normative scope with regards to the author of the latter decision, since this author has the ultimate power to interpret these statements, to make them come into being as norms"²⁹. This is logical, for interpretation is considered as an act of will giving meaning to a text that was hitherto devoid of it.

Interpretation as an Act of Will on a Text Lacking a Predetermined Meaning. Interpretation is always an act of will. There does not exist a divide where are opposed, on one hand, clear statements that do not really require interpretation, for their predetermined meaning would appear on its own, and, on the other hand, ambiguous statements that need to be interpreted. *In abstracto*, each and every provision has more than one possible meaning since there is no predetermined meaning and therefore no *a priori* clarity. It is only at the moment of its application that the interpreter must choose one of its possible meanings³⁰. Hence, there is no interpretation without application and vice versa. And since the statement is not a norm before its interpretation, the judge is legally free to choose the meaning according to his will and the facts. This does not mean, however, that the judge is free from any and all constraints.

The Interpretation Subject to Constraints. Michel Troper and Véronique Champeil-Desplats start from the idea that, despite their freedom "The legal actors do not do everything they can but move towards a limited number of solutions" and that "this tightening is not due to legal obligations in the classic sense of this term, nor to a simple will to self-limit a discretionary power, but that it is the product of constraints on the legal actor"³¹. Even if their theory focuses on legal constraints, they also recognize

²⁵ See for example: Mélanie Samson, *Les interactions de la Charte des droits et libertés de la personne avec le Code civil du Québec: une harmonie à concrétiser*, supra note 8, pp. 397-399.

²⁶ Étienne Picard « Contre la Théorie de l'interprétation juridique », supra note 1, pp. 22-23

²⁷ Étienne Picard « Contre la Théorie de l'interprétation juridique », *ibid.*, p. 22.

²⁸ Michel Troper, « Le réalisme et le juge constitutionnel », supra note 4.

²⁹ Étienne Picard « Contre la Théorie de l'interprétation juridique », supra note 1, 22.

³⁰ Michel Troper, « Le réalisme et le juge constitutionnel », supra note 4.

³¹ Véronique Champeil-Desplats and Michel Troper, « Propositions pour une théorie des contraintes juridiques » in *Théorie des contraintes juridiques*, Michel Troper, Véronique Champeil-Desplats et Christophe Grzegorzczak, dir., Paris, LGDJ, 2005, p. 11.

the existence of extra-legal constraints related to economy, politics, linguistic, psychology or sociology³². Coherently, elsewhere Troper asserts that a legal actor is realistic or pragmatic “whenever he decides on the basis of the effects which his decision may have on the economic or social reality”, before adding that realism must “be understood as the interpretation of principles according to extralegal realities”³³.

Troper also points out that a legal actor practises realistic policy when he takes into account his situation in regard to that of other actors, such as Parliament or other courts. For example, a constitutional interpreter could choose an interpretation that avoids confronting elected officials so as not to provoke a constitutional revision and thus make it clear that he takes into account the constraints of the system³⁴. This time, it is a legal constraint “a *de facto* situation in which a legal actor is led to adopt a particular solution or behaviour rather than one or another, because of the configuration of the legal system it establishes or in which he operates”³⁵.

Michel Troper’s theory of legal constraints thus mitigates the main criticism of his realist theory, which is based on the fact that it recognizes that unelected judge holds great discretionary political power enabling him to oppose the democratically elected Parliament. And this is not the only answer to this criticism, since other answers are found in more political arguments in support of the realist theory.

Different Representation Provided by the Judge, his Willingness to Abide by Reality, and his Willingness to Contribute to High Standards of Law and his Status as a Balance to the Legislative Power. In addition to the theory of legal constraints, Troper invokes these four more political arguments in response to criticism that raises the undemocratic aspect of the realist theory³⁶. Regarding the different representation provided by the judge, it is based on the idea that all those who participate in expressing the will of the people should be considered as representatives and that this is the case of the judges since, like the king in a constitutional monarchy, they participate in the production of legislative norms³⁷. Willingness to abide by reality is directly linked to the constraints imposed on the legal actor by realities, in particular extralegal ones, as mentioned above. The judge's will to contribute to high standards of law could, among other things, result in greater restraint on the part of parliamentarians whose laws are subject to constitutional control³⁸. Finally, since according to the realist theory the judge does not limit himself to applying the law but has a discretionary political power that is both real and limited by constraints, to a certain extent he can use it to intervene even against a statement’s meaning or the intent of the Legislator and thus be a balance to the legislative power³⁹.

However, the best answer to the criticisms towards the realist theory is probably that it is descriptive and not prescriptive, contrary to the classical theory⁴⁰. It is in light of this distinction that the following tables should be read:

³² Véronique Champeil-Desplats and Michel Troper, « Propositions pour une théorie des contraintes juridiques » *ibid*, p. 12.

³³ Michel Troper, « Le réalisme et le juge constitutionnel », *supra* note 4.

³⁴ Michel Troper, « Le réalisme et le juge constitutionnel », *ibid*.

³⁵ Véronique Champeil-Desplats and Michel Troper, « Propositions pour une théorie des contraintes juridiques » *supra* note 31, p. 12.

³⁶ Michel Troper, « Le réalisme et le juge constitutionnel », *supra* note 4 and Michel Troper, *Le gouvernement des juges : mode d’emploi*, Lévis, PUL, 2006, p. 38.

³⁷ Michel Troper, *Le gouvernement des juges : mode d’emploi*, *ibid*.

³⁸ Michel Troper, *Le gouvernement des juges : mode d’emploi*, *ibid*, pp. 43-44.

³⁹ Michel Troper, *Le gouvernement des juges : mode d’emploi*, *ibid*, pp. 38-45

⁴⁰ Pierre-André Côté, *The Interpretation of Legislation in Canada*, *supra* note 1, p. 9.

Table 1. Main Elements of the Theories Related to the Author

Theory	Author	Goal of Interpretation
Classical	Author of the text (legislator)	Reveal the legislative intent
Realist	Interpreter (judge)	Create the norm

Table 2. Main Elements of the Theories Related to the Text

Theory	Clarity of the Text	Importance of the Text
Classical	Clear meaning <i>a priori</i> or determined by resort to principles of interpretation	Very important
Realist	Not clear <i>a priori</i>	Not very important

Table 3. Main Elements of the Theories Related to Application

Theory	Interpretation and Application	Importance of Anticipated Effects
Classical	Dissociated and successive	Not important
Realist	Interdependent	Very important

Table 4. Main Elements of the Theories Related to Political or Legal Principles

Theory	Judge vs Legislator	Political or Legal Principles
Classical	Deference	Sovereignty of Parliament Separation of powers Legal certainty and stability
Realist	Interventionism which can be moderated by constraints	Different representation Willingness to abide by reality High standards of law Balance to the legislative power

Since the classical theory is more normative and the realist theory more descriptive, there is a risk that judges pretend to adhere to the former while practicing the latter, and thus that jurisprudence reveals more traces of the first theory than the second. It will therefore be necessary to take a critical look and try to identify cases where a judge pretends to respect the classical theory without really respecting it, for example by citing a text and then ignoring it in his or her interpretations, thus acting rather as a realistic judge.

Moreover, Troper remarks that there are sometimes rather explicit elements of legal realism in case law⁴¹. And Côté mentions that the theory of creativity subject to constraints, similar to the realist theory, contains elements that can be detected in the jurisprudence⁴². This would be particularly true in constitutional matters.

In this context, we believe that it is worthwhile to look for traces of the classical and the realist theories in judgments concerning the CFL, a law which is at least partly constitutional in a broad sense, in particular by the impact of its interpretation on fundamental rights.

Judicial Interpretations and the *Charter of the French Language* in Light of Theories of Interpretation

It seems possible to analyze judgments, and more precisely interpretations contained in judgments, in light of classical and realist theories. For example, this can be done by focusing on the place occupied by the legislative intent. An interpretation that revolves around legislative intent will be considered more classical and one that contains little or no reference to it will be considered more realist. A judge who

⁴¹ Michel Troper, « Le réalisme et le juge constitutionnel », *supra* note 4.

⁴² Pierre-André Côté, *The Interpretation of Legislation in Canada*, *supra* note 1, p. 22.

quotes and who dwells at length on the texts of statutes and who takes them into account in his reasoning leading to his conclusion will be classified as classical, whereas one who quotes few or no such texts or who does not really take them into account will be classified as realist.

It is possible to uncover multiple example of this by referring to each of the elements raised in Part I or in Tables 1 to 4. We will be using these elements to analyze decisions written in two different cases: Miriam and Nighthlife. These cases were chosen because they are somewhat similar in terms of the type of case and the questions examined, even though they gave rise to very different judgments and interpretations.

These two cases deal with what Professor José Woehrling calls external private use, that is, the language which private persons use when they express themselves in public or when they address an audience⁴³. They both have been appealed, one in the Court of Appeal and the other in the Superior Court. The Miriam case is of great importance because, as language law specialist Éric Poirier has demonstrated, it resulted in the Court of Appeal's first judgement interpreting the CFL⁴⁴. Not to mention that this judgement was followed many times since⁴⁵. The Nighthlife case is also important because it is one of the few judgments that provides an interpretation favorable to the French language which was upheld on appeal. It is also importance because it was drafted by Justice Johanne White, who issued many rulings concerning the CFL⁴⁶. Therefore, we may ask whether she elaborated a judicial interpretation of the CFL that can be associated with the classical theory of interpretation...and opposed to the judicial interpretation of the CFL inaugurated by Justice Marcel Nichols in the Miriam case, which could hypothetically be associated with the realist theory.

Justice Nichols' Opinion in Miriam: A Realist Approach

In order to fully understand the judicial interpretation of the CFL inaugurated in the Miriam case, it is necessary to summarize its facts and decisions given by lower courts in this case, before analyzing the opinion of Justice Nichols of the Court of Appeal in light of classical and realist theories of interpretation.

Facts and First Rulings in Miriam. The case concerns an employee who was caught in the process of stealing goods belonging to her employer. She was then fired. Her union filed a grievance because the employer notified the employee of her dismissal by a notice written in English only, while Section 41 CFL states that "Every employer shall draw up his written communications to his staff in the official language (meaning French)". The question, then, is whether this section applies to all communications by the employer regardless of whether they are addressed to all employees or to an individual employee, or only to communications addressing to all employees.

After quoting Sections 41, 43, 44, 48 and 49 CFL, the arbitrator Émile Moalli stated, "From the foregoing, one can easily conclude that the legislator wanted to make French the language of work; It obligates the employer to communicate in French with his employees, which includes the employees

⁴³ José Woehrling, (2010). « Les concepts juridiques mis en œuvre en matière de politique linguistique », *Télescope*, vol. 16, n° 3, p. 24.

⁴⁴ Éric Poirier, *La Charte de la langue française. Ce qu'il reste de la Loi 101 quarante ans après son adoption*, supra note 3, p. 65-73.

⁴⁵ See for example : *Pierre Migneron v. Zellers Inc. and La Compagnie La Baie d'Hudson*, 2004 QCCRT 0513, par. 44 and *Normand Ash v. Berendsen Fluid Power Ltd*, 2005 QCCRT 0659, par. 13.

⁴⁶ See notably : *Directeur des poursuites criminelles et pénales v. Italméodie inc.*, [2010] C.Q. CanLII 5148; *DPCP v. Importations Inbeat Inc.*, 2010 QCCQ 8241 [2010] QJ 9636 (CQ); *P.G.Q. v. Aroyan.*, [2006] C.Q. QCCQ 6922.

individually”⁴⁷. He went on to say that the employer cannot avoid these provisions because of Section 50 CFL which he also cites: “Sections 41 to 49 of this Act are deemed an integral part of every collective agreement. Any stipulation in the agreement contrary to any provision of this Act is null”. For the arbitrator, the fact that the employee was a unilingual anglophone does not change anything, because section 41 is peremptory and contains no exception.

Justice Anthime Bergeron of the Superior Court summarized his contrasting reasons, which were cited in the opinion of Justice Monet of the Court of Appeal: “When an arbitrator, who in addition is not a lawyer, interprets a statute or a legal text and does so in a manner as unreasonable at first sight as Mr. Moalli has done in this case, I believe that this opens up the possibility for a revision provided by section 856 C.C.P., and I am of the opinion that this meets the criteria laid down by 847 C.C.P.”⁴⁸.

The first two decisions in this case are, therefore, very different in their conclusions, but less so in their apparent inclinations towards one theory of interpretation. The arbitrator’s ruling cites at length the texts of the statutes, refers to the intention of the legislator and concludes that they easily lead to a single possible conclusion, which indicates that they are clear. His reasoning, therefore, seems to be in line with several elements of the classical theory. The same seems to be true, to a lesser extent, for the Superior Court’s reasoning, since it implicitly considers that the rule is clear and the text important.

In order to find more traces of legal realism, we need to turn to the judgment of the Court of Appeal and specifically, despite the dissent of Justice Nolan, to the opinion supported by Justice Monet and drafted by Justice Nichols.

Justice Nichols’ Opinion in Light of Classical and Realist Theories. In the very first sentence of his opinion, Justice Nichols stated that the interpretation of section 41 is at the heart of the appeal⁴⁹. Then, after a reference to the factual background and in particular to the fact that the employee speaks only in English, he cites the preamble and Sections 1, 2, 4, 41, 50 and 89 of the CFL, but also contradictory arbitration decisions interpreting Section 41. He then rejects an arbitration decision which concluded that “the Legislator’s intention to see the official language as the working language cannot be clearer”⁵⁰. According to Justice Nichols, the legislator never intended to impose the exclusive use of French. In reaching this conclusion, he cites the preamble of the CFL which refers to the objective of making French the “normal and everyday” language of work.

For him, these words do not reflect the idea of exclusiveness of French: “On the contrary, they demonstrate that the legislator is aware that the official language can not, in principle and in practice, be imposed absolutely”⁵¹. For him, on the one hand, the preamble clearly denounces the intention of the legislature and, on the other hand, any need for interpretation must be resolved in accordance with the spirit of the CFL and his preamble. He then adds that, in pursuit of the objectives mentioned in the preamble, “the complexity of human relations required the legislator to take account of certain realities”⁵². According to him, for this reason, the legislature has adopted provisions designed primarily to protect

⁴⁷ *Centre d'accueil Miriam and Syndicat canadien de la fonction publique*, (T.A., 1982-01-29), SOQUIJ AZ-82141074, D.T.E. T82-116, [1982] T.A. 418, p. 6.

⁴⁸ *Centre d'accueil Miriam v. Émile Moalli, Syndicat canadien de la fonction publique et Vivian Bromfield*, (C.S., 1982-04-16), SOQUIJ AZ-82021281, J.E. 82-519, D.T.E. T82-375 quoted in *Syndicat canadien de la fonction publique v. Centre d'accueil Miriam*, [1984] C.A. 104, p. 1.

⁴⁹ *Syndicat canadien de la fonction publique v. Centre d'accueil Miriam*, *ibid*, p. 1.

⁵⁰ *Hôpital de Montréal pour enfants et Infirmières et infirmiers unis Inc.* (T.A., 1981-03-25), 12 S.A.G. 767.

⁵¹ *Syndicat canadien de la fonction publique v. Centre d'accueil Miriam*, *supra* note 48, p. 7.

⁵² *Syndicat canadien de la fonction publique v. Centre d'accueil Miriam*, *ibid*, p. 8.

those who speak the official language and who make up the majority (presumably, in light of a passage from the preamble, francophones).

It is in this mindset that Justice Nichols reads Sections 2, 4, 45 and 46 having to do with the right to receive communications from companies in French, to work in French and not to be discriminated against in employment or when applying a job because of a lack of knowledge of a language other than French. For him, these rights are strictly individual and do not obligate the employer to use French exclusively, except on the explicit request of an employee. He then relies on Section 89 CFL which provides that “Where this Act does not require the use of the official language exclusively, the official language and another language may be used together”. Surprisingly, insisting on the word “continuer” which appears only in the French version of this section (“Dans les cas où la présente loi n’exige pas l’usage exclusif de la langue officielle, on peut continuer à employer à la fois la langue officielle et une autre langue”), he concludes that this section reflects an intention not to disrupt what already exists and that, therefore, “Freedom of choice is the rule; Exclusive use the exception”⁵³, and that this freedom includes the possibility for the employer to communicate exclusively in English to an individual employee. Any exceptions to this rule should be stated in clear and precise terms and leave no doubt as to the intent of the legislator.

Since he considered the word “staff” in Section 41 to be ambiguous, Justice Nichols concluded that this section should not be interpreted as creating an exception to that rule. Even Sections 32 and 49, which contain the obligation to communicate in French with all members of a professional order or an association, but also an explicit exception allowing communication in another language with a particular member, do not change his mind, despite the absence of such an exception in Section 41. He explained this by the fact that the word “staff” (“personnel” in French) has perhaps a collective meaning sufficiently obvious to render such an exception unnecessary and, in a somewhat contradictory manner, by the ambiguous character of that section which would justify interpreting it in light of Section 89.

Thereafter, he asserted that his interpretation did not violate the rule of Section 40 of the *Interpretation Act*, which provides that “In case of doubt, the construction placed on any Act shall be such as not to impinge on the status of the French language”. For Justice Nichols, this means that an interpretation should not restrict the status of French as established by the CFL, for example, by Section 41 as interpreted by him. Accordingly, Section 40 of the *Interpretation Act* has no effect in this case.

Thus, the judge concluded that the arbitrator’s decision was unreasonable. He even added that if the arbitrator’s interpretation was to prevail “it would result in a denial of justice for all workers who do not speak the official language”. As for the controversy surrounding Section 41, because of contradicting arbitration decisions, “it leaves employers and employees in uncertainty”. Finally, he justified his intervention against an arbitral decision by the fact that the interpretation contained in that decision “imposes the official language virtually in all written communications in the world of work”⁵⁴ and by the importance and public interest of the issue.

Does this opinion by Justice Nichols express his adherence to the classical or the realist theory? Two elements of his opinion are in line with the classical theory. He refers to the Legislative intent several times and considers it clear in light of the preamble. His mention of legal uncertainty reflects a concern associated with the classical theory.

⁵³ *Syndicat canadien de la fonction publique v. Centre d’accueil Miriam*, *ibid*, p 10.

⁵⁴ *Syndicat canadien de la fonction publique v. Centre d’accueil Miriam*, *ibid*, p 14.

However, more than two elements fit better with the realist theory. His insistence throughout his opinion on the ambiguous nature of Section 41 and the need for its interpretation is an example. Even if he had quoted the texts of the relevant sections, which is usually consistent with the classical theory, he sometimes dismissed the ordinary meaning of words. The heart of his decision revolved around the rule of interpretation of the CFL that he pretended to deduce from Section 89 and according to which “Freedom of choice is the rule; Exclusive use the exception”. This section does not allow the exclusive use of a language other than French as proposed by Justice Nichols, it states that “the official language and another language may be used together”.

The fact that the ordinary meaning of a text can, thus, be dismissed and replaced by a creative interpretation of the judge is much more easily explained and even justified by the realist theory. The classical theory is all the less followed because, if Justice Nichols had followed it by drawing on the parliamentary and legislative history in case of doubt, he would have discovered that his interpretation of Sections 41 and 89 was not in line with the intention of the designers of the CFL⁵⁵. The classical theory is also set aside a bit when Justice Nichols quotes Section 40 of the *Interpretation Act*, which could lead to an interpretation more favorable to the French language than its own, and then does not give it any effect.

The realist theory can explain Justice Nichols’s references to “practice” and “certain realities”, which he invokes in support of his interpretation of the intent of the legislator, and his references to the result of the interpretation of the arbitrator or to the fact that the employee speaks only English. All these references reflect the fact that for him interpretation and application take place simultaneously and are thusly confused. This is so obvious that the Office de la langue française saw in the Court of Appeal’s judgement in *Syndicat canadien de la fonction publique v. Centre d’accueil Miriam* a case apart justified by special circumstances, namely the fact that a unilingual anglophone was complaining about having received a notice in English⁵⁶.

Concerning the more political issues raised by the theories of interpretation and by this judgment, Justice Nichols seems to act to a certain extent as a balance to the legislative power, as being willing to abide by reality and being rather interventionist. He acts as a balance to the legislative power because he proposes the liberal interpretation, that favors individual freedoms or at least those of the employer, of a law designed to regulate these freedoms in order to promote the collective ideal of making French the common language in Québec⁵⁷. He is willing to abide by certain realities according to his own words, as we have seen. Since he was not constrained by the risk of a legislative amendment to Sections 41 or 89 after his judgment, because the legislator had amended the CFL so as to soften it three months before that judgment⁵⁸, Justice Nichols can be rather interventionist. This idea has since been proven true because his judgment has had a real impact on the scope of the CFL by restricting it, according to several legal authors⁵⁹.

⁵⁵ Éric Poirier, *La Charte de la langue française. Ce qu’il reste de la Loi 101 quarante ans après son adoption*, supra note 3, pp. 93-96.

⁵⁶ Office de la langue française, *Charte de la langue française et règlements dont l’application relève de l’Office avec notes explicatives et jurisprudence*, Montréal, OQLF, 2008, pp. 32-33.

⁵⁷ Guillaume Rousseau et Éric Poirier, « Le droit linguistique en France et au Québec: de l’intention républicaine à l’interprétation libérale ? », in *Proceedings of the World Congress on Linguistic Rights*, Roma, Aracne, 2017, should be published in 2017.

⁵⁸ *An act to amend the Charter of the French Language*, S.Q. 1983 c. 56.

⁵⁹ Éric Poirier, *La Charte de la langue française. Ce qu’il reste de la Loi 101 quarante ans après son adoption*, supra note 3, p. 70-73; Henri Brun et Guy Tremblay, *Droit constitutionnel*, Supplément, Cowansville, Yvon Blais, 1985, p. 46; Michel Plourde, *La politique linguistique au Québec*, Montréal, Institut de recherche sur la culture, 1988, p. 100 and Joseph-G. Turi, « Quelques considérations sur le droit linguistique » (1986) 27 C. de D., 463, p. 470.

This does not mean, however, that there will never be any subsequent judgments proposing another judicial interpretation of the CFL based on a different theory of interpretation.

Justice White and Justice Wagner’s Judgments in the Nightlife Case: A Classical Approach

In order to analyze the Nightlife case and the judicial interpretation of the CFL embodied by the rulings made in this case, it is necessary to summarize its facts and the decision of the Court of Québec, before analysing the judgment of the Superior Court.

Facts and Justice White’s decision in the Nightlife case. In the Nightlife case⁶⁰, the story concerns a magazine of which approximately 70% of the content is in French and the other 30% in English. It revolves around the fact that an edition of the magazine contains three unilingual English advertisements that do not appear in the separate English section. Sections 58 and 59 CFL which read as follows are invoked:

58. Public signs and posters and commercial advertising must be in French. They may also be both in French and in another language provided that French is markedly predominant. However, the Government may determine, by regulation, the places, cases, conditions or circumstances where public signs and posters and commercial advertising must be in French only, where French need not be predominant or where such signs, posters and advertising may be in another language only.

59. Section 58 does not apply to advertising carried in news media that publish in a language other than French, or to messages of a religious, political, ideological or humanitarian nature if not for a profit motive.

Justice White, speaking for the Court of Québec, refers to these facts, cites these sections, summarizes the positions of the parties and raises the questions in dispute as to whether commercial advertising written exclusively in English in the Nightlife Magazine is subject to the exception provided for in Section 59 or complies with the requirements of Section 58.

In answering this question, she dwells on the details of Section 58 and cites both the *Regulation defining the scope of the expression “markedly predominant” for the purposes of the Charter of the French Language*⁶¹ and the *Regulation Respecting the Language of Commerce and Business*⁶². She notes that there are no provisions in the CFL or these regulations specifically governing advertisements for bilingual magazines. This led her to quote Sections 40 and 41 of the *Interpretation Act* which provide:

40. The preamble of every statute shall form part thereof and assist in explaining its purport and object. In case of doubt, the construction placed on any Act shall be such as not to impinge on the status of the French language

41. Every provision of an Act is deemed to be enacted for the recognition of rights, the imposition of obligations or the furtherance of the exercise of rights, or for the remedying of some injustice or the securing of some benefit.

Such statute shall receive such fair, large and liberal construction as will ensure the attainment of its object and the carrying out of its provisions, according to their true intent, meaning and spirit.

⁶⁰ *Québec v. 9074-3527 Québec Inc.*, [2006] CQ 7174 AZ-50384838.

⁶¹ *Regulation defining the scope of the expression “markedly predominant” for the purposes of the Charter of the French language*, CQLR c. C-11, r. 11.

⁶² *Regulation respecting the language of commerce and business*, CQLR, c. C-11, r. 9.

She then quotes a long passage from *Bell Express Vu Limited Partnership v. Rex* which reads as follows:

“Other principles of interpretation – such as the strict construction of penal statutes and the “values” presumption – only receive application where there is ambiguity as to the meaning of a provision. (On strict construction, see: Marcotte v. Deputy Attorney General for Canada, [1976] 1 S.C.R. 108, at p. 115, per Dickson J. (as he then was); R. v. Goulis (1981), 33 O.R. (2d) 55 (C.A.), at pp. 59-60; R. v. Hasselwander, [1993] 2 S.C.R. 398, at p. 413; R. v. Russell, [2001] 2 S.C.R. 804, 2001 SCC 53, at para. 46. I shall discuss the “values” principle later in these reasons.

What, then, in law is an ambiguity? To answer, an ambiguity must be “real” (Marcotte, supra, at p. 115). The words of the provision must be “reasonably capable of more than one meaning” (Westminster Bank Ltd. v. Zang, [1966] A.C. 182 (H.L.), at p. 222, per Lord Reid). By necessity, however, one must consider the “entire context” of a provision before one can determine if it is reasonably capable of multiple interpretations. In this regard, Major J.’s statement in CanadianOxy Chemicals Ltd. v. Canada (Attorney General), [1999] 1 S.C.R. 743, at para. 14, is apposite: “It is only when genuine ambiguity arises between two or more plausible readings, each equally in accordance with the intentions of the statute, that the courts need to resort to external interpretive aids” (emphasis added), to which I would add, “including other principles of interpretation”⁶³.

Justice White then asks whether it would be plausible to believe that under Section 59 it was the intent of the legislature that advertisements written in English, without any translation, could be found in a magazine written mainly in French. To respond, she cites a section, which to her, appears to state “the primary purpose of the legislative provisions concerning the use of French in advertising”⁶⁴, namely Section 5 CFL which states that “Consumers of goods and services have a right to be informed and served in French”. She concludes that it would be unthinkable that the legislature’s intention under section 59 be to deprive Francophone consumers of information in their language.

Therefore, Justice White considers that in a bilingual magazine the advertisements must be in French, bilingual or, in accordance with an administrative interpretation by the Office de la langue française, in French in the French section and in English in the English section. This means that Nighthlife magazine, despite its 30% English-language content, is not a news organization broadcasting in a language other than French within the meaning of Section 59 and must therefore comply with section 58, which requires a clear predominance of French. And this predominance would not be a matter of percentage, because accepting a percentage of advertising in a language other than French in a magazine targeting a francophone clientele would not achieve the objective of Section 5.

Justice White then quotes Pierre-André Côté on the principle of strict construction of penal statutes, which would apply only if the impartial interpretation ordered by Section 41 of the *Interpretation Act* leaves a reasonable doubt as to the meaning or scope of the text. She also quotes him concerning Section 40 of this Act and the status of “fundamental law” of the CFL⁶⁵. She also refers to *Ontario v. C.P.* where

⁶³ *Bell Express Vu Limited Partnership v. Rex*, [2002] 2 RCS 559, par. 28-29.

⁶⁴ *Québec v. 9074-3527 Québec Inc.*, supra note 60, par. 30.

⁶⁵ Pierre-André Côté, *L’interprétation des lois*, 3^e éd., Montréal, Thémis, 1999, p. 473.

the Supreme Court, in the context of a constitutional challenge to a statute, advocates that a deferential approach should be taken in relation to legislation with legitimate social policy objectives⁶⁶.

Justice White then states: “The analysis of Sections 58 and 59 of the Charter of the French Language, in light of the provisions of the Interpretation Act, does not reveal any real ambiguity (...) it is, therefore, not necessary to resort to other principles of interpretation”⁶⁷. She concludes by rejecting the argument based on freedom of expression and the *Ford* case⁶⁸, because she believes that there are several options to exercise freedom of expression in compliance with the CFL.

It goes without saying that several elements of Justice White’s decision may be associated with the classical theory. The legislator’s intention is the alpha and omega of her reasoning. And she seeks answers to the questions first in statutes or regulations, and then only in tools to understand these texts, namely the principles of interpretation provided by the *Interpretation Act* and the purpose of these texts as set out in provisions of the CFL. She discovers the true meaning of the relevant texts, which means that they “do not reveal any real ambiguity”.

Even if she adds some interpretation arguments at the end of her decision, she makes a distinction between the phase of application and the phase of interpretation, which is almost totally completed when she reaches the phase of application.

Finally, her reference to *Ontario v. C.P.*, and thus to judicial restraint in the context of a challenge to a statute, and her refusal to give any relevance to the judgment in the *Ford* case, in which the court was interventionist, reflects deference towards the legislator and her respect of the sovereignty of Parliament.

Fewer elements of this decision are in line with the realist theory and in most cases can be relativized. The reference to an administrative interpretation of the Office de la langue française made after the adoption of the CFL cannot be linked to the search for the intention of the legislator and thus with the classical theory⁶⁹. But it can be linked to the realist theory according to which the text acquires its meaning only when interpreted by a competent authority. However, since Justice White states that “The Court is obviously not bound by an administrative interpretation of the Office de la langue française”⁷⁰, this element is not decisive.

As for the judge’s argument concerning the effect of accepting a percentage of advertising in a language other than French in a magazine addressed to a Francophone clientele, it seems to be focused on the issue of the effects of interpretation, which is a rather realist consideration. Considering that the judge’s concern for these effects is linked to the fact that this would be contrary to the objective of the provisions of the Act and to the intention of the legislator previously discovered, this concern nevertheless falls within the context of a classical interpretation.

It appears, however, that her insistence on the rights of Francophones is linked to a sociological reality, namely the fact that Francophones are more likely than non-Francophones to read magazines in French, and not to the text of the CFL, which confers rights related to the French language to all, and not only to Francophones. On this specific point, her reasoning is more realist than classical. Finally, when she links the CFL with legitimate social policy objectives, she can be seen as venturing somewhat into the

⁶⁶ *Ontario v. C.P.*, (1995) 2 S.C.R., p. 107.

⁶⁷ *Québec v. 9074-3527 Québec Inc.*, *supra* note 60, par. 38.

⁶⁸ *Ford v. Québec*, (1988) 2 S.C.R., 712.

⁶⁹ Pierre-André Côté, *The Interpretation of Legislation in Canada*, *supra* note 1, p. 11.

⁷⁰ *Québec v. 9074-3527 Québec Inc.*, *supra* note 60, par. 19.

political realm, which the realist theory admits, but not the classical theory which obeys the rule of separation of powers.

It remains to be seen whether the judgment of the Superior Court in the *Nighthlife* case⁷¹ will confirm or overrule Justice White's decision, which is much more classical than realist.

Justice Wagner's decision in the *Nighthlife* case. Following an appeal from the decision of Justice White, Justice Richard Wagner rendered judgment on behalf of the Superior Court. After a brief recapitulation of the facts, he quotes Sections 58 and 59, and then states: "In a very well-structured decision, the trial judge (...) concludes, in light of the objective pursued by the Charter of the French Language, that it is unnecessary to attempt to interpret a clear text and that it must be understood that the exception of paragraph 59 of the Charter only applies to publications written exclusively in a language other than French"⁷².

He goes on to summarize the positions of the parties, adding that "According to a principle of interpretation now well established, the provisions of a law must be read in relation to each other in order to ascertain the intention of the Legislator"⁷³. For him, the objective of the legislator is to ensure the predominance of the French language in all spheres of social activity in Quebec. For this reason, he considers that the proportional approach of accepting 30% of advertisements in English in a magazine with 30% of the content in English is incompatible with the intention of the legislator.

On the idea of allowing a French-language magazine to include in its pages a few articles in English so that it could be allowed to include only English advertisements, the judge stated that "This is exactly the result that is to be avoided by a Legislation that ensures that all citizens who have access to a French-language text or periodical can understand the scope of the advertising contained therein"⁷⁴. Finally, Justice Wagner rejects the argument that, since the allegations concerned only three ads, the trial judge should have taken into account the absence of actual harm rather than finding an infringement. He does not accept this argument because it "is much more a matter of fairness than of the application of the rule of law"⁷⁵. And he goes on to say that "in order to preserve the principle of the stability of the legal order (...) [the tribunal] cannot modulate the application of a law according to the gravity or importance of the offense"⁷⁶.

Judging Justice White's decision "very well-structured" and refusing to overturn it, Justice Wagner seemed to adhere to the classical interpretation embodied in that decision. The rest of his judgment confirms that. His reasoning revolves around the intent of the legislator, which must be sought by reading the provisions of the Act, which he quotes from. He endorses the decision of Justice White which he interprets as meaning that Section 59 CFL is a clear text in light of the purpose of the statute and therefore does not need to be interpreted. His refusal to vary the application of the law according to the gravity of the offense and therefore the facts reflects a refusal to leave the facts to which the rule of law should be applied influence the interpretation. He therefore distinguishes between interpretation and application. Better still, he does so in the name of preserving the "stability of the legal order", a principle related to the classical theory of interpretation.

⁷¹ 9074-3527 *Québec Inc. v. Sa Majesté La Reine*, [2007] CS 472 AZ-50415401.

⁷² 9074-3527 *Québec Inc. v. Sa Majesté La Reine*, *ibid*, par. 6.

⁷³ 9074-3527 *Québec Inc. v. Sa Majesté La Reine*, *ibid*, par. 23.

⁷⁴ 9074-3527 *Québec Inc. v. Sa Majesté La Reine*, *ibid*, par. 26.

⁷⁵ 9074-3527 *Québec Inc. v. Sa Majesté La Reine*, *ibid*, par. 28.

⁷⁶ 9074-3527 *Québec Inc. v. Sa Majesté La Reine*, *ibid*, par. 29.

As to the aspect of his decision which may be described as realistic, his concern for the result of interpretation, as it is linked to the objective of the legislation, it can also be considered compatible with the classical theory. Furthermore, in accordance with the text of the CFL, this objective is reformulated to target “all citizens who have access to a French-language text or periodical” and not only Francophones. In this respect, Justice Wagner’s decision is more in line with the classical theory than that of Justice White.

Conclusion

If we take a look at the four tables presented above and include the names of the three relevant judges (Nichols, White and Wagner)⁷⁷ in the appropriate boxes, according to our analysis of their interpretations in light of classical and realist theories, this gives the following:

Table 5. Main Elements of the Theories Related to the Author

Theory	Author	Goal of Interpretation
Classical	Author of the text (legislator)	Reveal the legislative intent: Nichols, White and Wagner
Realist	Interpreter (judge)	Create the norm: Nichols

Table 6. Main Elements of the Theories Related to the Text

Theory	Clarity of the Text	Importance of the Text
Classical	Clear meaning <i>a priori</i> or determined by resort to principles of interpretation: White and Wagner	Very important: White and Wagner
Realist	Not clear <i>a priori</i> : Nichols	Not very important

Table 7. Main Elements of the Theories Related to Application

Theory	Interpretation and Application	Importance of Anticipated Effects
Classical	Dissociated and successive: White	Not important: Wagner
Realist	Interdependent: Nichols	Very important: Nichols

Table 8. Main Elements of the Theories Related to Political or Legal Principles

Theory	Judge vs Legislator	Political or Legal Principles
Classical	Deference: White	Sovereignty of Parliament: White Separation of powers Legal certainty and stability: Nichols and Wagner
Realist	Interventionism which can be moderated by constraints: Nichols	Willingness to abide by reality: White and Nichols High standards of law Balance to the legislative power: Nichols

It is clear from these tables that Justice White and Justice Wagner, who arrive at conclusions favorable to French, share a judicial interpretation more in line with the classical theory (even though Justice White is a little realistic because of her willingness to abide by reality). Justice Nichols, who comes to a conclusion that is unfavorable to French, has a much more realist judicial interpretation (even if he adheres a little to the classical theory by invoking the intention of the legislator and referring to legal uncertainty).

Does this mean that the classical theory is more likely to promote the attainment of the objectives of the CFL than the realist theory? More judgments related to the CFL should be analyzed to confirm this, but the results of our analysis of the judgments in the Miriam and Nightlife cases points in that direction.

⁷⁷ We exclude Arbitrator Moalli and Justice Nolan because their interpretations have been overturned or put in a minority, as well as Justice Bergeron and Justice Monet, whose interpretations are too unsubstantiated.

This would be logical, since the classical theory is centered on the legislator who expresses the will of the people in the general interest, which implies a more collectivist methodology, whereas the realist theory is centered on the judge who expresses his own will on an individual case and thus proceeds through methodological individualism. The first methodology is probably more in line with the mostly collective objectives of the CFL.

Does this mean that the CFL should always be interpreted in a strictly classical way, even though this may have the effect of limiting individual freedoms? No, because no one can deny the relevance of the realist theory as a descriptive framework. Of course, the judge may have a power of interpretation contributing to shaping the norm set forth by the CFL. But he should exercise it in a way that convinces the reader that he respects the classical theory which is normative and based on political or legal principles particularly relevant in Quebec language policy.

By proposing a judicial interpretation based on the intent of the legislature and section 89, but disregarding several words of that section, Justice Nichols fails to convince that he truly respects the classical theory. He reaches a radical interpretation, the authorization of English unilingualism in individual employer-employee communications, when there was not only a radical opposite interpretation, the obligation that such communications be in French only, but also an interpretation in a spirit of compromise, the requirement that such communications be in French or in French and in another language.

Justice White succeeds in convincing us that she respects the classical theory. And this does not prevent her from being probably partly realistic. In fact, with her proposed interpretation of Section 59, she somehow succeeds in reconciling the two theories. Between three possible interpretations (general authorization of English advertisements in bilingual journals, authorization only in a separate English section, and a general prohibition), she chooses the middle way, an interpretation in the spirit of compromise⁷⁸. While there is no clear evidence that this is the intention of the legislature, the fact remains that, pragmatically and therefore realistically, it is more likely to approach it, which, compared with Justice Nichols's opinion, is already much better.

Acknowledgement

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⁷⁸ Éric Poirier, *La Charte de la langue française. Ce qu'il reste de la Loi 101 quarante ans après son adoption*, *supra* note 3, p. 205.

Keynote Address IV

A Study on Language Normalization of Criminal Indictments Under the Background of Judicial Reform in China

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[Abstract] *Based on the problem orientation, this paper aims to emphasize that we must insist on the position of the nature and functions of indictments and resolve the following issues: to remove the language expressions of non-procedural meanings from indictments; to remove the common derogatory stylistic features, political expressions and subjective evaluative words from indictments with a view to ensuring the objective and neutral position, as well as the obligatory nature of prosecutors; to remove the direct quotations of legal provisions beforehand in case-fact expressions and evidence presentation with a view to avoiding the suspicion of incriminating criminal suspects in advance and the discrepancy of linguistic expressions and contents. From a certain point of view, the correction and normalization of the stubborn problems in indictments embody the researchers' spirits of scientific research and service by carrying on the problem orientation and forging ahead in spite of difficulties.*

[Keywords] *normalization; criminal indictments; rule of law; judicial reform*

At present, human rights protection and civilized law enforcement have been emphasized in China. Under this background, do the criminal indictments issued by procuratorial organs need to be examined and specified by the standard of the *human rights protection and civilized law enforcement*? As far as the current situation of criminal indictments is concerned, the answer is affirmative. From *rule by law* to *rule of law*, from *criminal* to *criminal suspect*, Chinese law has been changing. In fact, these changes have been circling around the two terms of legal language which Chinese people are familiar with: 法制 (*fǎ zhì*, the corresponding English is *rule by law*) and 法治 (*fǎ zhì*, the corresponding English is *rule of law*).

In 1999, before the amendments of Constitution of China, Li Buyun, a jurist from Chinese Academy of Social Sciences (CASS), urged to write *managing state affairs according to law* into the state constitution at the Forum of Jurists held by the Central Government.

From *rule by law* to *rule of law*, the jurists from CASS have argued about this for 20 years. The difference of only a single word marks a major breakthrough of the statecraft thoughts and an important milestone in the process of rule-of-law construction of China. The *rule of law* is opposite to the *rule of man*. The *rule by law* focuses on system construction, namely, the construction of laws and regulations. The *rule of law* refers to the management and governance according to law. A complete legal system does not mean a rule-of-law country. It is in this sense that in 1997, the Party's 15th National Congress changed the *construction of a socialist country under the rule by law* to the *construction of a socialist country under the rule of law* and turned the emphasis of legal system building to a full range of managing state affairs according to law.

On June 9, 2010, the Supreme People's Procuratorate issued *the Civilized Language Rules of Procuratorial Organs*, which is another footprint in the process of the construction of judicial language in

China after *the Basic Norms of Professional Ethics of Judges and the Code of Practice for Lawyers*. In *the Civilized Language Rules of Procuratorial Organs*(2010), Article 5 stipulates that the civilized language of Procuratorial Organs is based on national common mandarin as the basic media and meanwhile respects the utilization of the languages of minorities and deaf-mute incompetents as well as regional dialects; Article 6 stipulates that the civilized language contains the wordings of law enforcement and procuratorial work in relation to reception, questioning, interrogation, appearing in court, propaganda and mass work, etc. in procuratorate affairs and comprehensive work. The specific rules of the aforementioned wordings are stipulated equally and respectively from Article 7 to Article 13.

On the back of these provisions stipulated by the Supreme People's Court and the Supreme People's Procuratorate, we can comprehend the advancing pace of constructing the rule-of-law civilization in China. Our country requires judicial officials to follow the constitutional and legal provisions and to respect and guarantee human rights when they use judicial language, which embodies the socialist rule-of-law concept, legal provisions and humanistic solicitude. These provisions have really brought about a new look for the judicial language of our country – the phrases like *[gǒu] [jì] [tiào] [qiáng]* (*Desperation drives a dog to jump over a wall*) have been eliminated in legal documents; the term *[rén][fàn]* (*criminal*) has been removed from legal provisions after it had been used in the stipulations of Criminal Law for 17 years on account of its problem of human rights violation.

From *criminal* to *criminal suspect*, the terms in criminal indictments of our country should be further normalized. The following problems still need to be improved.

Eliminate the Common Derogatory Words from Indictments

The stylistic features of a text depend on corresponding words used in this text. The common derogatory words in the texts of indictments have caused the salient problems that such words deviate from objective and fair obligations of prosecutors, e.g. the common derogatory words *[huǒ][tóng]* (*do sth. in collusion with sb.*), *[dé][chěng]* (*accomplish sth. in an evil purpose*) and *[cuàn][zhì]* (*flee to*), etc.

Example 1

At about 21 o'clock of May 3, 2014, Defendant Liu fled to the corridor of the 8th floor, Unit 1, Building No.3, a residential district of F-District, B-City in collusion with Huang (fugitives), stole the yellow electric bicycle of Brand Yadea parked by Victim Zhang and hid it beneath a billboard on the roadside.

The wording *[cuàn][zhì]* (*fled to*) in the above example describes the way of the defendant's arrival at the scene of crime. From the origin of the word *[cuàn]* (*flee*), traditional Chinese “竄” (*cuàn*) is a word with associative meanings. “鼠” (*mouse*) and “穴” (*hole*) indicate that a mouse flees to a hole and hides itself in it. In modern Chinese, they refer to run and escape frantically and often indicate enemy troops, beasts and bandits with obvious derogatory senses (Dictionary Editorial Office, 1996, p. 251). Similar words are *[liú][cuàn]* (*flee hither and thither*).

Example 2

At about 4 o'clock of November 25, 2013, Defendant Duan...entered Victim Wang's room while she was sleeping soundly, with intent to have sex with her forcibly by resorting to violent means of covering her mouth and pressing her down, but did not accomplish this evil purpose because the Victim's husband returned home afterwards.

The wording [wèi][dé][chěng] (*did not accomplish this evil purpose*) in the above example indicates the Defendant's **attempted crime**. [Dé][chěng] (*accomplish sth. in an evil purpose*) means *to achieve one's goal* and often contains derogatory sense indicating conspiracy or bad success. At present, the wording [dé][chěng] has been used in almost all the indictments concerning the cases of attempted crimes. The application of [dé][chěng] implies that procurators have already had the affirmation that defendants had committed the crime. Tracing it to its source, the application of [dé][chěng] in indictments follows the example of the wording [wèi][suì] (*uncommitted*) in Article 23 of the Criminal Law of China.

These words, as well as [rén][fàn](criminal) and [gǒu][jī][tiào][qiáng] (Desperation drives a dog to jump over a wall), etc., all have the rhetorical features of derogatory senses. There is not much difference among them in this sense. They are the presumption of guilt and the product of rule-of-man context. Now in the situation of civilized law enforcement of managing state affairs according to law and presumption of innocence, such words should be eliminated completely.

Example 3

At about 16 o'clock of January 10, 2014, Defendant Guan...intended to have illicit sexual intercourse with Hu by using verbal threats but did not accomplish his evil purpose for his own reason. At about 23 o'clock of the same day, Defendant Guan...had illicit sexual intercourse with Hu forcibly by using the same means.

The wording [jiān][yín] (*have illicit sexual intercourse with sb.*) is used in the above example instead of the phrase [qiáng][jiān] (*raping*). The phrase [jiān][yín] (*have illicit sexual intercourse with sb.*) is a derogatory term which means *to have sexual relations with women forcibly by violent force or improper means*. In fact, [jiān][yín] refers to [qiáng][jiān] from its meaning. In the situation of factual description, it is a legal evaluation of defendants' acts with the suspicion of advance conviction.

Eliminate the Common Formulaic Expressions from Indictments

Formulaic expressions are used inappropriately in the case-fact expressions of indictments, namely, the wordings are quoted directly from the conviction and sentencing discretion in legal provisions instead of objective statements of litigant's acts. Furthermore, the inappropriate use of formulaic expressions has already formed regular formula and resulted in advance incrimination and human rights violation, e.g. [yǐ][fēi][fǎ][zhān][yǒu][wéi][mù][dì] (*for the purpose of illegal possession*) and [lì][yòng][zhī][wù][zhī][biàn] (*by taking advantage of official posts*), etc.

Example 4

From 2009 to 2011, Defendant Zhao embezzled ¥464000 from agricultural infrastructure funding appropriated by Government by taking advantage of his official post and by using the means of repetitive expenses while he was serving as a village cadre of Village Xi Heng He, Xi Tian Ge Zhuang Zhen, Miyun County.

The wording *by taking advantage of his official post* is used in the above example instead of the description of the defendant's specific acts, which results in the suspicion of advance incrimination. Prosecutors must insist on the law enforcement positions of objective obligations, justice and civility, eliminate formulaic expressions so as to refine the objective facts and evidence hidden behind such expressions. If prosecutors wish to achieve this purpose, they must remove the stubborn problem which has been existing for a long time in indictment writing, discard the mentality for convenience in case of

errors, develop a habit of describing case facts clearly and making evidence chain complete, and insist on the judicial concept of objectivity, neutrality and justice.

Eliminate the Inappropriate Vague Words from Indictments

At present, the formulaic expressions in long-term professional practice also contain a type of inappropriate vague words in indictments. Such words can cover up the truth in use. One of the most typical formulaic expression is [yīn] [suǒ] [shì] (*for trifles*). In modern Chinese, [suǒ] [shì] (*trifles*) refers to trivial matters, indicating insignificant affairs in life. In diverse cases, whatever the facts are, the wording [suǒ] [shì] used in all the indictments makes facts unclear.

Example 5

At about 22 o'clock of January 21, 2014, Defendant Shui had verbal conflicts with Li (male, died at the age of 54) for trifles at home in Room 103, Unit 2, Building No.2, Tianhong Courtyard, Bei Da Qiao, Shahe Town, Changping District, Beijing City. Afterwards Shui chopped Li's head with a knife and caused his death for craniocerebral injury and hemorrhagic shock.

The above example is the fact description of intentional homicide accusation. [yīn] [suǒ] [shì] (*for trifles*) is the common expression of the cause of a case in indictments. The intention of defendants in the cases of intentional homicide or the cause of a case concerns the judgment of the subjective evil character of defendants. It is too fuzzy that [yīn] [suǒ] [shì] is only used in the above example to describe the cause of the defendant's acts and the judgment of [suǒ] [shì] (*trifles*) is full of subjective colors. Everybody has different cognition of [suǒ] [shì] and therefore, it is not beneficial to the judgment of the subjective evil character of defendants.

Eliminate the Words of Non-Procedural Meanings

The criminal indictments of procuratorial organs are the legal documents examined and made by people's procuratorates. They are applicable to instituting a public prosecution to the People's Court when people's procuratorates are determined to refer the accused to the court. The nature and function of indictments determine that the language expressions of non-procedural meanings are redundant and sometimes harmful. Therefore, all of the following expressions should be abandoned, such as some political words: [mù] [wú] [guó] [fǎ] (*defy the national law*) and [wú] [shì] [fǎ] [jì] (*disregard the law and discipline*) etc., along with the words of the subjective evaluation on defendants made by prosecutors, e.g. [jìng] (*have the impudence to*) and [mǎn] [zú] [gè] [rén] [yín] [yù] (*satisfy one's personal lust*), etc.

Example 6

Defendant Zhao defied the national law and caused the wrongful death. His act has violated the Article No. 233 of the Criminal Law of the People's Republic of China and constituted the crime of manslaughter.

In indictments, such words as [mù] [wú] [guó] [fǎ] (*defy the national law*), [wú] [shì] [fǎ] [jì] (*disregard the law and discipline*), [wú] [shì] [guó] [fǎ] (*disregard the national law*), [fǎ] [lǜ] [yì] [shì] [dàn] [bó] (*faint legal consciousness*) and [fǎ] [zhì] [guān] [niàn] [dàn] [bó] (*faint sense of legal system*), etc. can only strengthen the imposing manner, but they do not have any argumentative function of the crime accusation of procuratorial organs. Furthermore, they affect the entire language features of objectivity, rationality, neutrality and moderation.

Example 7

The Court considers that Defendant Piao defied the national law, had the impudence to rob other people's money with a knife and act indecently against women by force with the intent to have illegal possessions and satisfy his personal lust. His acts have violated the Article No. 263 of the Criminal Law of the People's Republic of China with clear criminal facts and irrefutable, sufficient evidence. Robbery crime and compulsory indecency shall be investigated for their criminal liability.

The wording [jìng] (*have the impudence to*) in the above example indicates the strong subjective malignancy of the defendant. In modern Chinese, [jìng] means *unexpectedly*, showing that the content modified by it does not tally with socio-cultural rules or legal regulation and that the subject of language selection has his negative judgment or surprising emotions of the selected facts. This is a highly emotional word, which violates the objective obligations of procurators obviously. The wording [mǎn] [zú] [gè] [rén] [yín] [yù] (*satisfy one's personal lust*) suggests the procurators' subjective speculation of the defendant's intention, with highly derogatory connotations and likewise violates the objective obligations of procurators.

All of the wording in the above examples are taboo in respect to human rights and civilized law enforcement at present and must be eliminated from indictments. Based on the problem orientation, we must insist on the position of the nature and functions of indictments and resolve the following issues: to remove the language expressions of non-procedural meanings from indictments; to remove the common derogatory stylistic features, political expressions and subjective evaluative words from indictments with a view to ensuring the objective and neutral position as well as the obligatory nature of prosecutors; to remove the direct quotations of legal provisions beforehand in case-fact expressions and evidence presentation with a view to avoiding the suspicion of incriminating criminal suspects in advance and the discrepancy of linguistic expressions and contents. From a certain point of view, the correction and normalization of the above-mentioned stubborn problems in indictments embody the researchers' spirits of scientific research and service by carrying on the problem orientation and forging ahead in spite of difficulties.

Social needs are the impetus of discipline development and the discipline tasks are the life of discipline. To achieve the great rejuvenation of the *Chinese Dream*, the deepening of the judicial reform is progressing smoothly in present China. The argumentation and viewpoints of the normalized indictment making in this paper take root in China proper. By integrating theory with practice, they have become the specific embodiment of the matching project of the judicial reform – the Judicial Language Construction and therefore, have practical significance.

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Keynote Address V

Developing or Designing an Ideal, Reliable Language Policy for Teaching and Learning in South African Schools

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[Abstract] There are eleven official languages enshrined in the Constitution of South Africa. Teaching and learning from grade one to secondary levels is conducted in English as a medium of instruction. An only African language as a subject is taught in vernacular. There is an outcry from different language groups wishing that teaching and learning be done in one's mother tongue. This paper seeks to investigate and develop an ideal language policy where mother tongue would be used. Several published and unpublished policy documents would be analyzed to develop an acceptable policy acceptable to all South African schools using qualitative methodology.

[Keywords] developing; ideal; language policy; teaching, learning

Introduction

The topic discusses how the reliable language policy should be developed or designed. *The Oxford Dictionary* (2010, p. 334) defines the word 'develop' as 'unfold reveal, bring of come from latent to an active or visible state'. It means 'make or become fuller, more elaborate or systematic or bigger treat so as to make picture visible; make progresses'. On the other hand, *The Oxford Advanced Learner's Dictionary* (2010, p. 4007) also states that develop is "to think of or to produce a new idea, product".

The Macmillan English Dictionary for advanced learners (2007, p. 399) defines 'design' as 'to decide how something will be made, including how it will work and what it will look like, and often to make drawings of it'. *The Longman Dictionary of Contemporary English* (1985, p. 297) defines design as 'a plan in the mind, a drawing or pattern showing how something is to be made'. On the other hand, the *Oxford Advanced Learner's Dictionary* (2012, p. 311) defines 'design' as 'the general arrangement of the different parts of that is made such as a building, book, machine, etc.; the art or process of deciding how something will look, work, etc.; a drawing or plan from which something may be made; an arrangement of lines and shapes as a decoration'. Deducing from these definitions, one may conclude that the above-mentioned discussion has to do with the drawing or developing of mental thought about an acceptable language policy to replace the current one which does not satisfy the requirements of the constitution of the Republic of South Africa and the majority of the population in terms of language use in the teaching and learning and of South African child in South African schools.

Language Policy Before 1996

Before 1996, language policy of South African schools was used to compartmentalize people of the same language group into homelands according to the apartheid policy of separate development. The Ped were in the north occupying their homeland called Lebowa speaking Sesotho sa Leboa or Sepedi. In the Orange Free State, there was the Sesotho (South Sotho) speaking community within their homeland called Quaqua. The Tswanas were in their independent homeland called Bophuthatswana which was found in

the north western area of South Africa. In the east, bordering Swaziland, there was a SiSwati speaking community. In the northern part of South Africa, there was a Tshivenda-speaking community in the then Republic of Venda. On the eastern part of the then-Republic of Venda, there was a Xitsonga-speaking community occupying a self-rule homeland. The Zulu-speaking community was in its homeland in Natal, and the Xhosa-speaking community was in the Eastern Cape in two homelands known the Republic of Transkei and Republic of Ciskei. On the eastern side of Lebowa, which was occupied by a Pedi-speaking community there was the isiNdebele-speaking community in their separate homeland called Kangwane or KwaNdebele. The rest of South Africa was occupied by the English and Afrikaans-speaking communities.

The African languages such as Sepedi, Sesotho, Setswana, SiSwati, Tshivenda, Xitsonga, isiNdebele, isiXhosa, and isiZulu were used in the primary schools in all the parts of the country. All subjects in schools from beginner to primary school were taught and learned in the vernacular as a medium of instruction. They felt that they were not included in the economy of the country. From Grade 5 to Grade 12 (previously known as Form 1 to Form 5), all subjects, with the exception of vernacular, were taught and learned in English. Only vernacular was taught and learned in each of South African languages.

Language Policy after the 1996 Dispensation

In 1994, the Republic of South Africa conducted a democratic election in order to ‘build a unified and democratic South Africa able to take a rightful place as a sovereign state in the family of nations’ (Constitution of the Republic of South Africa preamble). The 1996 Constitution of the Republic of South Africa advocated that South Africa belongs to all who live in it, unified in their diversity (Constitution of the Republic of South Africa preamble), and built a democratic non-sexist South Africa where people have rights of life and place where to stay. No one could take away these rights unless considered unconstitutional.

Section 29(2) of the Constitution of the Republic of South Africa (Act No. 108 of 1996, p. 4) states that ‘Everyone has the right to receive education in the official language or languages of their choice in the public, educational institution where that education is reasonably practicable’. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium, taking into account, equity, practicability, and the need to redress the results of past racially discriminatory laws and practices.

The 1996 Constitution of the Republic of South Africa brought about a dispensation that the government was not prepared for since the implementation of the Constitution of the Republic of South Africa. From 1996 to 2016, it is now about twenty years having the subjects in the primary school systems being taught or learned in African languages as a medium of instruction. The subjects from secondary schools to the university level are taught or learned in English. All prescribed books have been written in English, contrary to the constitutional requirements of Section 29(2) of the Constitution of the Republic of South Africa wherein it is required for everyone to have a right to receive education in an official language of their choice that they would understand best.

The failure of the government to take language seriously has prompted this researcher to establish that the problem could be from not seeing any will of the government to take steps to see to it that the issue of language policy could be solved. This researcher came up with alternatives which may be developed or designed to the meet the requirement of South African school language policy. It is hoped

that the alternatives would give ideal and suitable language policy for teaching and learning in African Languages in South African schools.

Methodological Perspective

This researcher seeks to investigate and discuss how an ideal, reliable and suitable language policy or planning with which teaching and learning through one's mother tongue would be possible. This will be accomplished by analyzing and observing the current language policy documents to enable the researcher to develop or design an ideal, reliable and suitable language policy or planning using qualitative methodology.

Historical Analysis

This methodology is supported by Kaplan and Baldauf Jnr (1997, p. 88) when they say: 'The roots of many languages planning problems lie in the role and historical development of language usage in a particular policy or location'. It is found that if one understands the historical circumstances it may give the research example time to understand why there is such a language problem in the past, current or future. Historical background and other elements may indicate the basis and nature of the problems. A historical fact of paying attention to the authentic city of different sources of information as contained in the language change which occurred over time. The historical analysis may be used to shed light on the nature of language problems that exist in the current life.

At present, teaching and learning in the primary schools is conducted in African languages, whereas the prescribed books and other works, such as Nature Study, History, Social Study, Physical Science, General Science and other materials are in English. Although teaching is conducted in African languages, it is only after educators have translated the materials into several African languages. To enable that teaching and learning is possible in African languages, there would be a need of translating or interpreting the content of prescribed materials into African languages. The question is how to do it? It would take years to complete the project.

Need for Translation of Teaching Materials

The language for teaching and learning the subjects indicates that translation should start from Grade 1 to Grade 5 and should be under the leadership of the Committee of English and African languages/linguists/experts; subject experts/specialists should also be established. English linguists would help explain what is meant by the English language concepts in the prescribed books written in English, while the African language linguists would create terminologies and the subject experts/specialists who teach the subjects would explain what the subject concepts mean. An example of such an ad hoc committee should be like the ones established by the Department of Arts and Culture whose functions were to develop terminologies for specific subjects. All of the prescribed materials that were written in English should be translated into African languages. There should be concrete arrangements so that at the end of each translation process, the materials are printed and published. At the end of the year, the prescribed materials translated into African languages should be sent to the schools for use in teaching and learning purpose in one's own mother tongue.

Secondly, the prescribed materials from Grade 5 to Grade 12 should be translated into several African languages. The arrangements should be made that the printed materials should be checked or edited and published. The translation ad hoc committees should be prepared that, by the end of the year,

they should be finished with the translation, printing and publication of learning materials for several grades for the next year.

At the end of the year, the arrangements should be made that the materials are printed, and they are in several African languages. The implementation of teaching and learning in several African languages should be conducted progressively. The first year should start with Grade 5, the following year should be Grade 6, and then follow with Grades 7, 8, 9, 10, 11, and lastly, Grade 12. The implementation year of grades would assist members of the committees in establishing what should be corrected in the prescribed materials in regard to translated materials from English into African languages. At the same time, the authors writing the new material should be busy writing and publishing in their African languages.

Creating Enough Infrastructure in Terms of Classrooms

The translation of the prescribed material from English into several African languages causes a shortage in classrooms. Therefore, additional classrooms for learners and students will be needed. The translation of several subjects into several African languages creates avenues that there would be a need for additional classes which would be required for each standard, or grade, in each subject. The schools may be composed of many pupils or students learning several subjects that are taught and learned in several African languages. There would be many additional classes to cater for learners and students learning one subject in several African languages. This could enable the schools to cater for several languages that are taught in such a school. A school may be attended by pupils or students not learning these languages in a school. The huge number of subjects in a school has to do with the huge number of teachers that would be needed in that school.

Arrangements should be made that there should be more classes in one school to cater for learners or students of several languages and several subjects. There will be several classes for several languages which cater for teaching and learning at the same time.

Provision of Prescribed Learning Materials

At the beginning of the year, the learners and students do not need to buy the prescribed book/learning materials for the primary and secondary levels. They go to school and the prescribed books are given to learners and students free of charge. The only issue is that if the pupils or students lose the book or prescribed materials then they should buy copies to replace them to enable that the group following thereafter is able to receive the assistance from the prescribed book available at the schools.

Even the prescribed materials written in African languages should be prepared to be given to the pupils or students in such a school. The translated prescribed books should be sent to different schools when the time is due. The materials should be given to the learners and students as their learning materials.

Provision of More Additional Teachers

Since one subject will be in several African languages that are found in the area, the government may be forced to require more additional educators. The government may say it does not have enough or adequate funds to employ a huge number of educators. Where will the educators come from? Historical background informs us that there are a huge number of educators who are not employed. There are those who were educated and gained profession under the *Funza* Bursary Scheme. There were many educators who have completed their educational profession, but they are currently unemployed. The huge number of learners or students who are unemployed would find a new avenue where employment would open for

them. In addition to the above assertion, there would be a huge number needed for the translation of prescribed materials of different languages in South Africa. There would be a huge number of educators to teach several subjects in their home languages. There would a huge number of persons who would follow a translation profession that would assist the government in the translation or teaching and learning in several subjects in their own home languages.

Provision of More Funds

The project will require that more and adequate funds are channeled to it. The funds will be needed for translation services, printing and publishing services of the prescribed materials, provision of adequate and enough number of educators to teach the subjects, and the provision of adequate number of classes. Indeed, the project needs a large chunk of funds which should be channeled to it. The issue is that South African government has enough adequate money to can fund this noble project. This is shown in the recent protest. University students embarked on //UNIVERSITY FEES MUST FALL// protest after the government responded that there will be a free education. The students want the fees to fall away. When the students did not see anything coming from the promise, they took to the streets. The government later responded to the students that they cannot afford it & it would be insurmountable mountain to climb to fund such a project. It was estimated that to fund the university students it would need 2-3 billion rands.

Recently, the Sowetan dated Monday, (14 November 2016, p. 13) published a story entitled '*Billions wasted by district municipality*'. In the story, it was alleged that 'ORTambo District Municipality Council has setup a committee to investigate more than 4-billion rands in irregular and wasteful expenditure incurred in the Eastern Cape authority in just five years'. The above-mentioned amount could have been used to meet the funding of the project rather than to spend the money in a useless and fruitless expenditure.

SWOT Analysis

The Macmillan English Dictionary (2017, p. 1517) defines SWOT which means that it is as 'an examination of an organization's strength, weaknesses, opportunities and threats used as a way of measuring how successful it can be and as a way of planning for the future'. The strength of the development or designed policy to measure whether it would be useful to the communities of South Africa is to enable people to study and communicate in their several African languages that had been advocated by the constitution of the Republic of South Africa. This project would attract every member of the society and it would be a supported initiative since every member of the society would be forced by circumstances to support it.

Secondly, whether the authorities will be free to channel the funds to the project where they had failed before, Section 6(2) of the Constitution of the Republic of South Africa (Act 108 of 1996, p. 4) gave the authorities powers to support languages of the Republic of South Africa which reads thus,

'Recognizing the historically diminished use and status of the indigenous languages of our people, the state must take practical and positive measures to elevate the status and advance the use of languages'.

Will they attend to language voluntarily when they have failed to act when they were mandated by the provision of the law? It is doubtful for them to act.

Another weakness is the perception of the communities of South Africa on education. The community perceive teaching and learning in African languages lowly and they perceive that getting

education through teaching and learning in several African languages as a media of instruction is adversary considered. They consider that to get education through African languages does not open them avenues of opportunity of employment. Because of the apartheid condition that people were under, people were forced to teach and learn through the English language. Failure to understand the English language was perceived as, or considered, uneducated. This is supported by Musehane (2002, p. 276) when he stated that English is sometimes used as a measure to gauge student's level of education as well as staff members' knowledge during interviews. Another aspect to be considered is effective expression in the English language; if one who cannot express himself or herself well in English, his or her chances of appointment are slim.

The opportunities are diverse of advancing African languages, translation of prescribed books, which when stuck to, there would be many opportunities in the African languages which they understand and could learn best. The threats facing the teaching and learning in African languages may be perceived as a step backward when learners and students who were taught in African languages may be reminded of the time where they were under the apartheid rule when the learners or students were compartmentalized into the homelands. They would perceive it as if they are in the homelands education system where educators, students and learners are not exposed to the outside world.

Conclusion

The above language policy or planning will be ideal and suitable for educators, pupils and students to teach and learn in their several African languages where they can understand best. The policy would be more acceptable to learners, students, educators and parents because it would be the first time in their lives to teach and learn in one's African language which would be understood by both teachers, learners, students and parents. When one teaches or learns in one's African language, it would be internalizing of one's culture. When teaching or learning is conducted in a foreign language there is no guarantee that one's culture would not get lost in the process.

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Keynote Address VI

Communities of Message Senders and Recipients in Legal Settings and their Communicative Needs. The Translator's Perspective

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[Abstract] *This presentation will be devoted to types of communities communicating in legal settings for various purposes. The author will focus on the communicative needs of message senders and recipients and communication strategies they may employ from the translator's perspective. The focus of the presentation will be placed on the communication reality and the choice of the translation strategy which should be applied in the translation or interpretation process. The following exemplary types of communicative communities taking part in legal communication will be accounted for:*

- *The multi-lingual (international) communicative community,*
- *The European Union communicative community,*
- *The common law communicative community,*
- *The civil law communicative community,*
- *The business-oriented foreign communicative community,*
- *The legal system ignorant communicative community,*
- *The business relation bound communicative community (Matulewska 2013).*

Of course, it is possible to distinguish many more communicative communities, which embrace recipients of legal texts and who participate in communication in various legal settings. However, for the purpose of this work only the most typical ones will be taken into consideration to illustrate the implementation of the translation strategies.

The research methods comprise the following: the analysis of comparable texts, the method of axiomatization of legal linguistic reality, the terminological analysis of research material, the concept of adjusting the target text to the communicative needs and requirements of the community of recipients, the techniques of providing equivalents for non-equivalent or partially equivalent terminology, the analysis of pertinent literature and finally the hypothetical-deductive method.

The research hypothesis is put forward that the more homogeneous the communicative community of message senders and recipients is, the easier the translator's choices in respect to the translation strategy are. Consequently, the more heterogeneous the communicative community is, the more difficult it is to meet the expectations of all members of the community in question. The process of choosing sufficient equivalents requires determining the communicative needs of communication process participants. However, sometimes needs and expectations of communication process participants are contradictory. Additionally, not identifying communication problems properly may result in dire consequences affecting the life of persons involved in the process of communication in legal settings. The relations binding participants to communication may be very complex. The consequences of improper identification of communicative needs of message senders and recipients will be illustrated with real-life examples of such distortions in legal communication.

[Keywords] *legal term; legal translation; sign; effective legal communication; relativization of communication; communicative community; discourse community*

Introduction

In pertinent literature it is argued that the relativization of the process of translation is not necessary and even frequently undesirable (Garzone, 2000). However, taking into account that the right of the translator in legal proceedings is one of human rights, one cannot accept that stance unconditionally. Before making the final decision in this respect, one should answer the question concerning human rights in the process of translation and how they are affected when the communicative needs of the translation recipient are not taken into account. If the translators and interpreters fail to make the message understandable for the recipient, the process of communication is not effective. When translating and interpreting messages, intermediaries in communication should be aware of cultural differences. Cultures vary to a great extent. For instance, in some cultures it is impolite to ask questions to persons who are higher in the social hierarchy than the speaker. It must be assumed that in court settings during the process of interpretation the person who is the highest in the hierarchy is the judge. All other persons are lower in the hierarchy.

The participants in the process of communication may consider asking questions for clarifications in such situations highly impolite and thus, unacceptable. It may also happen that in some cultures asking questions is going to be understood as losing one's face, that is to say admitting that someone does not understand the message because he or she is an ignorant. In such instances, participants in legal communication are not going to be able to understand the message without the voluntarily offered help of the interpreter or translator. As a result, the messages must be adjusted to ensure the effectiveness of interlingual communication.

Research Methods

The research methods applied by the author comprise the following:

- The analysis of comparable texts (cf. Neubert, 1996, Delisle, et al., 1999, Lewandowska-Tomaszczyk, 2005, Biel, 2009, Roald & Whittaker, 2010);
- The method of axiomatization of legal linguistic reality (Bogusławski, 1986, Bańcerowski & Matulewska, 2012, Matulewska, 2013);
- The terminological analysis of research material;
- The concept of adjusting the target text to the communicative needs and requirements of the community of recipients (cf. Vermeer, 2001, Šarčević, 2000, Kierzkowska, 2002, Matulewska, 2013);
- The techniques of providing equivalents for non-equivalent or partially equivalent terminology (Newmark, 1982, 1988, 1991, Kierzkowska, 2002, Matulewska & Nowak, 2006, Matulewska, 2007);
- The analysis of pertinent literature;
- The hypothetical-deductive method; and finally
- The empirical observation of translational and interpretative reality in the scope of translation and interpretation errors and mistakes and their impact on the process of communication.

Translation and Interpretation as the Process of Effective Interlingual Communication

Linguists claim that efficiency of sign communication may be understood as a compliance of the intent of the verbal message sender with the content reconstructed by the message receiver” [“efektywność komunikacji znakowej można rozumieć jako zgodność zamierzenia nadawcy znaku z treścią zrekonstruowaną przez odbiorcę”] (Bańcerowski, Pogonowski, Zgółka, 1982. p. 38). Talking about sign

communication or, in other words, verbal communication, we must realize that signs have referential and pragmatic meanings. There are also phenomena deeply rooted in given cultures. Therefore, the message recipient who wants to understand properly the intent of the message sender needs to belong to the same communicative community otherwise he may not understand properly cultural conventions and consequently may misinterpret the message. If the message sender and the message recipient belong to the same communicative community, they need an intermediary communicator who is going to belong to both communicative communities and who will be able to amend for the deficiencies in common ground for communication between the message sender and recipient. Such an intermediary should be aware of the differences between communicative conventions known to both the message sender and recipient. Translators and interpreters are very special types of intermediaries.

First of all, they are supposed to be experts in at least two languages, which means that they have linguistic competence which enables them to decode a message in one language and recode it in the signs of another language. What is more, they should possess communicative competence; that is to say, they should be able to recode that message in a manner fully understandable and acceptable for the message recipient. Therefore, translators and interpreters (if they are professionals) are experts in interlingual and intercultural communication at least in respect to two languages and at least two cultures.

Moreover, the trend forcing people to migrate for a wide variety of reasons additionally results more and more frequently in the need to translate and interpret from an intermediary language (the so-called pivot language) which is a foreign language for either the message sender or recipient. If that is the case the translators and interpreters should be aware that their cultural competence (which is understood as a sort of conglomerate composed of linguistic, semiotic, and communicative competences) may not be sufficient to convey the average message content intended by the message sender. The situation is much more complicated when we take into account that communicative competence may be either social or individualistic.

If the communicative competence is social then the message produced by the sender is understandable for a given social group, that is to say, a communicative community, for instance that is the case of the prison jargon. This special language is created by prisoners who do not want other communicative communities to understand their messages as the messages are intended to be understood only by a very limited group of message recipients. Obviously, groups of professionals also create messages which are addressed only to other professionals specializing in the same field. In such instances they not necessarily want to keep their communications secret, but they usually aim at precision which results in coining signs to name objects of reality with which they deal on a daily basis. Other social groups do not need to communicate about such objects of reality and therefore, do not know signs that refer to them. As a consequence, the messages produced by such professionals are understandable only for a given social group possessing that particular social communicative competence. Social effectiveness of a given group of senders and recipients of messages depends:

“solely on conventionalized cultural rules that is to say for instance linguistic competence (...) Communication arts, in particular signs, are manifestations of social activities in such a sense that results that are achieved by undertaking those activities are regulated socially on the basis of social rules and social consciousness. It means that undertaking sign activities is accompanied by (1) a subjective sense intended by the subject of that activity that is to say the message sender and (2) social objective result which is associated with that activity on the basis of the rules binding in a particular social

consciousness. The subjective sense intended by the message sender of course is not to be identical with the social objective result”⁸⁰ (Bańcerowski, Pogonowski, Zgółka, 1982, p. 39).

There is also individualistic effectiveness of communication, which is also called pragmatic:

“It is achieved when the act of communication is undertaken on the basis of competence of a particular type. Simultaneously the communicative sense intended by the message sender who is an individual is exactly the same as the sense decoded by the sender who is also an individual”⁸² (Bańcerowski, Pogonowski, Zgółka, 1982, pp. 38-39).

In accordance with the theory of communicative communities (also called discourse communities nowadays), which was elaborated on by L. Zabrocki (1963), the proper understanding of the message depends on our membership in a given communicative community which uses a language adjusted to its own communication needs and requirements. What is more, every language is continually changing together with the changes taking place in the reality in which we live. Therefore, language is going to be affected by all sorts of changes starting with social ones (Matulewska, 2017), political ones, technological ones, economic ones and many others. Therefore, it may happen that someone who belongs to a given communicative community leaves that community for a certain period of time because he travels abroad. Having returned to the communicative community he used to live in, such a person frequently discovers that he no longer fully understands the messages produced by other members of the community. Such trends are especially visible nowadays when a wide array of signs is created for our daily communication due to the rapid development of information technologies.

Some objects of reality and consequently the signs referring to them have such a short life that they may be understandable only for one generation and, at the same time, may be completely unknown for the next. Language users aim at economy of communication. This means that the majority of users are going to learn and use signs that are needed for daily communication. And if the archaization of signs in some fields is rapid, the signs are going to be quickly abandoned, which means that they simply go out of use. Therefore, the core premise for effective verbal communication is the possession of communicative competence by both the message sender and recipient which enables the sender to formulate the message in a manner understandable for the recipient, and on the other hand, which enables the recipient of the message to react properly to it. The reaction of the message recipient may be both verbal and non-verbal. Sometimes the message recipient is expected to respond to the message as a result of which the recipient and sender change their roles.

To sum up, in order to talk about effective interlingual communication between the message sender and recipient, the message must be formulated in the code which is understandable for both of them. If they do not communicate in such a code, they need an intermediary in interlingual communication who is

⁸⁰ [„zostaje osiągnięta wówczas, gdy czynność komunikacyjna podjęta jest w oparciu o kompetencję określonego typu. Jednocześnie zaś sens komunikacyjny zamierzony przez nadawcę (rozumianego jako konkretna jednostka) jest dokładnie identyczny z sensem przypisywanym owej czynności przez odbiorcę (również konkretną jednostkę).”]

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⁸² The efficiency of verbal communication always involves the compliance of the in subjective intent of the message sender with the social objective result which is associated with the action undertaken by the sender in the context of a particular competence which constitutes a fragment of social consciousness” [„Efektywność komunikacji znakowej polega na zgodności zamierzenia subiektywnego nadawcy z rezultatem społeczno-objektywnym przypisywanym danej, podjętej przez nadawcę czynności, na gruncie określonej kompetencji stanowiącej fragment świadomości społecznej” (Bańcerowski, Pogonowski, Zgółka 1982, 39).

able to transfer the message formulated in one code into a message in another code providing mutually understandable communication.

But there is one more aspect that we should take into account. In order to talk about effective interlingual verbal communication, we first need to guarantee the right to a language and communication in a language which is understandable for participants in communication. In the case of communication with foreigners or people who do not communicate in a given ethnic language but use, for instance, sign language, it amounts to ensuring the right to communicative help of a professional translator or interpreter in the process of communication.

Taking into account the rapid development of communication studies and information technology which pervades all spheres of human communication, it should be assumed that communication is a process involving at least two persons that take part in the process of conveying the message between communication process participants. The message has some intended meaning, that is to say, the meaning which the message sender wants to communicate (convey) to the message recipient. In order to convey the message, the message sender should formulate the message using the code which is understandable for all communication process participants, that is to say, the system of signs and semiotic rules that are known to them. In other words, it may be said that the process of communication is the process of conveying messages in a system of signs (both verbal and non-verbal) understandable for communication participants aimed at achieving mutual understanding. The process involves not only the exchange of data, but also the process of exchanging information, that is to say, the process of knowledge acquisition (learning) if need be. The process of knowledge acquisition is the process of sharing knowledge. It is also a process of creating and developing mutually shared knowledge through explaining the meanings of signs unknown to the message recipient.

The aim of the interlingual communication is to provide mutual understanding between the participants of the process of communication who do not know any mutually understandable code. As the communication codes they use are not mutually understandable, there is a need to appoint an intermediary – the translator or interpreter – knowing both codes who will make the communication process effective by transforming the message encoded in one language system into another.

As far as the interlingual communication is concerned the purpose of the appointment of the translator or interpreter is to provide effective communication. If the aim of communication was not to convey the message effectively, there would be no justification for the appointment of an interpreter or translator and bearing the costs of such services. Therefore, the next question that should be answered is what the effective interlingual communication is. The effectiveness of communication is understood as the capability of conveying the intended message which is sent by the message sender to the message recipient in such a way that the message recipient can understand it in the manner intended by the sender. The message which is sent by the sender is transformed into the code understood by the message recipient in such a way that the average message content is comprehended by the recipient.

In order to reach that aim, the message addressed to the message recipient must be formulated taking into account the level of knowledge of the code of communication of the message recipient, or the command of a given language with respect to terminology, collocations, grammatical structures (lexis and syntax). When the process of communication takes place in the language mutually understandable for the message sender and the message recipient, the message sender usually quickly realizes whether the recipient understands the message or not. In a situation when it turns out that the message recipient does not understand the message fully, the message sender usually automatically and subconsciously adjusts

the complexity of the code to the linguistic competence of the message recipient for instance by paraphrasing the message. Such a process of message adjustment is especially visible when adults communicate with children or when a lawyer communicates with his client who does not know the law. However, when we deal with interlingual communication it is much more difficult for the message sender to realize communication problems due to the fact that professional translators and interpreters are usually well-educated people who specialize in a given type of translation or interpretation and as a consequence they understand formulated messages as intermediary message recipients.

Therefore, the burden of adjusting the message to the communicative needs of the message recipient shifts from the primary message sender to the secondary message sender, which is the translator or interpreter. It should also be borne in mind that nowadays more and more frequently the language of communication is not necessarily the native language of the participant to communication in legal settings. It sometimes happens that a translator or interpreter of the native language of a participant in communication in legal settings cannot be found, and therefore, the appointed person is someone who can speak a foreign language acquired to some extent by the foreigner. As a consequence, translators and interpreters communicate with people coming from countries (and consequently cultures) not necessarily well-known to them. In that context it is extremely important to realize that communication cultures and rules of cultural communication differ in various countries considerably. These phenomena are well-known in linguistic studies and described as high context cultures and low context cultures. People coming from low context cultures will be open to take active part in communication and will be prone to ask questions and find answers when they do not understand the message fully.

However, people from high context cultures where asking questions is considered either rude or inappropriate (e.g. due to the social hierarchy that must be obeyed in the process of communication) will behave differently. There are also cultures in which asking questions is equal to admitting one's insufficient knowledge in a given field, and therefore, in order to save face, such persons are going to pretend they understand the message. There are also introverts (or extremely shy personalities) who are going to be afraid to outwardly ask questions for clarification. Furthermore, it must be remembered that taking part in communication in legal settings may be incredibly stressful to communication participants (e.g. victims of crimes, accused, and witnesses, etc.) and people react to stress in a wide variety of ways including the inability to communicate fluently and freely. Therefore, translators and interpreters should be aware of the fact that the burden of providing effective interlingual communication is on their shoulders. They cannot ignore the fact that they are appointed to facilitate communication rather than make a mockery of it by conveying the message without thinking about the consequences of the lack of effectiveness of that process in legal settings.

Convention for the Protection of Human Rights and Fundamental Freedoms Rome, 4.XI.1950

One more already-mentioned aspect which cannot be ignored when dealing with providing effective interlingual communication with the participation of translators or interpreters is the Convention for the Protection of Human Rights and Fundamental Freedoms which was signed in Rome on 4 November 1950. That convention provides in Article 5 that:

“2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.”

The Convention for the Protection of Human Rights and Fundamental Freedoms Rome, 4.XI.1950 and subsequently in Article 6 referring to a right to a fair trial provides that:

“1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

*3. Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, **in a language which he understands and in detail**, of the nature and cause of the accusation against him; (b) to have adequate time and facilities for the preparation of his defence; (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (e) **to have the free assistance of an interpreter if he cannot understand or speak the language used in court**” (Convention for the Protection of Human Rights and Fundamental Freedoms Rome, 4.XI.1950)*

Let us focus on the phrase “in a language he understands” and its meaning in the context of the observance of fundamental human rights and freedoms. In order to understand the phrase “in a language he understands” one should first refer to the definition of the term language and language command. Languages are sets of signs and rules of combining those signs into messages. What is more, in the context of translation and interpretation we must realise that not only ethnic languages may be languages of communication. More and more frequently the languages such as the sign language or Esperanto are the languages which may be treated as languages of communication and the only languages ensuring effective interlingual communication. Bańcerowski (1996, p. 15) claims that

“we shall content ourselves with the intuitive concept of language, since whatever could be said about it, would be incomplete, and only partially true. Therefore, it seems safer to approach this entity via identifying some of its relevant components and determining the properties within a certain set of dimensions. What is the language as a whole, in its totality? Or, to put it differently, what is language reality? Is it at all possible to answer satisfactorily such a question? Or, is it not arrogant to even pretend to know the answer? We say that someone knows or uses a language, utilizes language for certain purposes, has acquired a language, or translates from one language into another. We also say that language varies and changes. Language reality is complex and heterogeneous, and it happens within a set of n-dimensional space.”

Thus, we must realize that there is no language user who knows the totality of a given language. Linguists devote all their professional lives to investigating language and linguistic reality. However, they are still far from knowing everything about the language. Therefore, the participants in communication

also know only some fragments of languages in which they communicate. Bańczerowski (1996, p. 16) continues saying that:

“no language manifests itself directly but is mediated by lects. (...) lects will be considered here as modes of language manifestation. There can be distinguished such lects of a language as: a standard lect or the so-called standard language, a colloquial lect, a dialect, a social lect, an idiolect. Metaphorically we could say that language, similarly to light, shines through particular lectal windows, the size and shape of which determines the quantity of light and the form of light beam, but not the quality of light itself. Thus, one and the same language projects itself through various lects revealing different aspects.”

It must be assumed that language users or in other words human individuals communicate using lects known to them. To put it differently, they know and understand only a certain fragment of a given language which manifests itself in lects they know. The more lects a given user understands, the more comprehensive his knowledge of a given language is. However, our brains are incapable of acquiring the totality of a given language, as the number of possible lects is unlimited. Therefore, a given language user may learn a standard lect and some specialized lects but it is out of performance for a human being to learn all specialized lects through which a given language manifests itself. Consequently, language users communicate with each other by means of texts they produce in given lects (Bańczerowski 1996, p. 17). It means that message senders produce texts (verbal messages) and message recipients read them or listen to them in order to carry out a systematic analysis of the text as a result of which the message may be comprehended (understood) Bańczerowski (1996, p. 20). There are also non-verbal messages which affect the process of communication which cannot be ignored, and which may affect the meanings of verbal messages. Thus, effective communication must take place not in the ethnic language one knows (to some extent) but the language one understands which makes quite a crucial difference.

Translation and Interpretation Strategies for Exemplary Communicative Communities

Consequently, the translation and interpretation strategies adopted by translators and interpreters should aim at providing effective interlingual communication. In the event interlingual communication is not effective enough, the fundamental human rights and freedoms are going to be abused. The translators and interpreters are experts in interlingual communication and they may be the only persons who in fact may detect distortions in the effectiveness of interlingual communication. Participants in communication in legal settings such as judges, prosecutors, legal counsel are specialists in legal communication. They usually specialize in intralingual communication. As a consequence, they may be absolutely unaware of the tricks of the trade and problems of communication between people coming from completely different realities from the perspective of law and culture.

The following exemplary types of communicative communities taking part in legal communication will be accounted for:

- The multi-lingual (international) communicative community,
- The European Union communicative community,
- The common law communicative community,
- The civil law communicative community,

- The business-oriented foreign communicative community,
- The legal system ignorant communicative community,
- The business relation bound communicative community.

The multilingual international communicative community is a group of people who speak a wide array of native languages and communicate in a foreign language which is a lingua franca at a given period of time. The translators and interpreters when acting as intermediaries in communication, should aim at using internationalism as far as legal systems are concerned. Such internationalisms frequently are based on the terminology borrowed and assimilated from the Latin language. When dealing with culture bound or system bound terminology, in turn, the interpreters and translators when aiming at high precision of communication should provide detailed definitions of the meaning of such terms which may otherwise be easily misunderstood by message recipients. When the precision of communication is not of vital importance they may resort to generalisations or restrictive equivalents.

The European Union communicative community, in turn, is a group of people functioning in the European Union legal system. The translators and interpreters are expected to communicate in languages created by the European Union as a common ground for communication. If the average content of the message needs to be conveyed, the message recipients expect the translators and interpreters to use terminology created for that purpose of communication by the European Union terminologists. However, similarly to the multilingual international communicative community, when the message recipient needs to understand the message in detail such a community is going to expect definitions especially for system and culture bound terminology.

The common law communicative community is a group of people knowing the common law legal system. What is more, the message senders and recipients of this community realise that there is a wide variety of common law systems (the system of England and Wales, the state and federal systems United States of America, and the system of Australia etc.). However, they may not necessarily be well acquainted with the exact differences between those systems, and as a consequence between signs used in those systems and their meanings. It may lead to the situation when they may misinterpret some signs or misunderstand some messages. Therefore, they usually expect terminology from the variant of English which they are best acquainted with. Here is an example. In various legal systems there is an institution which enables the government to take the immovable property from its owner for the purpose of using it for purposes serving society or in other words in the public interest. If we analyse the signs used in various common law jurisdictions for that legal institution we clearly realise that the fact that English is spoken in over 60 countries all over the world affects also the development of legal terminology. The juxtaposition of terminology used in just a few of those jurisdictions is presented in the table below.

Table 1. *The Juxtaposition of Jurisdiction Terminology*

EU, Canada, South Africa, Roman	England and Wales, Scotland	Australia, Hong Kong	Australia	USA
expropriation	compulsory purchase	resumption	compulsory acquisition	condemnation (under eminent domain)

In the instances where the English language develops in various countries, various sets of terminology for the same or very similar legal institutions may be coined. Translators and interpreters must make the decision based on the communicative needs of the recipient of the message formulated in

the English language and choose the proper variety of the English language which would be sufficiently understandable for the message recipient.

The civil law communicative community is well-versed in the legal system of continental Europe. The members of the community are used to codified law and it is difficult for them to grasp the idea that in some legal systems one may base judgements on other judgements that were given even a few centuries earlier. Nowadays such persons usually expect to be able to find relevant provisions of law on the Internet at the governmental sites of ministries of justice. In fact, when talking about communicative communities living in the reality of the European Union, the message senders and recipients adopt a few communication approaches. The first approach aims at conveying the average content of the message by resorting to the European Union legal languages. The second approach aims at conveying the national content of the message, that is to say to stress the difference between national legal systems and the European Union system in spheres where it has not been unified yet. If the former is the case, there is a need to employ European Union coined terminology. If the latter is the case, there is a need to employ descriptive equivalents for instance in the form of definitions in the process of translation and interpretation.

The business oriented foreign communicative community is formed by a group of businessmen who want to operate in the business reality of the country foreign to them. The communicative needs of such people are very specific. They need to know differences and similarities between the legal system they know and the foreign legal system in which they want to operate. For that reason, they usually need equivalents in the form of exotics supplemented with descriptions in the form of definitions. What is more, they expect translators and interpreters not only to transfer a message in one language into a message in another language, but they also expect professionals in interlingual communication to be some sort of community interpreters and translators volunteering valuable advice on communication conventions in respect to verbal and non-verbal behaviours.

Let us analyze a real-life example of a Polish businessman who wants to carry out business in Indonesia. For a few weeks the Polish businessman has negotiated a contract with an Indonesian businessman. However, for some reason the Indonesian party refrained from signing the contract. At the verbal level it seemed that the contract was acceptable for both parties. However, the Indonesian party delayed the moment of signing an already accepted text. The contract was drafted in English and the negotiations were carried out in the English language. Therefore, all communication process took place for both parties in a pivot language. What is more, the interpreters/translators were the experts in Polish-English and Indonesian-English communication respectively. None of the parties to the process of communication was an expert in Polish-Indonesian communication.

The Polish party became highly frustrated and finally decided to consult an expert in Indonesian culture for advice. It turned out that the Polish party, being unaware of the rules of efficient communication in business settings in Indonesia, behaved in a highly impolite manner. First of all, during the course of negotiations it avoided small talk at the beginning of the meeting, trying to discuss the business matter instantaneously. Additionally, the Polish party failed to show its willingness to cooperate because it failed to give the other party small souvenirs that are extremely important in Indonesian business communication. The expert in Polish-Indonesian communication advised the Polish party to send to Indonesia some souvenirs. The moment the souvenirs were received by the Indonesian party, the contract was signed. Therefore, the efficiency of interlingual communication very frequently may

involvement not only verbal but also non-verbal behaviours that are considered polite or impolite in given communicative communities.

Communication in legal settings also involves dealing with communicative communities which are ignorant of legal systems. People belonging to such communities are usually victims of crimes, witnesses or simply parties to civil or administrative proceedings. They are lay people who have never been educated in the field of law. When the communication takes place between a lawyer and a layperson not educated in law, the interpreters and translators should relativize the message so that it becomes understandable sufficiently for the lay participant of communication process. The failure to do so may have dire consequences.

“What are the consequences of not adjusting such terms to the communicative needs of translation recipients? Let us quote again the Melbourne case where the term legal aid was not properly rendered into Japanese. The sentence: ‘You have a right to call a Legal Aid’ was translated as: ‘There is an organization called Legal Aid which is connected with law. Do you want to contact it?’ The Japanese who unconsciously smuggled drugs in their suitcases decided not to “contact Legal Aid”. In Japan there is no such system. One needs to pay for any legal representation before the court. They had no money and assumed that legal aid is unattainable for them for that reason. The crucial information that legal aid is provided free of charge in Australia was not given by the translator and that way they were deprived of the help of a professional lawyer who may have spotted the irregularities if he had been present during the trial (Nagao 2005:6-7). Overall, translation errors and a failure to adjust the message to the communicative needs of recipients led in that case to the miscarriage of justice” (Matulewska 2016, pp. 179-180).

The business relation bound communicative community, in turn, is a group of people who for a wide variety of reasons develop a sort of jargon, that is mutually understandable, and which may diverge from the standard communication in similar settings. In order for such a jargon to be created the message sender and recipient must cooperate for some time. For the so-called in-house interpreters and translators, the acquisition of the jargon takes place on a daily basis. However, if the services of the interpreter or translator are needed just from time to time and such a person is unaware of the existence of such a jargon, the process of decoding the message sent by the sender and recoding it into the message directed to the recipient may be burdened with mistranslations and misinterpretations.

It is mostly due to the fact that signs are frequently created by language users in a spontaneous way and they may not be intuitively understandable for persons not participating in daily communication in a given communicative community. Sometimes larger organizations cooperating regularly prepare bilingual or multilingual dictionaries of mutually understandable terminology. If that is the case, the translators and interpreters are expected to learn such terminology and use it consistently in texts produced by them. The failure to apply such terminology may result in communication distortions and consequently may diminish the efficiency of communication. Among the international institutions that have elaborated such dictionaries we may enumerate the European Union, the United Nations, Insol, many auditing state institutions, and many others.

Conclusion

Taking into account all the factors mentioned above we must state that it is not possible to communicate effectively without relativisation of message to the needs of the recipient. Of course, the

more homogeneous the communicative community of message senders and recipients is, the easier the process of translation and interpretation in respect of relativisation is. When dealing with the translation of legislation, which is definitely addressed to lawyers who (dealing with comparative law) are aware of differences between legal systems, the process of relativisation may sometimes not be necessary. It is due to the fact that normative acts very frequently provide definitions of signs used in them which shifts the burden of explaining system and culture bound terminology from the translator to the legislator. The research hypotheses that have been put forward at the beginning of the paper (1) that the more homogeneous the communicative community of message senders and recipients is, the easier the translator's choices in respect to the translation strategy are and (2) the more heterogeneous the communicative community is, the more difficult it is to meet the expectations of all members of the community by information in the pertinent literature and empirical observation of the court cases where the messages were misunderstood by participants to legal communication.

What is more, when investigating the classifications of translation and interpretation errors and mistakes we find the concept of fatal or critical errors that include insufficient level of information included in the targets text as a result of which the full comprehension of the text is impossible. Additionally, taking into account the Convention for the Protection of Human Rights and Fundamental Freedoms it must be assumed that the phrase "in a language he understands" refers not only to the ethnic language but also any other language of communication (e.g. a sign language). Additionally, it also refers to the individual competence of the speaker in respect to linguistic, semiotic, cultural aspects of verbal and non-verbal communication that is to say the lects a given person knows.

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An Acoustic Analysis of English Monophthongs Produced by Chinese EFL Learners

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[Abstract] This study aims to explore Chinese EFL learners' production of English monophthongs through phonetic experiments and acoustic measurements. The results reveal that the vowel space chart of the tested monophthongs is generally in line with the vowel space chart proposed by Ladefoged (2006). In comparison with the monophthongs produced by RP speakers, /e/, /u/ and /ɜ:/ produced by the tested subjects were lower and more backward in articulatory space, while /æ/ was higher and more advanced in articulation. Vowels /a/ and /ɔ:/ pronounced by the tested subjects were lower and more advanced in articulatory space than those produced by the RP speakers.

[Keywords] Chinese EFL learners; English monophthongs; acoustic measurements; vowel space chart

Introduction

Pronunciation of a language is essential for language learners and plays a very important role in second language acquisition (SLA). In the past few decades, a great number of researches in L2 speech have been conducted to investigate the problems or difficulties L2 learners encounter in the production of vowels and consonants (Barros, 2003; Flege & Davidian, 1984; Liao, 2006; Wang, 1997), syllable structures, and prosody (Liu, 2010). In the studies on vowel acquisition by speakers with different language and cultural backgrounds, vowel quality has always been a heated topic.

To examine vowel quality, three parameters are often involved: fundamental frequency, formant frequencies, and duration. The formant frequency corresponds to the vibration of air particles in the vocal track during the production of vowels (Ladefoged, 1996; Reetz & Jongman, 2009). The shape of the vocal track, as determined by the positions of vocal organs, differs from vowel to vowel, generating different patterns of frequency peaks in the spectrograms for different vowels. The frequency peaks are, in reality, formant frequencies. Each of them is a parameter termed as the first formant (F1), the second formant (F2), the third formant (F3), etc. Each vowel is distinctive in the first and second formant frequencies (Ladefoged, 1996; Reetz & Jongman, 2009).

This paper is devoted to analyzing the first two formant frequencies of English monophthongs produced by Chinese EFL learners. The F1 and F2 of monophthongs produced by subjects will be figured out to make a comparison with those of Received Pronunciation (RP) so as to find out the production difficulties Chinese EFL learners have in learning English monophthongs.

Methodology

Subjects

Sixteen native Chinese speakers (eight males and eight females) in Mainland China participated in the study. All the participants were raised in Ningbo, a city in Zhejiang province, which lies in the east of China. The geographical and dialectical backgrounds of all the participants were controlled to be as similar as possible. At the time of the experiment, they had just finished their third-year study in a

college in Ningbo. They were all 22 years old. Most of them had studied English for an average of about 12 years. All participants reported no speech or hearing deficiency.

Stimulus Materials

Audio recordings were made of subjects reading lists containing 12 vowels (/i/, /ɪ/, /e/, /æ/, /ɑ /, /ɒ/, /ɔ/, /ʊ/, /u/, /ɔ/, /ɜ/, /ʌ/) mostly in /hVt/ and /hVd/ contexts (eg. heat /hit/ and heed /hid/). Those monophthongs were chosen based on commonly used English vowels (Ladefoged, 2006). There were two major reasons for choosing /hVt/ and /hVd/ contexts as stimuli. First, all the words in the /hVt/ and /hVd/ contexts in the recording materials are high-frequency words, and are relatively easier for speakers to produce. Second, choosing those two contexts as the stimuli for this research would be helpful in conducting necessary comparison between the data of this research and the data of RP in previous researches (Cruttenden, 2001).

Recording Procedure

The subjects first received oral instructions in Chinese, and they were given a short warm-up session. All subjects were instructed to read the listed words clearly and at a rate they felt to be reasonably normal. Subjects were given as much time as needed to practice the task and demonstrate an understanding of the pronunciation that was expected for each listed word. When reading the materials, the subjects were provided with IPA (International Phonetic Alphabet) transcriptions for the vowels in the reading list so as to give them pronunciation reference for the words.

During the recording process, participants were required to read the material accurately and clearly in a quiet room. Chances of correction and repetition were given to them when they failed to pronounce words clearly and accurately or when they found it necessary to correct or repeat.

All the sounds were recorded in a quiet room by using the speech analysis software Cool Edit with a sampling rate of 44100 Hz on a Lenovo computer. The stimuli were recorded using a microphone 3 cm away from the speaker's mouth. The volume was adjusted to a suitable value. The recordings were all saved in wave files.

Each word listed in the stimulus materials was read three times by each subject. Six readings of each vowel were selected for analysis. Therefore, there were in all 1152 utterances for analysis (24 words × 3 times × 16 subjects).

Measurements

All the data were processed in Praat (Boersma & Weenink, 2015). Segmentation was conducted under the assumption that anything on the spectrogram with vocal pulses and well-defined formants were labeled as a vowel. Altogether, 1152 tokens were transcribed and measured acoustically. Two tiers were labeled in the textgrid window in Praat. The first tier was labeled as "word" and the second tier was labeled as "vowel." For example, for /ɑ/ in /had/, the first tier was specified as "hard," and the second tier was specified as "ɑ." The transcription of the vowels was carefully obtained by the researcher alone. An example is presented in Figure 1 to show the transcribing process.

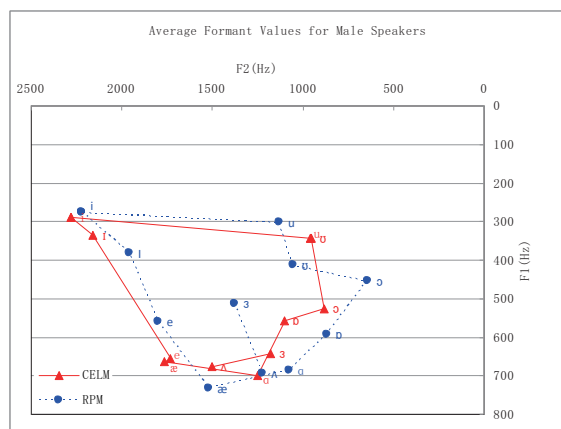


Figure 3. Acoustic vowel diagram showing average formant frequencies for male Chinese EFL learners (CELF) from the present study and male RP speakers (RPF) from Cruttenden (2001).

From the above two figures, it can be roughly seen that almost all the monophthongs produced by the tested Chinese EFL learners differ from those produced by RP speakers. In order to see if there was really a significant difference in the vowel production between the tested Chinese EFL learners and the native speakers, the F1 and F2 of the monophthongs produced by the test subjects were analyzed by being compared with those of the RP speakers. The result for both groups and the differences (as measured by one-sample T Tests) between them were presented in Table 1 and Table 2.

Female Chinese EFL Learners vs. Female RP Speakers

In general, there is a negative correlation between F1 values and tongue elevation, and there is a positive correlation between F2 values and tongue advancement (Borden *et al.*, 2003; Pickett, 1999).

Table 1. F1 and F2 Mean Values for Each English Monophthong by Female Chinese EFL Learners (CELF) and Female RP Speakers (RPF)

Monophthongs	Speaker	F1 (Hz)			F2 (Hz)		
		Mean	SD	p	Mean	SD	p
/i/	CELF	340.71	28.496	<0.001	2363.27	49.326	<0.001
	RPF	319			2723		
/ɪ/	CELF	427.46	17.869	0.085	2266.31	47.085	<0.001
	RPF	432			2296		
/e/	CELF	819.62	18.326	<0.001	2261.40	41.199	<0.001
	RPF	645			2287		
/æ/	CELF	849.46	46.716	<0.001	1843.08	32.191	<0.001
	RPF	1011			1759		
/ɑ /	CELF	857.02	22.022	<0.001	1355.98	18.202	<0.001
	RPF	779			1181		
/ɒ/	CELF	740.29	18.996	<0.001	1212.88	15.598	<0.001
	RPF	602			994		
/ɔ/	CELF	633.52	19.620	<0.001	984.90	18.255	<0.001
	RPF	431			799		
/ʊ/	CELF	429.23	13.679	<0.001	962.46	14.357	<0.001
	RPF	414			1203		
/u/	CELF	436.25	27.719	<0.001	1091.56	36.357	<0.001
	RPF	339			1396		
/ʌ/	CELF	894.15	21.420	<0.001	1661.38	37.068	<0.001
	RPF	813			1422		
/ɜ/	CELF	783.67	23.826	<0.001	1445.58	45.074	<0.001
	RPF	650			1593		

For the female test subjects and RP speakers, there were significant differences between them in their pronunciation of the five monophthongs (/i/, /e/, /ʊ/, /u/, /ɜ/) for both F1 and F2 ($p < 0.001$). Those vowels produced by the female test subjects had a significantly higher F1 and lower F2 than those produced by the RP speakers, suggesting that those phonemes produced by the former were lower and more backward in articulatory space than those produced by the latter.

On the contrary, the mean F1 of /æ/ produced by the female test subjects was significantly lower than by the RP speakers ($p < 0.001$), while its F2 was significantly higher ($p < 0.001$). This means that /æ/ produced by the female Chinese EFL speakers was higher and more advanced in articulation.

As for vowels /ɑ /, /ɒ/, /ɔ/ and /ʌ/ pronounced by the female test subjects, both F1 and F2 were significantly higher than those of the same phoneme pronounced by the RP speakers ($p < 0.001$), suggesting that those phonemes produced by the former were lower and more advanced in articulatory space than those produced by the latter.

Unlike the other vowels, the F2 of /ɪ/ produced by the female test subjects was significantly higher than that by the RP speakers ($p < 0.01$), but its F1 was not significantly different ($p = 0.085$), suggesting that this phoneme produced by the former was more backward in articulatory space than that produced by the latter.

Male Chinese EFL Learners vs. Male RP Speakers

For the male test subjects and RP speakers, there were significant differences between them in their pronunciation of the three monophthongs (/e/, /u/, /ɜ/) for both F1 and F2 ($p < 0.001$). Those vowels produced by the male test subjects had a significantly higher F1 and lower F2 than those produced by the RP speakers, suggesting that those phonemes produced by the former were lower and more backward in articulatory space than those produced by the latter.

In contrast, the mean F1 of four vowels (/ɪ/, /æ/, /ɒ/, /ʌ/) produced by the male test subjects was significantly lower than by the RP speakers ($p < 0.001$), while their F2 was significantly higher ($p < 0.001$). This means that those four phonemes produced by the male Chinese EFL speakers were higher and more advanced in articulation.

Table 2. F1 and F2 Mean Values for Each English Monophthong by Male Chinese EFL Learners (CELM) and Male RP Speakers (RPM).

Monophthongs	Speaker	F1 (Hz)			F2(Hz)		
		Mean	SD	p	Mean	SD	p
/i/	CELM	288.00	27.176	0.002	2280.00	39.375	<0.001
	RPM	275			2221		
/ɪ/	CELM	335.08	15.025	<0.001	2158.04	58.699	<0.001
	RPM	382			1958		
/e/	CELM	654.92	45.557	<0.001	1730.25	67.975	<0.001
	RPM	560			1797		
/æ/	CELM	661.94	29.795	<0.001	1763.10	54.529	<0.001
	RPM	732			1527		
/ɑ /	CELM	699.31	23.296	0.001	1249.54	56.717	<0.001
	RPM	687			1077		
/ɒ/	CELM	557.56	31.476	<0.001	1102.02	76.253	<0.001
	RPM	593			866		
/ɔ/	CELM	527.48	26.425	<0.001	879.69	13.516	<0.001
	RPM	453			642		
/ʊ/	CELM	342.56	24.123	<0.001	954.19	23.875	<0.001
	RPM	414			1051		
/u/	CELM	344.35	15.742	<0.001	960.52	30.035	<0.001
	RPM	302			1131		

Table 2. F1 and F2 Mean Values for Each English Monophthong by Male Chinese EFL Learners (CELM) and Male RP Speakers (RPM). (continued...)

Monophthongs	Speaker	F1 (Hz)			F2(Hz)		
		Mean	SD	p	Mean	SD	p
/ʌ/	CELM	677.08	20.376	<0.001	1501.65	69.605	<0.001
	RPM	695			1224		
/ɜ:/	CELM	641.67	32.040	<0.001	1179.77	32.411	<0.001
	RPM	513			1377		

As for vowels /i/, /a / and /ɔ/ pronounced by the male test subjects, both F1 and F2 were significantly higher than those of the same phoneme pronounced by RP speakers ($p < 0.01$), suggesting that those phonemes produced by the former were lower and more advanced in articulatory space than those produced by the latter.

On the contrary, both F1 and F2 of /ʊ/ produced by the male test subjects were significantly lower than those of the same phoneme pronounced by the RP speakers ($P < 0.01$), suggesting that those phonemes produced by the former were higher and more backward in articulatory space than those produced by the latter.

Conclusion

This research investigated Chinese EFL learners' production of English monophthongs through phonetic experiments and acoustic measurements. The vowel qualities, F1 and F2, in particular, in the recorded data were measured. Based on the statistics, the general pattern of F1 and F2 of the English monophthongs produced by Chinese EFL learners in this research has been outlined. The vowel space of the tested monophthongs is generally in conformity with the common tendency, with /i/ and /i/ being the most front and high vowels, /ʊ/ and /u/ being the most back vowel, and /æ/ and /a/ being the lowest vowels among the tested monophthongs. Based on the results of one-sample T Tests, which compare the F1 and F2 of the monophthongs produced by the tested Chinese EFL learners with those of the RP speakers, it can be seen that /e/, /u/ and /ɜ/ produced by the test subjects were lower and more backward in articulatory space than those produced by the RP speakers. To the contrary, /æ/ produced by the tested Chinese EFL speakers was higher and more advanced in articulation. Vowels /a/ and /ɔ/ pronounced by the test subjects were lower and more advanced in articulatory space than those produced by the RP speakers.

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Courtroom Discourse in China's Criminal Trials

– Does China Need Witnesses to Appear in Court?

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[Abstract] This paper reviews the Chinese literature on courtroom discourse in China's criminal trials, introduces empirical observations of some Chinese courts regarding the appearance of witnesses in court, and identifies in-depth reasons for why few witnesses testify in court. Based on the research findings, this paper makes some recommendations for improving the securing of witnesses to appear in court, aiming to put the reforms introduced by the 2012 Criminal Procedure Law (CPL) into effect in China and, thus, from a procedural perspective, strengthening the protection of a defendant's human rights

[Keywords] witness; criminal procedure; criminal trial; recommendations

Introduction

In December 2016, the Supreme People's Court quashed the conviction in NieShubin's murder case, which caused many discussions on how to prevent miscarriages of justice in China (E.g. Hunt et al., 2016; Luo et al., 2016; Leonard, 2015). When talking about the reasons of wrongful convictions, some people may argue about the extortion of a confession at first and attributing it to the state actors' strong traditional ideology of confession being "the evidence of the King." On the other hand, wrongful convictions involve various aspects of the criminal justice system, as well. Research showed that witness statements are another important reason that leads to wrongful convictions in China (He & He, 2008). About this issue, people may wonder why the state actors and the defense cannot discover the doubt in court, since witnesses are required to testify and receive cross-examinations according to the CPL. Chinese literature reported few witnesses have appeared in court. Why do they disappear from court? Are there any specific safeguards for witnesses? This paper reviews the CPL reforms in 1996 and 2012, analyzes empirical observations in some Chinese courts regarding witnesses' appearance in courts during the years 2002-2006 and 2015-2017 (for comparison purposes), and identifies in-depth reasons for why few witnesses testify in court.

Reforms of the Criminal Procedure and Witness Court Appearance Since 1996

Generally speaking, China set up a trial system with adversarial elements after the reform of CPL in 1996. Under such a trial process, witnesses appear in court to testify and be cross-examined by the parties involved in the trial; this procedure is of great importance to securing the defendant's procedural rights. Witnesses can help judges better understand the case, reduce the state actors' heavy reliance on the defendant's confession, and, thus, contribute to reduction of wrongful convictions. In 2012, China made further amendment to the CPL in order to solve the problems discovered in judicial practice. Some major improvements involved rights protection of the defendant or criminal suspect. For example, an accused is entitled to hire a defender in the investigation stage and enjoy the privilege of not incriminating oneself. Moreover, the law provides detailed provisions for the exclusion of illegal evidence and measures to secure witness appearance in court. Given that there is always a gap between the law in "books" and the law in

action, people have reason to ask: Does the defense have a chance to cross-examine the prosecution witnesses and to produce its own witnesses in court? Does China really need witnesses to appear in court?

Current Situation of Witness Appearances in Court

In judicial practice, the number of witnesses appearing in criminal courts is said to be rather low before the 2012 CPL reform, varying from 0-10% (He, 2004; Zuo, W., et al., 2007). However, is this true in all areas of China? In order to find answers to this question, I conducted empirical research in three Mid or West China's courts during 2003-2004 with structured research tools. Among the case files (n=235) accessed, witness appeared in *NO* court trials. When the prosecutor presented evidence, he or she just read out the record of the witnesses' statements. On the other hand, criminal defense is not a popular sector for lawyers in China, mostly because of personal safety concerns, e.g., the risk of being charged with perjury. The low rate of witness appearance in court becomes more problematic in China and has, sometimes, even caused public outrage and criticism from international communities. It is particularly a headache to judges in cases where the two parties involved have produced two different versions of testimonies from the same witness. As part of the effort to address these problems, the CPL (2012) made dramatic revisions to securing witness appearance in court. For example, the law further clarified and improved the conditions of witnesses' appearing in court by providing such things as a system of witness compensation, protection, and forced court appearance.¹ Despite these changes, some Chinese literatures still showed that few witnesses would come to testify in court for various reasons (Wu, et al., 2015; Zhou, 2016; Huang, & Wu, 2017; Ye, 2017). In judicial practice, few police officers responsible for criminal investigation would explain and testify in a court trial as well, leaving only the expert witnesses (Wu, & Zhou, 2015).

On my part, I also updated my research data in Site A during 2015-2017, where I read more than 40 cases files, observed 3 trials, and interviewed three judges and prosecutors. My recent courtroom observation of the three cases involving job-related crimes further confirmed this situation—none of the witnesses came to the court at Site A, although the parties had different opinions on whether the defendant had the circumstance of voluntary surrender in a high-profile case (CTO A-26 offence of embezzlement). What lawyers questioned and debated was based on the written record of witnesses. In no case did the prosecutor explain the absence of experts in court, in no case did the judges ask for an explanation of the absence, and in no case, presumably, did the defense request an explanation .

If the judges cannot decide which parties' testimony is reliable without the examination and cross-examination of witnesses in court, they have to review the testimonies after the trial on the basis of their work experience. This means that there has been no substantive or practical change despite of the reform in 2012, which would make the adversarial trial process a formality, so that the court, in fact, had retreated to its former inquisitorial system. Therefore, the low rate of witness appearance in court might directly influence the quality of criminal trials and menace the success of the CPL reforms. If we look at the international perspective, e.g. Article 14(3)(5) of *International Covenant on Civil and Political Rights*, the defendant is endowed with the right "to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him." As a result, a witness' absence in court may detract from the defendant's right to a fair trial. In this respect, the witness' appearance in court is essential to the protection of the defendant's rights from both

¹Articles 187-189 of the *Criminal Procedure Law of the People's Republic of China* (2012).

substantive and procedure perspectives. In other words, the radical institutional reform in the criminal trial is reliant on the enforcement of law in China.

Analysis of the current witness system in China

There may be various reasons for witnesses' unwillingness to appear in court. In general, it will involve issues from the perspectives of legislative defects and the state actors' ideology and law enforcement, apart from the impact of Chinese traditional culture.

Legislative Perspective

The most important reason for low witness appearance in court is closely related to the defects in the present witness system. In fact, witness protection was viewed as the biggest problem in China before the reform of CPL (2012) (Zuo, et al., 2007). The reforms in 2012 made some positive improvements. Witnesses should testify in court if the testimonies may have substantive impact on the conviction and sentencing. From the legislative perspective, the provisions provided the judge with discretionary power to determine if the witnesses were to testify. However, some of the provisions allow the prosecution to read out testimonies of witnesses in court to be justified. In addition, where the witnesses fail to appear to testify in court proceedings after the court's notification, few judges force witnesses to testify in court.

The Witness' Duty to Testify in Court

The CPL (1996) set out the witness' duty to expressly testify. However, the *Judicial Interpretation of the Supreme People's Court on the Implementation of the Criminal Procedure Law* (1996) allowed a witness to not appear in court after securing the permission of the Court.² The CPL (2012) made some improvement in this regard; for example, where the witnesses fail to appear and testify in court proceedings after the court's notification, the judge may force the witnesses concerned to testify in court; where the expert witnesses refuse to testify, their expert opinions will not be used as the basis for determining the case. However, such provisions are almost all on paper, which not only involves the legislative issue but, also, the enforcement of law. In judicial reality, witnesses, particularly the investigators, seldom testify. A good illustration of this is that, in the first half of 2013, only 0.6% of the investigators appeared in court in criminal cases to be heard in courts of Beijing (Dong, 2017).

Ineffective Use of the Compulsory Measures in Practice

What if the witnesses refuse to testify in court? There were no provisions in the CPL (1996) for consequences of witness refusal to appear in court. In Lawyer Li Zhuang's case, for example, the defense applied for the witnesses to testify in court, but, in fact, no witnesses appeared in the trial in 2011 (Huanglong Net, 2011). The CPL (2012) made some improvements in securing witness appearance in court to some degree. For example, Article 188 states that except for the defendant's spouse, parents, and children, where the witnesses fail without justification to appear and testify in court proceedings after the court's notification, the judge may force the witnesses concerned to testify in court; when the expert witnesses refuse to testify, their expert opinions will not be used as the basis of determining the case. When the degree of such refusal is serious, the witnesses can be detained for 10 days. According to Article 208 of the Interpretation on CPL (2012), the presiding judge shall sign and issue the writ to force witnesses to

²E.g., the witness is a minor; the witness is suffering from a serious disease or has difficulty in getting about in the term of court session; the witness' testimony does not play a decisive role in the trial; and the witness has other reasonable grounds. See Article 141(2), the Interpretation on CPL(1996).

appear in court, which means a lot of administrative formalities to the case-responsible judge, possibly causing delay in the trial process and exceeding the time limit for completing the case. Furthermore, witnesses' families may make trouble if the court detains or penalizes those who refuse to testify in the trial, which can be seen as contrary to the macroscopic atmosphere of developing a harmonious society in China. This situation might be worse given that the defense is in a disadvantageous position in evidence collection because of structural arrangement.

Compensation Issue

If a witness chooses not to give testimony in court, he or she may have a morally guilty conscience, as a potential criminal may not be convicted due to insufficient evidence. By contrast, a witness' refusal to testify may avoid retaliation or being threatened by the accused, thereby maintaining their good relationship and not incurring economic loss. The CPL (2012), accordingly, made some changes. For example, Article 63 provides: "witnesses should be provided with such subsidies for their transportation, lodging and meals arising from testifying in court, and such costs should be added into the business expenditures of judicial organs, which should be guaranteed by the budget of people's government at the corresponding level." However, the problem is that there is a disparity among different regions in China, so there is no fixed standard for subsidies, and no budget has, in judicial practice, been fixed for handling cases (Ye, 2017).

Traditional and Cultural Influences

China is a country with a long history. People are deeply influenced by Confucius thought, such as the preference of non-litigation, going between extremes, and compromise and concession, in order to realize a harmonious and peaceful society, which contrasts with the modern practice of fulfilling social justice and fairness by litigation. The moral and ethical requirements of peaceful interrelationships seek peace by making concessions to avoid trouble. Such traditional thought of avoiding litigation has exerted a subtle influence on the behavior of modern Chinese. In some cases involving bribery or embezzlement, witnesses in most cases had economical or business contact with the accused. After appearing in court, their figure and reputation might be lowered by their colleagues, which will cause inconvenience for their business in the future. Everyone has his or her own social network and is unwilling to destroy that relationship. Sometimes, for instance, "even when a witness knew someone, their country fellow, who stole the electrical wire, they would be reluctant to give testimony in court as a way of supporting the prosecution, if "the villain doesn't harm his neighbors" (Su, 1998). Against such a background, witnesses are strongly affected by the negative ideology of showing themselves in the litigation.

Law Enforcement

Apart from the reasons mentioned above, another important reason involves the judicial staff's attitude toward witnesses' appearance in court, although such a practice is not very common. When the fact is clear, and the evidence is sufficient, or the defendant admits to committing the crime, in most cases it seems that the witnesses' attendance in court is unnecessary. As a result, at least some judges have formed the ideology that there is need to have witnesses appear in court, even when there is disputed evidence between the defense and the prosecution (*Legal Daily*, 2001). Research showed that having witnesses testify may finishing a court session longer, as "each witness occupied 27.7% of court session on average ranging from 3 to 47 minutes" (Zuo, et al., 2007). Given the need for crime control, judges have to hear more and more cases, which means their workload is much heavier than before. If witnesses are summoned to court, it will, in fact, take judges more time, energy, and resources to complete the trial. Thus, it is the judge who is not

active or who is unwilling to summon a witness to the court instead of the witnesses' unwillingness to testify. In my field observation, there were some cases in which the requests of defendants or the defense lawyers were refused by the court, as well.

Furthermore, the prosecution is, also, unwilling to have witnesses appear in court. This is extremely true if a witness has the tendency to change his or her testimony after having given his or her written testimony in a public security organ or in the Procuratorate. Witness' change of testimony in the trial will make the prosecution embarrassed and will be disadvantageous to the charge(s) against the defendant. Moreover, if the testimonies are obtained by illegal means, some prosecutors would be concerned that the witnesses' appearance in court might, quite likely, disclose an illegal aspect of the evidence and, thus, lead to the unsuccessful prosecution (Zhu, & Zhang, 2010). In addition, if the witness appears in court, he or she may change his or her testimony after being cross-examined. As a result, the prosecution will try to hinder witnesses from attending a court trial by various means. For example, the prosecution, in some cases, even contacted and coordinated with the court before the trial and sought to avoid summoning witnesses; some even warned the witness directly of the criminal responsibility of perjury or sent the police to wait outside the court to prepare for the arrest of the witness if the testimony was to be changed (Ma, 2002).

The reform in 2012 allows "the judges, before witnesses giving testimony, to instruct them to give testimony truthfully or undertaking possible legal liability for intentionally giving false testimony or concealing criminal evidence. Meanwhile, the prosecution will transfer all the case files (original copy) to the court before trial, which cannot avoid the practice of first impression being the strongest. The judges may feel it unnecessary to call witnesses to testify in court. In cases with witnesses' testifying in the trial, the judges would seldom admit such statements in the judgment by arguing that there are contradictions between the oral and written statements, or the oral statement is of weak persuasiveness or cannot collaborate with other evidences; and saying nothing about in the judgment on the witnesses' testimonies given in court (Mao, & Yuan, 2015). On the prosecution side, prosecutors represent the state to prosecute a criminal suspect, aiming to punish the crime in China (and elsewhere, too). In the context that the practice of successful prosecution, conviction, and case conclusion rates is not clearly abolished (although there are some changes in some areas of China), prosecution witnesses testifying in court may bring the risk of failing to convict the defendant after trial and in case of changing a statement after cross-examination, it is safer to read out the witnesses' testimonies (Ye, 2017; Mao, & Yuan, 2015). They were said to seldom request witnesses' court appearance (Mao, & Yuan, 2015). In addition, my observation in three cases in Site A in 2016 found similar practices.

Some thoughts on reforming the current witness system

In the CPL reforms of 1996 and 2012, China has attempted to move toward securing more procedural rights for the accused. Such official documents, such as the *Opinion of promoting the trial-centered reforms on the criminal procedure system* in October 2016 further strengthened the importance of improving the system of witness' court appearance, which specifies that witnesses should testify in court if the judge thinks the testimonies would have great impact on the conviction and/or sentencing. However, the reality showed that China does not really need witnesses in court in most criminal cases. Here, the author wants to emphasize agreement with the view that not all the witnesses should testify in court, considering the national tradition, cost-effectiveness, and the practical need of prosecution in China. Cross-examination should be applied in disputed criminal cases. In this way, it would not bring too much burden to the court and the

parties to affect the procedural efficiency, but it would still satisfy the need of maintaining judicial fairness. For this purpose, some thoughts as recommendations will be raised in this section.

Improving the Witness System from the Perspective of Effective Protections

If looking at foreign jurisdictions, a number of good practices concerning the protection of witnesses may serve as an example for China, such as the Federal Witness Security Program (WITSEC) and the 1982 *Victim and Witness Protection Act* in the USA, and the witness protection programs introduced in Hong Kong's *Witness Protection Ordinance*, enacted in 2002 and amended in 2004. In China, as far as the problems of witness protection are concerned, it is necessary to strengthen the witness protection from the following aspects: First, the scope of protection should be enlarged rather than focus on the four types of cases only. In addition, it needs to provide whole-way protection rather only during or after the trial. Only when a witness is convinced that there is effective protection for his or her near relatives will he or she be able to not fear retaliation and give testimony before the court.

Second, there should be some interim protective measures in the CPL, which may reduce witnesses' potential risks of being retaliated against by the defendant or his or her relatives. In judicial practice, some specific protective measures did have some positive effects in the delivery of witnesses' testimony.

Third, it should find an alternative way of giving testimony before the court. There are similar provisions in the laws of foreign countries. For example, according to the *Criminal Justice Act* 1988, a witness in the UK must give evidence from the witness box, and the use of a live television link with the court is permissible under certain specified circumstances. On one side, this measure can protect the witness; and on the other hand, it helps judges determine the reliability of testimonies by hearing and watching witnesses under cross-examination. Meanwhile, it should have some restrictions on this alternative to prevent abuse of use and to save judicial resources in terms of financial and temporal costs.

Fourth, as for the refusal to appear before the court after summons, it is worthwhile to decentralize the power of issuing the writ of forcing the witnesses to testify in court rather than only the presiding judge. Moreover, it would be of practical effect to impose on witnesses fines for refusal to testify. The law in many countries provides various punitive measures.

Last, but not the least, China needs to continue judicial reform and change the ideology of justice personnel. They should be exposed to best practices in this area to better understand the importance of witnesses in reducing wrong convictions.

Concluding Remarks

Based on the discussions above, we find that the witness' appearance in court is still problematic in China. As far as the reasons are concerned, it does not only result from the defects from legal perspective, but also law enforcement and the strong impact of the traditional culture. It is obvious that the success of the trial system in China depends heavily upon witnesses' appearing in court. In the broader context of the (still) limited lawyers' role in the criminal procedures and fighting against the crime (Liang, He & Lu, 2014), China needs more institutional reforms to achieve its goals of creating a balance between crime control and protection of human rights. In short, (key) witnesses' appearance in court will ensure smooth functioning of the adversarial trial process, better protect a defendant's rights and contribute to reduction of wrongful convictions in China.

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Resolving Potential Threats: Use of “language control” in the Police Force¹

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[Abstract] “language control” is the linguistic force used by law enforcement officers. In order to understand how “language control” is used in potentially threatening situations, this paper analyzes the meaning and categories of “language control” through document research and expert interviews. Police use both verbal and body language to help diffuse potentially threatening situations. “language control” belongs to legal writing, and should be used regularly on the basis of law. The purpose of using “language control” is to de-escalate potentially threatening situations. Different levels are used according to the situation. The results of this paper will contribute to reducing the risks encountered by law enforcement personnel.

[Keywords] law enforcement; language force; police; threat

Introduction

The main task of law enforcement is the prevention of crime and violence. In addition to maintaining law and order through peaceful means, it is sometimes necessary to use force to resolve potentially threatening situations and minimize the risk of harm to police and people's lives (Reiner, 2000). The most frequently used control techniques include: “language control”, “catch control”, “police implement control”, “weapons control”, and “teamwork control” (Qu & Shi, 2014). The element of “language control” includes verbal and body language, both of which fall into the category of legal language. In actual law enforcement, the majority of crimes are non-violent crimes, and just a few are violent crimes. With the standardization of the law enforcement procedures throughout the world and the increasing concern for human rights, the role of “language control” in law enforcement becomes increasingly necessary. Well-used “language control” not only fosters a positive image of the government by deepening relations and increasing trust between people and law enforcement, but it also prevents the escalation of potentially violent situations. Altogether, effective “language control” is conducive to effective law enforcement.

However, worldwide police training emphasizes self-defense skills, the implementation of police skills, and firearm skills and neglects training officers on the legal language of “language control”. The result is that the content of police training is not in sync with the most common circumstances encountered by law enforcement personnel. For example, when police face people who are unaware of the law or who are prejudiced and leery of police, if the police lack of the skills of “language control,” then the police will likely react with an approach that may, in fact, be more violent than criminal's! This results in the expansion of on-site conflicts and on-site chaos, which puts police in a defensive posture. Therefore, in reviewing the hierarchy of application of law enforcement skills, we must emphasize and focus on “language control” instruction so that the orders of the police are effectively communicated to the person or suspect to achieve the desired effect of law enforcement.

Therefore, this study aims at resolving the above problems, which currently exist in the training and application of law enforcement, through the analysis and implementation of “language control” skills and tactics and the use of linguistic methods by law enforcement personnel.

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The Meaning and Types of “Language Control”

The Meaning of “Language Control”

Language control is not only a legal language, but it is also one of the mandatory measures of the police force. In response to criminal acts, the police use verbal or physical forms of action that require the suspects to act according to police orders to achieve an on-site legal disposition (Chen, 2001). Language control is very common in the actual law enforcement process, such as in the search for the suspect, securing the suspect, inventory investigation, and escorting the suspect. In addition, language control also aids other methods of control in order to achieve the purpose of controlling the suspect. The main characteristic of language control is that it is based on law and regulation. Language control reflects the qualities of seriousness, rigor, accuracy, and deterrence. The elements of language control by law enforcement personnel generally include indicating identity, issuing verbal commands, and the consequences of not following commands. That language control reflects the dictates of law enforcement is beyond doubt.

The Types of “Language Control”

The field of law enforcement uses categories of “language control” as defined by J. R. Searle. Although Searle’s work focused on categorizing sexual speech into Assertives, Directives, Corrosives, Expressives and Declarations (1981), these categories are applicable in other areas, as well. According to the above schema, the “language control” used by police in China should be Directives and Declarations. These two categories of language are expressed through two kinds of behaviors: verbal language control and body language control.

Verbal language control is used before physical force to warn the suspect, to reduce harsh rhetoric, and to convey information. If the suspect does not comply immediately, then the law enforcement officer may escalate the use force to prevent potential criminal actions. When using verbal language control, the police should first identify him or herself to eliminate unnecessary misunderstandings and resistance (Xie, & Yue, 2013). The verbal language used by police is required to be clear, accurate, simple, and easy to understand. Other warning actions can also be used to achieve the effect of deterrence. Verbal control will not directly result in physical injury to the suspect, and it is a low-level of force used by police.

Body language control is a visible manifestation of personal emotions, and each gesture or action may become a key or clue to understanding our emotions and the emotions of others (Yao, 2004). It has been noted that about 55% of information is delivered by non-verbal or silent body language (Pease, & Pease, 2007). Body language, as used by law enforcement personnel, is a manifestation of training and professionalism and is in accordance with the law. Police should use a body posture appropriate to the scenario in which they find themselves. Often, a situationally correct body posture can act as a deterrent to the need for physical force. Understanding the suspect’s body language can clearly tell the police what level of force to use and what kinds of weapons and equipment to use. The ultimate aim is to convince the suspect to comply with law enforcement directives, to deter violence, and to settle the task.

The Implementation of “Language Control”

The implementation of “language control” is aimed at preventing obstruction in emergency situations, eliminating potential hazards, and preventing, suppressing, and controlling the illegal or dangerous condition. The use of “language control” exists in objective conditions. The existence of an “emergency situation” is the basic condition for the implementation of “language control” except for those circumstances in which a threat assessment determines the situation has escalated beyond the capabilities

of language control. Language control is mostly used as the initial effort to de-escalate a dangerous or potentially dangerous situation. However, if the situation becomes a physical threat to law enforcement, then police should use self-defense, and, if needed, weapons to control it.

“Language control” has a mandatory role and a universal legal binding. The various levels of force used by the police are mandatory in order to stop illegal and criminal acts. If the person refuses to comply with the language control, then this person will bear the corresponding legal consequences. Language control is the first step in seeking compliance with the written law. Hence, language control is a mandatory means of deterring and cracking down on criminal activities. If the criminal suspects do not obey the police “language control” directive, they will face a higher level of police control measures.

“Language control” has legitimacy, and the laws provide for and authorize language control. The “Procedures for Prohibiting Criminal Offenses Committed,” as written by the People’s Police in Public Security Organs and promulgated by the Ministry of Public Security of China, has prioritized law enforcement’s use of force in the following order: language control, physical control, firearm Control. The latter proceeds from the former ,and each is defined by law and regulation.

The Basic Procedure of “Language Control”

“Language control” is one of the most commonly used means of control by the police. For example, it orders the criminal who has committed the criminal offense to stop carrying out the criminal act and to be inspected as required; it notifies the criminal of the consequences of refusing to obey the order of police, and it notifies bystanders to avoid the crime scene and so on. The basic procedure of “language control” is stipulated in Chinese law. First of all, the identity of the subject (police) should be indicated. When the police interrupt a suspect involved in criminal behavior, the police must verbally identify themselves and use body language to demonstrate the state of alert and warn the criminal suspect. Second, police make an order through verbal language and must be prepared to use self-defense, police implements or weapons to push the suspects to cooperate with the police, who are enforcing the law, and to stop dangerous and harmful behavior. According to the actual situation, the police can also ask bystanders to move away. Third, police inform the criminal suspects that the police will take higher-level measures if the subjects do not carry out the orders of the police. If there is any endangering situation, “language control” can also assist in the display of high-level military means and police equipment and can have a better effect on language control in order to prevent crime (Sun, 2010).

“Language control” is a special language used by the police to prevent crime on the spot. Whether it is a warning, an investigation of a criminal suspect, or the searching, handcuffing, and escorting of a specific criminal suspect, using “language control” helps to avoid unnecessary conflict, and the application of “language control” should follow the aspects below:

- a) Risk assessment of the level of criminal violence that includes not only the people but also the environment and people involved. When the police arrive at a crime scene, they are required to maintain a safe distance from the suspect and quickly scan the environment to determine the seriousness of the crime, the nature of the case, the number of suspects, weapons, explosives, injuries, and other basic conditions to assess the possibility of a suspect's resistance. On the basis of the conditions above, the police can determine the appropriate “language control” to use.
- b) The use of “language control” should have a clear division of teamwork. Law enforcement situations generally require more than two police officers. When using “language control” in these situations, there is a need for a clear division of teamwork. For example, in the task of interrogation

and examination, there is a division between police officers conducting the main interrogation and the auxiliary interrogation. Each has corresponding responsibilities and powers. The main interrogation police officers use “language control” to verbally control the suspect. The auxiliary police officers take charge of the site and prevent risk factors. If the crowd on the scene needs to be evacuated, the police should separate the members of the crowd from the scene. In this way “language control” among the police reflects security elements in mutual cooperation.

- c) Using effective “language control” can prevent confrontation. “language control” is an example of police performing legal duties. It reflects the respect, fairness, and justice in the process of law enforcement. It is accepted by the public subconsciously and does not harm the self-esteem of the criminal suspects or offenders. Police need to use “language control” on the spot to control illegal and criminal activities. They should maintain a positive attitude so that criminal suspects can accept the “language control” order of the police, try their best to avoid physical confrontation and reduce the danger level so as to achieve good results.
- d) Conduct the follow-up work of “language control” well. “Language control” has two possible outcomes. One is that the suspect obeys the order from the police, the suspect is taken into custody, the evidence is investigated, the injured are helped, and the suspect’s suspicion is eased. The other possible outcome is that the suspect does not obey the order. In this circumstance, the police need to use more stringent “language control” to warn the suspect and use a higher level of control according to the level of violence committed by suspect.

The Application of “Language Control”

In the actual work of law enforcement, suspects in a large number of criminal cases often refuse to cooperate in order to evade legal liability. They pretend that they do not understand the legal language of the police, threaten the police by using complaints, or become violent. The choice and application of “language control” should conform to the law enforcement environment, mission, and criminal nature.

The Way of Colloquial Language Control

Moderate response. When using colloquial control with suspects who are not recognized criminals, the police need to use moderate colloquial control. For example, innocent people who do not appear to have criminal intent may be in the wrong in a particular occasion. In this case, police should be polite, gentle, and friendly, avoid using provocative rhetoric, use random questions to communicate and observe the demeanor of the person to determine whether he or she has the possibility of committing crime. However, the moderate colloquial language control is external. Police must always be aware of the inherent danger in any situation and be prepared to deal with emergencies. This method is more suitable for the police to deal with inventory of the situation without confirmation of criminal facts.

Verbal warning (order). In the face of major suspects, the police are in a state of high alert. They usually check first and then grill according to the basic procedure of “language control”. They first indicate the identity of the police and tell the police that the other police are carrying out official duties. The language commands issued should be concise and clear, and they can also bring police equipment. The police can make a body search to eliminate potential dangers. This method is of a higher compulsory level, and the police have the initiative to control, which is important for the police to deal with highly dangerous suspects.

Language and weapons control methods. For those who have been found guilty of felony crimes or criminal suspects who are arrested and taken into custody at the scene, language control cannot achieve the

purpose of control, so the police need to cooperate with the police implementation of weapons. In China, the police should principally carry out the warning procedures before using weapons, including verbal warnings and warning shots. These two approaches should be used cooperatively. In the case of a serious violent crime, if the scene of a crime is in a noisy environment, the suspect may not be able to hear or hear clearly the verbal warning of the police, so the deterrent and deterrent effects are limited. In this case, police may fire a warning shot into the air or other safe direction before firing at the person who is committing violent crime. In this way, the police can warn the criminal to immediately cease his criminal activity or he will be shot.

Body Language – Alert Position

Using gestures is a universal human way to exchange information. Some postures are even commonly used worldwide. Body language is very common in police duty, such as traffic police command gestures and vigilance. The alert posture is a way to express deterrence in law enforcement to prevent a potential crisis and let the others know that police can take coercive action at any time. The alert posture of the police should correspond to the level of danger being faced. An appropriate alert posture can enable the police to successfully complete the task. On the contrary, an improper alert posture will communicate the wrong information to suspects, causing suspects to misunderstand the police, which can lead to confrontation and a more complicated situation. Alert posture is like adding a layer of protection between the police and the suspect so that the police can have time to judge the level of danger and increase or decrease the alert level or force level according to the actual situation to effectively control the scene.

When using force to deal with crimes, the alert posture should also correspond to the level of danger. We interviewed thirty police law enforcement instructors in China and concluded that the alert posture levels are from low to high and are classified, respectively, into hand alert, lifting hand alert, equipment alert, and weapon alert. The alert posture is chosen based on the circumstances encountered by the law enforcement officer (the nature of the criminal offense, the capacity and means of violent resistance, physical characteristics, etc.) and the need to go forward, and then it is adjusted according to circumstances.

The Matters of “Language Control”

There are some points that should be paid attention to when using “language control”:

1. “Language control” commands should be clear and accurate. The purpose is the same both in spoken language and in body language. Suppression of criminal behavior, if not expressed clearly, may lead to misunderstanding and confrontation with the suspect, thus causing unpredictable danger.
2. For different criminal situations, the police should use different methods. Law enforcement sites vary widely, and police need to use language control based on the extent of violence committed by suspects, their age, gender, and whether or not they are impaired (alcohol or drugs) or have some mental disability. In addition, when using language control, police try to avoid crowded places and chaotic scenes.
3. The “language control” of the police is one of the coercive measures that need to be implemented in accordance with laws and regulations to avoid discriminatory and insulting language.
4. When using “language control”, police pay attention to the suspect’s hands because many dangerous actions come from the hands. If the suspect puts a hand into a pocket or bag, the police should immediately take an appropriate alert action.

5. The police should politely apologize for mistaking an innocent person's apparent criminal intent. In some cases, "language control" is carried out without confirming the suspect's intention. The person may have merely appeared at the scene by coincidence, and the police need to explain and allow the person to leave.

Conclusion

To sum up the above analysis, the main point of view of this paper is that "language control" belongs to the law enforcement force of the police, it has the characteristics of the linguistic law, it expands the scope of the traditional viewpoints that the use of force is merely physical or weaponry, and it ignores the role of nonviolent language control. The paper can make the police understand the police force for law enforcement from a broader perspective "language control" force needs to be regulated in linguistic law instead of being used to directly control suspects by compulsion (fighting or shooting), as the attitude and behavior of criminal suspects are affected by verbal and body posture. This point view underscores the fact that the "language control" is a "soft approach" to controlling suspects and subjecting him to police orders in the police enforcement force system. All the result points will be helpful for improving police enforcement.

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The European Charter for Regional or Minority Languages and its Compliance with the Law of Georgia on the Official Language

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***[Abstract]** Joining the Council of Europe, Georgia undertook the obligation to ratify the European Charter for Regional or Minority Languages by April 27, 2000. Despite the fact that the Council of Europe and Georgia carried out a number of works supporting ratification, the Charter has not yet been signed until now. We are interested in the legal aspect of this current issue of Georgian language policy; namely, in this paper we have studied the compliance of the European Charter with the Law of Georgia on the Official Language adopted in 2015.*

***[Keywords]** European Charter for Regional or Minority Languages; Law of Georgia on the Official Language; Georgian Language Policy*

Introduction

This paper deals with one of the most current issues of the Georgian language policy, namely, the purpose of our study is a comparative analysis of the European Charter for Regional or Minority Languages and the Georgian Law on the Official Language, including determination of compliance at the legal level.

The European Charter for Regional or Minority Languages is a document adopted by the Council of Europe as the Convention Status in 1992. It considers the regional and minority languages as a part of the European cultural heritage and is the only international instrument designed to protect them. Until today, the Convention was joined by 25 member states of the Council of Europe. Joining the Council of Europe (1999), Georgia undertook the obligation to ratify the European Charter for Regional or Minority Languages by April 27, 2000. However, the Charter has not been signed yet. The reason for delaying this process could be the complex language situation in the country.

The Georgian language has the status of being the official language throughout the territory of Georgia. According to Article 8 of the effective Constitution adopted in 1995, “The official language of Georgia shall be Georgian. The official language of the Autonomous Republic of Abkhazia shall be Georgian and Abkhazian.” Although the country is historically multinational and multilingual, the Constitution does not refer to non-official languages because the law on language should be developed. In Georgia, most of the minority languages are Azerbaijani and Armenian; the populations are compactly settled in two regions with Azerbaijanis in Kvemo Kartli and Armenians in Samtskhe-Javakheti. They have been in the territory of Georgia since the 19th century as a result of Tsarist Russia and subsequent Soviet policy, but despite this fact, most of them still speak in their native language and Russian, and they do not know the official language, even at the level A1. In Soviet times, they used Russian to communicate outside of their zones. However, after restoration of independence (1991), Georgia defined its foreign policy towards Euro-Atlantic structures, and in the country, the Russian language was the first foreign one replaced by the

English language. In this context, the lack of knowledge of the official language poses a serious threat of isolation to the national minorities in their regions. Therefore, the state structures try to implement a policy in respect to the compactly populated minorities that will promote and enhance the level of knowledge of the official language and the people's civic integration.

Herewith, in the country, different works have been performed to create the environment necessary for the ratification of the Charter: the project, "Civic Integration of National Minorities in Georgia and the European Charter for Regional or Minority Languages," was implemented with the support of the Council of Europe; the high-level Inter-ministerial Commission was established, which created a draft instrument of ratification as a result of analysis of compliance with Georgian legislation in 2013. However, at that time, the Law on the Official Language had not been adopted. Adoption of the law was protracted, and, finally, the Parliament approved it in 2015. As we know, the analysis of the compliance of the European Charter with the law on Official Language was not performed within the Project of the Council of Europe nor within the Inter-ministerial Commission. So, we think that the study we have completed will be interesting for the persons concerned.

Comparative Analysis of the European Charter for Regional or Minority Languages and the Law of Georgia on the Official Language

Both the European Charter for Regional or Minority Languages and the Law of Georgia on the Official Language are legal documents designed to regulate the language situation. However, the purposes that they are designed for radically differ from each other. According to the explanatory report of the Charter, "the charter's overriding purpose is cultural. It is designed to protect and promote regional or minority languages as a threatened aspect of Europe's cultural heritage" (10, p. 2).

The purpose of the Law on the Official Language is to protect and develop official language (languages) and determine its legal status. As the first paragraph of the law defines: "The Georgian language is a historic cultural heritage of Georgia and a prerequisite for its statehood [...]. The State of Georgia performs its functions in this language, protects it and defines its, as an official language's functioning and development policy". However, the Charter does not consider the regional or minority languages from the antagonistic point of view in respect to the official languages and specifies in the preamble: "Stressing the value of interculturalism and multilingualism and considering that the protection and encouragement of regional or minority languages should not be to the detriment of the official languages and the need to learn them." As for the Law on the Official Language, protection of the language diversity of the country and respect for any language are confirmed in the introduction: "The State of Georgia, at the same time, protects and strengthens the tradition of coexistence and harmonious development of languages and cultures in the country having been established during the centuries."

The first article of the Charter explains the term of regional or minority languages, thus limiting its area of action: regional or minority languages means languages that are traditionally used within a given territory of a State by nationals of that State who form a group numerically smaller than the rest of the State's population and different from the official language(s) of that State. Herewith, it shall not be a dialect of the official language or language of migrants (Art.1.a). According to Spiga-Gickel, "this definition is simultaneously accurate – because it specifies the space and excludes the idioms which the principles set out in the paragraph do not apply to – and vague because it does not provide the list of the target idioms" (Spiga-Gickel, 2007, p. 81. Our translation).

The Law on the Official Language defines terms of non-official language and minority language, as well as the official language. If a non-official language is “any language other than the official language used by Georgian citizens and other persons living in Georgia in their private lives or publicly” (Art.3.b), the minority language separates of a non-official language group and is “non-official language traditionally used by the Georgian citizens living compactly on a certain territory of Georgia” (Art. 3.c). The draft instrument of the Ratification of Georgia specifies that the regional language is not used on the territory of Georgia and “regional or minority languages” in the sense of Article 1, paragraph a and Article 2, paragraph 1 of the European Charter for Regional or Minority Languages are the languages of the national minorities” (1. p. 2).

As we know, the Charter’s goals and principles presented in the second part of the Charter are of a general nature, so let’s pass to the third part of the document specifying the certain liabilities facilitating the use of regional or minority languages in different fields of public life. The state can select at least 35 provisions to be implemented in the context of each language situation.

Article 8 of the Charter deals with education. Paragraph 8.1 includes different levels of the education system: pre-school, primary, secondary, technical and vocational, university, and other types of higher education, adults’ and continuous education. It offers to the party undertaking of alternative obligations, such as education only in regional or minority language, bilingual education together with the official language, inclusion of these languages into the curriculum as one of the academic subjects, proper training of the teachers to fulfill their obligations taken, or establishing of a body monitoring the fulfillment of these obligations. In regard to bilingual education, we should specify that neither the term of bilingual education nor the term of the official language are explicitly used in the Charter (8.1.a.ii, 8.1.b.ii, 8.1.c.ii, 8.1.d.ii), but they are formulated, for example, as follows: “to make available a substantial part of pre-school education in the relevant regional or minority languages“(8.1.a.ii). However, as Woehrling explains “pre-school education organized substantially in a regional or minority language, hence partly in that language and partly in the official language” (Woehrling, 2005, p. 146).

Article 7 of the Law of Georgia on Education states that the state provides pre-school, general, and higher education in the official language and “the issue regarding education in non-state and national minority languages is regulated by the legislation of Georgia” (Art. 7.1). Both the Law on Early and Pre-school Education and the Law on General Education enact the right to get the education by the language minorities in the native language: “The institution is entitled to provide the children with educational services in their native and/or non-official languages and use educational programs and resources complying with the state educational standards defined by this Law” (the Law on Early and Pre-school Education, Art. 5.3); “The citizens of Georgia, whose native language is not Georgian, shall have the right to acquire a complete general education in their native language in accordance with the National Curriculum, as provided for by the legislation” (the Law on General Education, Art.4.3). Georgian legislation regulates differently the issue on getting the higher education by the national minorities than the preschool and general education. After the reforms implemented in the country in 2005 and regarding enrollment in the higher institution, the Standard Unified National Examination System is in effect on the territory of Georgia on the basis of which any entrants are required to pass a test in the Georgian language, general abilities and foreign language. According to the preferential enrolling system being in effect since 2009 for the entrants belonging to the national minorities, they can be enrolled “on the Georgian language 1-year educational program of the higher institution on the basis of the results of Azerbaijan, Armenian, Abkhazian and Ossetian general abilities tests of the Unified National Examinations” (the Law on Higher

Education, Art. 47.3.6), after completion of which they'll be entitled to continue their studies on the different educational programs of the same university. As we can see, the preferential system of enrollment in the higher education institution applies only to four minority language speakers; however, in accordance with the above law, teaching is also allowed in any foreign language in addition to the official language (languages) "if it is provided by the International Agreement or agreed with the Ministry of Education and Science of Georgia" (the Law on Higher Education, Art. 4).

Article 9 of the Charter presents the possibilities of using of the regional or minority languages in court. Article 9.1 provides the measures to be applied in criminal, civil, and administrative proceedings, such as legal proceedings in these languages, and/or the right to draw up written and oral documents and evidences in native languages, if necessary, with the assistance of translators/interpreters, and/or the right to self-expression in a native language without additional financial expenses, etc. Exemption of a person speaking in regional or minority languages from additional financial costs for oral and written translation services is presented in the provisions a.iv, b.ii and c.ii of paragraph 9.1 and subparagraph d according to which the state shall "take steps to ensure that the application of sub-paragraphs i and iii of paragraphs b and c above and any necessary use of interpreters and translations does not involve extra expense for the persons concerned" (9.1.d).

According to the Article 13 of the Law on the Official Language, "In accordance with the Constitution and Procedural Legislation of Georgia, legal proceedings shall be held in the official language. A person not knowing the official language will be provided with an interpreter." The Law on Common Courts states that in these cases "interpreter services will be paid from the state budget of Georgia" (the Law on Common Courts, Art. 10) and, thus, as the Charter offers, a person speaking in a minority language does not have to pay for any additional expenses. As we can see, in accordance with the Georgian legislation, a free interpreter's service can be used by a person only if he/she does not know or does not know fluently the official language. However, the Charter implies a wider range of usage of native language by a person speaking in a regional or minority language. As the explanatory report states: "Even if speakers of a regional or minority language are able to speak the official language, when it comes to justifying themselves before a court of law, they may feel the need to express themselves in the language which is emotionally closest to them or in which they have greater fluency. It would therefore run counter to the purpose of the charter for its application to be limited to situations of practical necessity" (95, p. 15).

Paragraph 9.2 of the Charter envisages the validity of legal acts drawn up in the regional or minority languages. As the explanatory report of the Charter defines, "a document is drafted in a regional or minority language cannot by itself alone be a ground for denying its validity. Moreover, it does not preclude a State from providing for additional formalities in such a case, for example the need for a particular formula of certification to be added in the official language" (97, p. 16). This paragraph complies with Article 73.4 of the General Administrative Code of Georgia stating that submission of the document or application drawn up in a non-official language is permissible with a notarized translation: "If an application of an interested party or other document submitted has been prepared in a non-state language, the interested party shall be obliged to present a notarially certified translation of the application or the document within the timeframe set by the administrative body." However, in this case, due to the fact that the party concerned shall submit a notarized translation, the expenses related to the translation will be paid by the party concerned and not from the budget, as it is in the case of the use of an interpreter's service in case of not knowing the official language during the legal proceedings.

According to the paragraph 9.3 of the Charter, the State's important legislative acts and the laws adopted on the minorities shall be available for regional or minority language speakers. This right is legalized by the Article 12.1 of the Law on the Official Language according to which a normative act is published in the official language (languages) and it "may be published in a non-official language as well, but this text shall not have official force." According to the same article "The local self-governing body shall, if needed, provide the translation of the normative act adopted by it into the national minority language" (Art. 12.2). In this case, only the original text of the respective text shall have the official force.

Article 10 of the Charter is devoted to the public sector; paragraphs 10.1, 10.2, and 10.3, provide the application of regional or minority languages in administrative bodies of different levels. These are: state administrative authorities, regional and local administrative authorities, state-controlled services (e.g. post office, hospital, transport). According to the proposed obligations, regional or minority languages can be used as the working language of the administrative body, or a public official shall ensure the communication in the native language of a person speaking this language, or the administrative authorities shall allow oral or written applications and responses or only oral or written applications in their native language, etc.

The Law on the Official Language does not oblige the citizens of Georgia to know the official language, but communication with both state and local self-governing bodies is in the official language (Art. 9.2). The different rules apply to the compactly settled national minority regions, entitling them to communicate with administrative bodies with the assistance of an interpreter: "The state shall ensure the communication between a person belonging to a national minority and the state and local self-governing bodies with the assistance of an interpreter in the national minority language" (Art. 9.3). According to the Article 11 of the above Law, "State and local self-governing bodies conduct official proceedings in the official language, save the case provided by the paragraph 4 of this article" (Art. 11.3), that means the translation of the "application submitted to, claim filed to, response received by a person belonging to the national minority from the local self-governing body in the language of this national minority" (Art. 11.4). In this case officially valid document is the original text.

According to Article 10.5 of the Charter, "The use or adoption of family names in the regional or minority languages, at the request of those concerned" should be allowed. Article 22 of the Law on the Official Language does not provide such possibility and explains that "official registration of the first name, father's name and last name of a person permanently residing in Georgia shall be made in the official language in accordance with the procedures established by the Georgian legislation."

Article 11 of the Charter defines the use of regional or minority languages in media, namely in television, radio, audio and audio-visual products, and newspaper. Sub-paragraph 11.1.f also implies the financial support of the media by the state: "to cover the additional costs of those media which use regional or minority languages, wherever the law provides for financial assistance in general for the media" (Art. 11.1.f.i); "to apply existing measures for financial assistance also to audiovisual productions in the regional or minority languages" (Art. 11.1.f.ii).

Article 27 of the Law on the Official Language specifies that the use of language in broadcasting is regulated by the Law of Georgia on Broadcasting. The above law provides the use of minority languages and financial support in the media. Based on this, the public broadcaster financed from the budget was established in 2004 and broadcasts in the country and is not subordinated by any state structure. This law requires from the Public Broadcaster: "to reflect in the programs the ethnic, cultural, language, religious, age and gender diversity existing in society" (Art.16.h); "to place in minority languages with appropriate proportions the programs prepared about or by the minorities" (Art.16.l); "to create annually one or more

regular program products at least in 4 languages, including in Abkhazian and Ossetian languages” (Art. 33.1).

Paragraph 11.2 provides free rebroadcasting of the media product created in a regional or minority language from neighboring countries in the geographical zones settled by minorities. Minorities settled compactly enjoy this service uninterrupted, although the Law on the Official Language does not regulate this field.

Article 12 of the Charter sets out the obligations related to the promotion of regional or minority languages in the field of culture. The proposed measures can be carried out here in different institutions implementing cultural activities in areas where regional or minority languages are traditionally used and also outside of these territories. It is also important to give the appropriate place for these languages and the culture expressing them in the culture policy directed abroad. The Law on the Official Language is limited to translation of literature and audiovisual work existing in other languages in the field of culture into the official language and their publication. As we read in the Article 32 the state promotes: “translation of belles-lettres, scientific, political and other literature existing in other languages into the official language and their publication; translation of audiovisual work into the official language and its publication.” The following provisions of the Charter also define obligations promoting translation with respect to the regional or minority languages: “to foster the different means of access in other languages to works produced in regional or minority languages by aiding and developing translation, dubbing, post-synchronization and subtitling activities” (Art.12.1.b); “to foster access in regional or minority languages to works produced in other languages by aiding and developing translation, dubbing, post-synchronization and subtitling activities” (Art.12.1.c). As we can see, the Charter's provisions, as well as its explanatory report, do not use the term official language in respect of these obligations; however, Woehrling explains that “these two clauses relate to translation, dubbing, post-synchronization and subtitling for disseminating in official language or languages works produced in regional or minority languages (Article 12.1.c) and for making known in regional or minority languages works produced in other languages” (Article 12.1.b) (Woehrling, 2005, pp. 217-218). Thus, the above obligations with such interpretation are in compliance with the Law on the Official Language.

Article 13 of the Charter is devoted to the economic and social sector. Paragraph 13.1 applies to the entire country and refers to the elimination of discrimination of use of regional or minority languages at the legislative level as well as in the companies' internal regulations and private documents, and paragraph 13.2 provides the promoting actions of the use of these languages within a certain geographical area. Provision 13.2.b (as well as Provision 13.1.d) does not include the certain obligation but is generally formulated in general form: “in the economic and social sectors directly under their control (public sector), to organize activities to promote the use of regional or minority languages.” However, Woehrling specifies that “Many kinds of action can be taken in this light, such as information display and signage, communication and public announcements in the languages [...], advertising in a regional language, etc.” (Woehrling, 2005, p. 229). Implementation of such type of actions in non-official language is established by the Georgian legislation. Under the Article 24 of the Law on the Official Language, the text intended for public information “if necessary, [...] may be also in a non-official language, as well in the language of the national minority – in the municipality where the representatives of this national minority live compactly.” As for the language of reference material, in case if it is only for language minorities, it can be published without translation into the official language: “Non-official reference material shall be attached by a translation into the official language, save when the material is provided for non-official user” (Art.

26.2). In regard to advertising language, Article 28 of the Law on the Official Language specifies the Law on Advertisement: “ Throughout Georgia an inscription on billboard shall be made in the official language, and optionally it may also be made in foreign language” (Art. 4.2.1).

Article 14 of the Charter deals with the field of inter-state relations and offers to enhance the bilateral relations between the countries, as well as between the regional and local authorities of bordering geographical areas. The Law on the Official Language does not specify the scope of inter-state relations; however, it should be noted that the relations in many different areas of public life between bordering territorial zones speaking in the same language, as well as the rebroadcasting of the media product, are intensively performed.

Conclusion

Thus, in this article we tried to show which aspects of the European Charter for Regional or Minority Languages are in compliance with the Law of Georgia on the Official Language and which are not. The issues of which specific provisions of the ratification of the Charter the obligation will be taken for depends on the state policy and whether it will be needed to perform the legislative amendment to harmonize with the European Law.

We note that the issue discussed in the article is one part of the linguistic policy of Georgia facing significant challenges today. The country should be able to actively involve Georgian citizens not knowing the official language as a result of Soviet policy in public life and civic integration. Thus, before ratification of the Charter, it is necessary to perform deep and comprehensive study of the issue in legal, social, psychological, and political contexts in order to ensure that ratification does not result in further closing and isolation of minorities, but on the contrary, to fulfill a function of one of the effective instruments of linguistic policy to overcome the challenges it faces.

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On Judicial Adjudication as a Speech Act – One Analytical Dimension of Improving Judicial Efficiency

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[Abstract] From the perspective of law, we emphasize the legality analysis of judicial adjudication. While from the perspective of philosophy of language, judicial adjudication reflects the feature of “saying something is doing something” significant. This paper analyzes and expounds upon judicial adjudication as a speech act, thus providing a new analysis dimension of judicial adjudication, including the truthfulness claim, the veracity claim, and the rightness claim.

[Keywords] judicial adjudication; theory of speech acts; judicial efficiency

Introduction

From the perspective of law, judicial adjudication is mainly considered as a process in which a statutory subject judges the legal cases under established rules and procedures. The evaluation criteria focus on the legality of adjudication. If we jump out of the perspective of law and look at judicial adjudication from the perspective of linguistic philosophy, we will be fortunate to find many characteristics of judicial adjudication as speech acts. First, this paper reviews the speech act theory. Second, it discusses judicial adjudication as a speech act. Finally, it explores this new analytical dimension to improve judicial efficiency.

An Overview of Speech Act Theory

The theory of speech acts was first proposed by John Austin in the 1960s and later developed by philosophers, such as Searle and Habermas. It not only promoted the “Linguistic Turn” of modern philosophy (Hong, 2010), but also moved the center of language research from formalism to functionalism. At first, philosophers believed that the function of speech can only be attributed to “description” of a situation or “statement of a fact.” In contrast to previous philosophers, Austin distinguishes sentences or words as constative and performative (Austin, 1962). The former kind of speech is merely “describing” something, while the latter is an act more than described or “just” describing something. Thus, the evaluation criteria of the former are “true” or “false,” while the latter's evaluation criteria are “appropriate” or “inappropriate”. Later, Austin (1962) further divided speech acts into locutionary acts, illocutionary acts, and perlocutionary acts .

On the basis of Austin, John Searle (1969) divides speech acts into utterance acts, propositional acts, illocutionary acts, and perlocutionary acts . A successful or appropriate illocutionary act needs to meet four constitutive rules, which are a propositional content rule, preparatory rule, sincerity rule, and essential rule (Searle, 1969). Propositional content rule is used to constrain the propositional content of speech acts. Preparatory rule is used to constrain the preliminary condition of speech acts. The sincerity rule is used to constrain the mental sincerity condition of speech acts. The essential rule is used to constrain the basic conditions or the purpose of speech acts (Searle, 1979).

Habermas argues that Searle's ontological concept is too narrow in reality because it ignores the "consensus formation process" and the "intersubjective relationship" formed by the participants in the process of reaching consensus (Habermas, 2004). In his opinion, the types of action in social context include purpose-oriented acts and communication-oriented acts. An effective communication-oriented act needs to meet three requirements--the truthfulness claim, the veracity claim, and the rightness claim (Habermas, 1976).

The Relationship between Judicial Adjudication and the Speech Act

Judicial Adjudication is a Speech Act

The core idea of a "speech act" is "saying is doing". "Legal act uses language as its medium to convey messages, communicate opinions, and gather consensus, thus legal act is essentially a speech act" (Zhang, Y., 2005). Judicial adjudication refers to the "court applies legal rules to specific cases or disputes" (Miller, 1992), which is an important kind of legal act.

The court mainly adjudicates in the form of written judgments. On the basis of China's judicial practice, the written judgments generally list the evidence and requests of the plaintiffs and defendants, then identify the facts of cases according to the evidence and make legal reasoning combined with relevant rules, and finally declares a verdict. This activity, which proceeds mainly through words, is, no doubt, "doing something". Therefore, it is a very typical and definite speech act. Austin divides illocutionary acts into verdictives, exercitives, commissives, behabitives, and expositives (Austin, 1962). In our country's written judgments, the identification of facts and legal reasoning are verdictives, while the declarations of a verdict belong to exercitives. Now, judicial adjudication seems to be a combination of verdictive and exercitive illocutionary acts.

Judicial Adjudication is a Perlocutionary Act

Judicial adjudication is a perlocutionary act accomplished through an illocutionary act. according to Jhering; the purpose of human existence includes two categories: individual and public. The law is aiming at striking a balance between individual and public purposes. The individual purpose, here, corresponds to "rationality", and the public purpose corresponds to "public reason". Public reason is a publicly oriented way of thinking and the citizens' capacities of cooperating and sharing governance, and it is especially significant for a transitional society. The basic elements of public reason contain the equality of subjects and the publicity of goals; thus, the basic elements may extend to three criteria of public reason: first, whether the public power takes itself just as one part of shared governance; second, whether the civil society takes itself as the subject of shared governance; and third, whether the two parts have shared social goals. For the public powers, the rule of law means the union of power and responsibility – power is rational, and responsibility is reasonable, which is the public reason of public powers. For private rights, public reason is the turning of every individual from civilian to citizen; in essence, it looks on society as ideal public roles, such as judges or other court staffs (Qian, & Wang, 2013). Judicial adjudication is an important way to settle disputes. However, its mission is more than that. Why do we emphasize judicial transparency and judicial authority more and more these days? This shows that we not only have some deficiency in reality, but it also proves that the effect of judicial adjudication directly affects the life of legislation. Therefore, judicial adjudication is not just "doing something in saying something", but is, also, "did something by saying something".

The judgment of the judge is not only an illocutionary act, but also a perlocutionary act. The judgment of the court is legally binding upon the declaration of the judgment, which will lead to corresponding legal effect and social effect. These effects are exactly the purposes of a judge's perlocutionary acts (Qiu, 2008). In procedural law, the legal effect of a judgment is the result of the judicial judgment itself. In written judgments, judges are making a statement, argumentation, adjudication, and a declaration through legal speech. These illocutionary acts contain corresponding speech forces within the social institutional framework. At the same time, the judicial judgments are, also, in the pursuit of certain legal and social effects and social. The legal effects include a series of actual changes of legal rights and obligations after the judgment. The social effects include the impact of the judicial judgment on other litigation participants, which includes their understanding and recognition of the judgment, the guidance of their future behavior, and so on. Meanwhile, as a "multiple-line speech act" (Zhang, 2005), the social effects of judicial judgment also include the impact on other unspecified publics through trial audit, judgments on the internet, and so on.

Improving Judicial Efficiency from the Perspective of Speech Acts

Judicial efficiency includes the following aspects: 1) legal rules and regulations are obeyed by the public; 2) if the rules and regulations are not obeyed, then the judicial power forces the public to obey the regulations (Kelsen, 1945); 3) the degree of the reality of the legal and social effects is pursued by the judicial judgments; 4) the ability of courts and judges to achieve the above-mentioned legal and social effects. The reality of our judicial efficiency is not optimistic. For instance, in Nanjing, in the "Peng Yu case", Nanjing Gulou District Court's judgment led to many misunderstandings and resulted in some negative social impacts, such as "be careful to help those elderly people". Added to other mishandled cases, such as the "Xu Ting case", the "She Xianglin case", and the "Zhao Zuohai case", and a number of judges on the Shanghai High Court becoming clients of prostitute, the credibility of the courts and judges has seriously suffered.

The Truthfulness Claim of Judicial Judgment

Speech acts require measurement criteria to determine whether a speech act is successful or appropriate. For those speech acts that do not satisfy the requirements of validity, the audience could reasonably say "no" to the speaker. As mentioned earlier, the truthfulness claim of Habermas' validity requirement refers to putting "forward a true proposition (and the appropriate practical conditions) so that the audience could accept and share the information of the speaker", that is, "present or set status and events" (Habermas, 2004). It corresponds to what Searle calls "propositional content rule" and a "preparatory rule". The realization of legal truth should first express proposition about corresponding facts and the content of legal rules and regulations in written judgments, and then proceed in the "direction of fit" in the relationship between the speeches and the world, which is showed by those speech acts. As institutional speech acts, the direction of fit of the relationship between the judicial adjudication and world has a certain degree of particularity. Judicial adjudication means the court and the judge carry out many speech acts (the assertion, the argument, the interpretation...) based on the text of legal rules and regulations for the specific cases or issues to be handled. So, these speech acts are assertive, and the direction is "words to world". However, at the same time, "These speakers are not directly using the natural language to seek the correspondence with the world, but to extend the explanation and interpretation of the world based on the text of legal rules and regulations. In my opinion, this structure also carries with the function to

declare some state of affairs as particular institutional concepts, for the world also needs to be interpreted and reconstructed based on the texts, which makes the corresponding relation bidirectional, not one-directional” (Yan, 2010).

Therefore, the judicial adjudication should uphold the corresponding relationship between words and the world, looking between the facts and the legal norms, constantly clarifying the facts of the case according to legal rules and regulations while, at the same time, applying legal norms combined with the appropriately identified facts. The description of facts in written judgments should be clear and definite; the application of the legal norms should be logical, rigorous and legitimate, and the corresponding relationship between facts and legal norms should be appropriate and truthful so that both parties and the public can fully share the speaker's legal knowledge and reasonably accept the judgment.

The Veracity Claim of Judicial Judgment

The veracity claim requires the speaker to “express his opinions, intentions, emotions and desires in good faith so that the listener believes in what the speaker is saying” (Habermas, 2004), which corresponds with Searle's “sincerity rule”. This is mainly used to stipulate the speaker’s sincerity in his or her psychological state and emotional conditions when performing speech acts.

As a demonstrator and speaker, a judge’s own virtue will directly affect the audience’s acceptance of the judicial adjudication. Judges should make efforts to enhance their moral character, public influence, and practical ability, which are the most intuitive and persuasive attributes for the audience (Xiong, 2010). The audience of judicial judgments mainly include both parties in the case and the public. The parties involved are the most direct factors affecting the executive effect of the judicial judgments and, also, the objective of the judge’s argument, which stresses while trying to persuade agreement. However, “The diversity of the parties determines the diversity of the ways of consensus formation. And it’s almost impossible to perfectly sums up the various ways in which the judicial consensus is formed through communication by the parties” (Sun, 2010). Hence, to a certain extent, resorting to the audience’s emotional persuasion is actually a process like giving a monkey exactly what it wants. In ancient China, there were often routine conversations using daily conversation and story language for the judicial practice, like “chun qiu zhe yu”. Such methods of adjudication use story language to debate legal issues on the basis of practical reason and intuition; this helps strengthen the legitimacy of the law through comprehension and spiritual resonance so that more and more people would favor a certain legal proposition even when they have inconsistent understanding about the content of legal norms and the result of adjudication (Ji, 1999). Resorting to the listeners’ emotional persuasion is accomplished, mainly, to take the appropriate means to achieve emotional resonance according to the specific circumstances of different persons. In this way, the audience would believe in a speaker's sincerity, and the effectiveness of speech acts could be accomplished. At the same time, the timeliness and transparency of judicial proceedings can reflect the judicially sincere attitude of the speaker.

The Rightness Claim of Judicial Judgment

The rightness claim means that the speaker should “complete a right speech act in a normative context in order to establish a proper interpersonal relationship between the speaker and the audience” (Habermas, 2004), which is related to what Searle calls “the essential rule”. Specific to the judicial adjudication, the rightness claim requires the court and the judge to make a right judgment within the established judicial proceeding and in accordance with legal norms. In such a litigation relationship, the purpose of the

speakers' speech acts is to adjudicate according to legal norms and to settle disputes, turning legal norms' validity into actual effects. In this way, the parties, other litigants, observers, and other unspecified members of the public would understand and recognize the judgments, which would evaluate and guide their future behavior.

“From the perspective of legal theory, the procedure is the process, the way, and the relation to engage in legal acts or make a decision...Of course, the most important thing among them is the 'relation’” (Sun, 2000). In order to establish proper interpersonal relations in such a normative context, it is necessary for the judicial adjudication to value legal procedures. The most important argument function and independent value of the judicial procedure is that it protects the equal participation of all parties so that the parties can express their opinions and argue adequately and openly in the official channel, making the different opinions tend to be polymerized. Through the judicial procedure, both plaintiffs and defendants can accept the results more easily, even if the final result does not fully meet their own expectations. Therefore, the judges' and the parties' relationships within the judicial proceedings have two levels: they are in the equal position when they are communicating and arguing, as well as in an unequal position when the judge is declaring the judgment. The effectiveness of the judicial adjudication as a speech act is based on the combination of “power” and “reason”. Only by exercising judicial “power” through “reason” can we really bring the illocutionary forces of judicial adjudication into play, realize its legal and social effects, and practically improve judicial efficiency.

Conclusion

The theory of speech acts provides us a new perspective on judicial adjudication. In adjudicative speech, judges are doing things such as stating, arguing, ruling, and declaring. These acts perform certain conventional forces (i.e. validity of adjudication) through the established social system, which are the adjudicative speech's illocutionary forces. Furthermore, as well as being an illocutionary act, judicial adjudication is a perlocutionary act that pursues certain legal and social effects via illocutionary acts.

In order to improve judicial efficiency, the judicial adjudication should meet the truthfulness claim, veracity claim, and the rightness claim. In the context of judicial judgment, the specific content of the truthfulness claim achieves legal truth based on the identified facts of the case and the legal rules and regulations applicable to the case. The veracity claim could be realized from the judges' own moral character and the emotional persuasion of the listeners. The rightness claim requires the proper relationship between plaintiffs, defendants, and judges. The parties have the right to fully present their views and submit evidence, while the judge should propose sufficient justification to show his recognition or refutation.

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“What’s in a name?”

Problems with Formalistic Statutory Interpretation in Uber Decisions

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[Abstract] The American ride-sharing app Uber’s aggressive expansion has infuriated the worldwide taxi industry, which has declared war against Uber in both the streets and in the courts. By naming itself a “technology platform” instead of a transportation service provider, Uber refused to comply with requirements for taxis. The three court decisions with Uber as defendant are identified as flawed in statutory interpretation due to the formalistic, static, or fragmentary view regarding the gap between taxi regulations and the novel on-call model. By exploring their implications, this paper suggests relevant considerations and an interest-based philosophy aiming at a more realistic, holistic, and reasonable updated statutory interpretation.

[Keywords] Uber; taxi; formalistic; statutory interpretation; interest

“What’s in a name? that which we call a rose/By any other name would smell as sweet.”

—Romeo and Juliet Act II, Scene II

Formalistic: Form over function

In *Transport for London (TfL) v Uber*, (*London Ltd. et al.*, 2015), the issue of whether the fine imposed by Section 11(2) of Private Hire Vehicles (London) Act 1998 applies to Uber vehicles. S11(2) provides:

(1) No vehicle to which a London PHV licence relates shall be equipped with a taximeter.

(2) If such a vehicle is equipped with a taximeter, the owner of that vehicle is guilty of an offence and liable on summary conviction to a fine not exceeding level 3 on the standard scale.

(3) In this section “taximeter” means a device for calculating the fare to be charged in respect of any journey by reference to the distance travelled or time elapsed since the start of the journey (or a combination of both).”

The two terms under scrutiny here are *taximeter* and *equipped*. The first one is resolved if the driver’s smartphone can be interpreted as a “taximeter” under S11(3). If so, the second one decides if an Uber vehicle is equipped with the driver’s smartphone.

The basics on the Uber fare calculation mechanism are as follows: the driver’s smartphone sends signals to Server 1 and 2 in the United States, providing GPS data and time details to Server 2, which calculates the fare to be paid by applying the London fare structure stored in Server 1. No fare can be calculated during a network outage. The court agrees that the driver’s smartphone provides inputs of time and distance for the journey in the calculation. Nevertheless, it is convinced that S11(3) clearly entails that “the device must be *for* [emphasis added] the calculation of the fare then to be charged....” It points to the shorter *Oxford English Dictionary (OED)* and holds that a smartphone does not amount to a *functional* (“thing designed or adapted for a particular functional purpose”) taximeter because it is not designed for calculating a PHV fare. Granted that the smartphone is essential to enable the calculation, it itself carries out no calculations but simply records, transmits inputs to, and receives output from the servers. The court also recognizes that “Section 11 is intended to catch all devices used for the calculation

of fares,” but its reference to the *OED* definition of “functional” suggests that it interprets “for calculating the fare” as *particularly*, if not *solely* for calculating the fare. The court consequently rejects a broad interpretation of taximeters as devices “expressly for the purpose of generating the fare,” which covers smartphones specially adapted by installing the Driver’s App, the odometer plus clock, etc. along with a black cab taximeter.

Admittedly, a smartphone or any telephone is neither designed to or defined by functioning particularly as calculator, clock, maps, GPS, or calendar, notebook, media player so on and so forth. Yet, it has become manufacturers’ common practice and customer’s reasonable expectation that these less sophisticated but useful functions be pre-installed. Furthermore, Uber’s operation would not be possible if smartphones could not record time, track locations, or measure distances with the simple programmes mentioned above. Suppose, one day, a taxi company decides to switch from the dull box-like taximeter to a fare-calculation app. Are they all of sudden running without taximeters? Another scenario is, one day the old-fashioned, boring taximeter is changed into a taxi-music-box-meter that charges for the music it plays based on the distance travelled and the time spent. Would the court hold that the taximeter no longer qualifies as taximeter, for it also plays music? Unlikely, for irrespective of the additional or extra, the single, most important point is that it meters, and the same applies to a smartphone or whatever novelty provides the same function. Besides, following the court’s narrowest construction, neither can we say that smartphone is designed to send messages and make calls, because that’s what every phone can perform and does mark the smartphone’s *smartness*. What is a smartphone’s designated purpose then? Is it a *functional* anything? One corollary of this court’s interpretation is that a multi-functional something becomes a functional nothing. Consequently, where the calculation requires joint effort of separate devices, none of them alone can be regulated, for each only functions as a component, not as a complete, proper taximeter, which means by artful division of function, people can circumvent laws structurally akin to Section 11.

The court also holds that an Uber PHV is not *equipped* with the driver’s smartphone, but the driver is because “equipped” focuses on what the vehicle is provided with and not what the driver temporarily brings in and uses. Furthermore, Section 11 in its entirety binds the owner of a vehicle, instead of the driver or the operator, so it could not go as far as to cover a smartphone of almost unlimited mobility. True, a smartphone is not a fixture in the vehicle. However, a vehicle is available as an Uber vehicle only when connected with a smartphone. What about the fact that “Uber supplies its drivers with a cradle to be attached to the car, into which the Uber-supplied phone is placed, and a 12v adapter and cable to connect the phone to the car’s integrated power supply” (Brown, 2014)? Does Uber incur such expenses for better enjoyment of music and films while driving or interior decorations? Be that as it may, the dominant purpose is to facilitate and improve Uber service and down-to-earth profitability. In this light, I understand the smartphone to be a taximeter, though a smarter one.

Static: Then over Now

In *Toronto (City) v. Uber Canada Inc.* (2015), the issue pertinent to our inquiry is:

- a. whether the unlicensed Uber X, Uber XL, or Uber Select vehicle is a “taxicab” or “limousine” and
- b. whether Uber Canada (hereafter UC) is a “taxicab broker” or “limousine service company.”

§ 545-1. in Article I provides that :

For the purposes of this chapter, the following terms shall have the meanings indicated:

LIMOUSINE – Any automobile, other than a taxicab as defined by this chapter, used for hire for the conveyance of passengers in the City of Toronto and formerly referred to in this chapter as a “livery cab”...

TAXICAB – An ambassador taxicab, a standard taxicab, a Toronto taxicab and an accessible taxicab...

For the first issue, the court believes that a straightforward reading manifests that only *licensed* taxicabs are included in the defined term “taxicab”. The City of Toronto advocated that common law defines “taxicab” broadly as a vehicle carrying up to five or six passengers for hire. Furthermore, only a broader interpretation can be consistent with Article VIII, which refers to taxicabs “licensed as such or required to be licensed as such”. However, the court rejected the reasoning that when Article I stated that “the following terms shall have the meanings indicated”, the word “shall” in its plain and ordinary meaning is mandatory. Thus, external resources shall not usurp the mandated interpretation unless absolutely necessary. “Taxicab” must be restrictive, also, because, otherwise, every limousine would fit the generic common law “taxicab” and thereby, require a taxicab license in lieu of a limousine license. The only reading that harmonizes the two provisions is to hold “limousine” as the default category while “taxicab” refers only to licensed taxicabs so that “the universe of automobiles for hire” is complete “without overlap.”

Article II requires every “taxicab broker” and every “limousine service company” to obtain a license as a prerequisite for business. The latter is defined as “any person or entity which accepts calls in any manner for booking, arranging or providing limousine transportation”. Since the majority of UC vehicles fall under “limousine”, does “limousine service company” fit UC? The court held *No* because (1) UC’s action is not to “accept”; and (2) no “calls” are involved.

Being aware that UC users’ requests are not accepted by any kind of human operator as with traditional limousine service companies, the City argues for extending “accepts” to mean “receives” or “relays”, thus encompassing a “purely automatic software-driven relaying of digital data without human intervention.” The court found this interpretation strenuous. It resorted to *The Concise Oxford Dictionary* (8th ed., 1990) in which the five enlisted meanings of “accept” all involve some conscious assessment by the recipient instead of a purely passive, mechanical relay, and concluded that the usual and ordinary meaning of “accepts” entails some judgment, interaction, or assessment. Furthermore, the broad interpretation would capture any telephone carrier or smartphone app that connects customers with local businesses that includes limousine transportation. Therefore, the more restrictive “accept” was selected in lieu of the more generic “receive,” which indicates legislative contemplation to *exclude* rather than *include* such businesses. Additionally, other usages of “accepts” related to taxi brokers within the code denotes conscious decision-making. Based on the principle of consistent expression, UC’s “passive, mechanical role of receiving and relaying electronic messages” does not amount to “accept” because it is at the sole discretion of the drivers to take or leave prospective passengers.

This decision relied on the dictionary to construe ordinary meaning, which is a common practice of statutory interpretation. Yet, when doing so, to certain extent, the contemplation of legislature is equated to that of the dictionary editors. Then, the question becomes which dictionary should be used in order to pay due respect to legislature. Essentially, depending on whether the court takes an originalist or non-originalist stance, it should choose one of the most trusted dictionaries and its latest edition, either at the time of legislation or of court decision. The cited part of Article I and II was adopted on June 20, 2002, by By-law 514-2002 and remained until 2016 after the decision. While the latest edition of the *Concise Oxford Dictionary* available for legislation was the 10th edition in 1999 and the 12th edition in 2011 for

this case, the court resorted to neither, but oddly chose the 8th edition that dated back to 1990. If the dictionary can be justifiably accorded the status of black-letter law or supposes a law-abiding citizen reads the dictionary to clarify what the law means, then, in this case, he should either read the 2011 or the 1999 edition instead of the 1990 one.

The opinion's reference to s.545-127 indicates that it understands "accept" in terms of the traditional contract notions of offer-and-acceptance: UC cannot say *yes* or *no* for the individual driver, and there is no deal until a driver presses the button, agreeing to undertake the requested trip. This means that each and every UC driver becomes a limousine service company whenever he starts service. Some might not find it absurd that the city can now regulate the industry by fining ten thousand part-time-limousine service companies. Even so, in this case, UC's supporting role can barely be described as a "passive conduit," for it has intentionally and continuously generated, aided, and abetted unlicensed limousine service companies on an expanding scale. So long as the drivers' services are unlawful, UC, in the very least, greases the wheel. Another flip side of the court's caution is smartphone service apps, in general, can view themselves as a technological platform, i.e. none of them provide the actual licence-required service but merely make it much easier. We may say that a licence to be unlicensed is generously granted, and why wouldn't previously regulated brokerages free themselves by operating as a technological platform? Such an argument might seem exaggerated, but bearing in mind that today's expanding, sharing economy is accompanied by a growing body of Uber-like middle-man apps, I am concerned that the court's narrow interpretation opens Pandora's box.

Another noteworthy fact unmentioned is that, albeit the driver alone decides whether to accept or not, those who reject over 20% offers or three offers in a row, cancel after acceptance and display other inappropriate conduct, are subject to Uber's warning system, "Driver Offence Process", or deactivation of their accounts. In one sense, it is announcing: dear driver, please accept now, or never. This quasi-three-strike-you-are-out-rule implies that Uber is not a sheer outsider of "accept."

Fragmentary: Part over Whole

In *Edmonton (City) v. Uber Canada Inc.* (2016), the same question of the license requirement hinges on whether UC does "business" under Business Licence Bylaw 13138 2 and whether it "operates, cause or permits the operation of a Vehicle for Hire" under the Vehicle for Hire Bylaw 17400 4(1) (NB: The decision erroneously refers to Bylaw 13813 for Bylaw 13138 in all but the first citation. And it is Bylaw 17400 instead of Bylaw 14700).

In the pertinent clause in Bylaw 13138 2, "Business" refers to "(iii) an activity providing goods or services, as described in Schedule 'A', and whether or not for profit and however organized or formed, including a co-operative or association of Persons". SCHEDULE "A" provides, among other detailed categories, a "General Business" and – "Any Business not otherwise specified in this Schedule".13138 4 imposes a license requirement for all businesses.

The City of Edmonton alleges that UC is, generally, carrying on business in Edmonton by recruiting drivers, advertising, and providing support to its affiliated companies, Rasier B.V., that license the app to qualified drivers and receives a fee for each completed ride, as well as Uber B.V. (both incorporated in the Netherlands and are non-party to this litigation). Namely, they are doing business and profiting in Edmonton through UC. However, the Court found that the money all goes to Rasier B.V., not UC, and neither UC, nor the two affiliates control each other, so the fact that UC's affiliates run a lucrative business throughout Canada does not render UC 's activity more business-like.

This conclusion is poorly substantiated and, also, contravenes common sense. In light of the purpose “to establish a system of licensing for businesses, business activities and persons engaged in business” and the fact that an umbrella term “General Business” in Schedule “A” actually sweeps over all activities that may fall under “Business,” it can be inferred that the legislator intends to regulate expansively though not universally. Inferring from Edmonton’s Business Licence Application form and other official guidelines, what’s at stake is the business’ commercial and environmental impact where profitability matters but is not dispositive. Consequently, one finds only narrow exceptions, basically non-profit ones with intangible output, such as religious ceremony services, academic research, and government services, but not a charity because charitable organizations and fund-raising businesses in general need licenses across Alberta. In view of the flock of advertising and marketing companies in Edmonton’s Yellow Pages, it is unthinkable that the court is telling all these shrewd enterprises that “what you are doing is ‘none of your *business*’”. The many existing sophisticated business models and economic theories on advertising also indicate that this activity is taken seriously as a business in general. Why does the court exclude UC’s advertising and job training from the business world?

Moreover, despite insufficient details on UC’s doings, we know that it “held several driver sign-up meetings (sic) at various hotels between November and December, 2014. These were advertised through an electronic invitation on Uber Canada’s web page.” It also introduced the apps in Edmonton, offering service. For me, then, it is evident that UC, and the same with its international counterparts, is established and operated mainly, if not solely for the purpose of Uber market expansion. The training it provides to the signed-up citizens is not philanthropic or fortuitous, but is a manifest strategic move to serve the Uber enterprise. The more drivers it recruits, the more customers and locations it can reach, accompanied by more profits. Without UC’s seemingly low-profile and unprofitable marketing and support, Uber will only be able to facilitate sporadic trips within a limited scope and in insignificant numbers. However, how is it actually faring? According to Uber’s own account, close to 4,000 Edmontonians have signed up as drivers in 2015, serving over 90,000 riders (passengers) and demand continues to grow “exponentially” (“One year of Uber Edmonton,” n.d.). Again, UC is not where the cash flows, but it greases the wheels. It simply cannot have it both ways.

The court also downplays UC’s share in the undertaking by stressing that the support is electronic and the advertising done only on social media networks. Against the backdrop of the growingly powerful internet commerce and social network, the court seems to suggest that only material support qualifies support, and real-life advertising, the proper advertising, is unsound. Such a view based on pre-app economy or internet economy would soon be outmoded, if not already so (Steinmetz, 2016). In a similar vein, the court also believes that information is neither “goods” nor “services”. However, by simply pushing it out of sight, is it saying that information should be left free to move around? Debates on viewing information as intangible goods or imperishable service or “product” – a kind of its own (Freidon, 1998) have not concluded yet, but it is undeniable that information is a subject matter of consequence, and unregulated cyberspace is fraught with problems that one cannot afford to be blind to. The court’s last card is that UC’s activity, even stretched to be business, was not continuous. “Several driver sign-up meetings (sic) at various hotels between November and December, 2014” seems like a series of continuing events. Why is it not continuous? The court provided no clue as what amounts to “continuous”.

The City also charges under Bylaw 17400, mainly relying on 4 (1): “A person shall not *operate, cause or permit the operation* (emphasis added) of a Vehicle for Hire unless it is a Taxi, Limited Taxi,

Accessible Taxi, Limousine or Shuttle”. “[O]perate” or “operating” a motor vehicle is defined as “to drive or to have care or control of the motor vehicle”. Since only Uber drivers are related to the vehicle in property law, UC apparently does not “operate”. The City then argues that in the peer-to-peer context, the word “cause” can mean “to induce”. Nevertheless, the court holds that “cause” as applied “requires a proximity to the offending action alleged to have been induced” and “What Uber Canada caused or induced was the downloading by drivers of the driving App on their smartphones... it does not cause drivers to drive or have care and control of a vehicle for hire”” Besides, it also falls short on continuity. By the same token, the court rejected the city’s interpretation of *permitted* because the very word denotes someone *allowing* another to drive or to have care and control over *his* vehicle, entailing an intended agency relationship or authorisation over one’s possession. Both are absent in UC’s case.

The court’s highlight on the driver’s exclusive autonomy in driving is plausible, as a driver does not steer a car because UC causes or permits him to do so. However, this construction is at best incomplete, for it actually interprets “cause or permit the operation of a *Vehicle*,” but not “cause or permit the operation of a *Vehicle for Hire*”. Indeed, people have been buying and driving cars for all kinds of causes before and after the advent of Uber, but now UC incentivised them to turn their private car into a temporary vehicle for hire at the click of a button. Absent such alluring benefit of flexible, part-time and easy operation, Uber driving would not be half as desirable as it is now, nor would Uber profit as much in consequence. Suppose a Verona citizen Romeo has been driving to and from work for 50 years and knows nothing about Uber whatsoever until one afternoon he signs up as an Uber driver after seeing UC’s advertisement and begins to earn extra income along the way to his office. Did UC command or persuade him to buy or drive a car? No, but it summons him to drive the same old vehicle as a vehicle *for hire*. Considering UC’s magic in transforming a vehicle mechanically defined into a vehicle for hire in commercial terms, UC cannot be prouder and, thus, more proximate and direct in the offending action of *causing*. Yet by reducing vehicle for hire to vehicle, the court conveniently overlooks Uber’s “peer-to-peer” issue within the context of an app-based sharing economy.

Towards a Realistic, Holistic, and Reasonable Updating of Interpretation

Statutory interpretation, in one way, is a craft aiming to answer Juliet’s famous question, “What’s in a name?” in *Romeo and Juliet*. Notwithstanding that her answer does not fit perfectly, there is one grain of truth in it: the identified meanings of a name rarely exhaust its significance. Consistency of law as one of the principles of legality (Fuller, 1969) does not call up judiciary to restate legislative language, but rather to ensure that the prospect, spirit, and vision of a rule of law responsive to needs and values are everywhere implemented. What’s the axis or the bottom line of statutory interpretation, then? I argue that it is the interests or the needs at stake. While modern society undergoes increasingly rapid transformations, it remains relatively stable and has been outlined in human rights law and numerous constitutions. The crux of rule of law, thus, is not about a well-crafted body of do’s and don’t’s, but rather to construct, shape, or support a society following conscientious rules in order to realize its members’ legitimate interests and gradually fulfillment of a higher level of needs. This approach also finds jurisprudential support, at least from Hart’s (1958) core meaning-and-penumbra theory, enmeshed in *Griswold v. Connecticut*, in which the Supreme Court of the United States found “the right to privacy” from the penumbra of the Bill of Rights (*Griswold v. Connecticut*, 1965). In terms of *application*, the crucial connection that enables later generations to pair one case to another or a statute to a myriad of happenings is the *interest* involved. When it can be reasonably believed that the case at the bar does not

implicate an *interest* pertinent to the legislative purpose, namely, that the lawmakers would not be interested in, the court's adjudication could be unnecessary and even intrusive. On the other hand, when lawmakers are indeed interested, the court would not be doing its job to dismiss the claim or fail in "taking rights seriously" due to a fragmentary, close-minded, or obsolete interpretation. With that said, statutory interpretation should aspire to be realistic, holistic, and reasonably updating. Such is preconditioned on understanding the legislative purpose to the extent that the court is able to, first, identify the gap – a subject not captured by its form may, nevertheless, be subsumed by its function or effect; and, second, close the gap – convincingly resolve whether the way the non-formally conforming subject begets such function is contemplable by the legislature. Thus, "business" should be interpreted to include Uber Canada's activities because the interests concerned are exactly what taxi regulations mean to take care of, e.g. safe transaction and fair competition. When the court artificially insulates Uber from the relevant laws, it not only risks diminished efficacy and impaired function, but also causes unequal applications that erode the fundamental legitimacy of pre-existing frameworks.

Rule-sceptics might challenge the merit of the current regime, but that is a separate issue determined by the legislature, while the judiciary sees to laws being applied in a purpose-fulfilling manner. These foregoing decisions display glaring flaws in statutory interpretation. Many vexing problems emerge from these textual loopholes for all parties involved, primarily the taxi industry, Uber drivers, and passengers. Nevertheless, these seeds of conflicts spurred legislators, mainly at municipal and state levels, to tailor regulations for ride-sharing companies in order to level the playing field (Sununu, 2014; Badger, 2016). The overall condition was also improved when the wiser, protesting taxi drivers strategically improved their service by learning from Uber (Wallsten, 2015). Indeed, the taxi industry is a classic example of the invisible hand while prevalent taxi regulations, the visible ones, and now Uber's worldwide popularity brings forth new friction between them. We are born into an age of innovation in which we are greeted daily by new problems. Many more novelties await the judiciary as it bridges the gaps between facts and laws and seeks justice via realistic, holistic, and reasonably updated interpretations.

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In Linguistic Movements and Transfers from the Kabyle Language: A Contrastive Study (French-Kabyle)

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[Abstract] *We want to study the transition from Kabyle, as a language reserved for oral use, to new areas, such as communication, education, and various other fields. We are concerned with analyzing the linguistic characteristics of the language used in new areas. In order to answer the various research questions, we have compared the language with that in usage to see the degree of conformity to the rules in question in the modern usage. To carry out our work, we hypothesized that the texts of the modern usage of Kabyle are characterized by structures modeled on the French language, on the level of the neological creation, and the syntactic level. Indeed, some neological creations generate new structures that are unattested and incomprehensible in the daily use. Our work is a contrastive study between the French language and Kabyle.*

[Keywords] *linguistic; movements; transfers; contrastive study; structure.*

Introduction

Alongside French and Arabic, used in the fields of education, administration, and communication, Berber (Kabyle), reserved for thousands of years for oral use, restricted to everyday life interactions, and sidelined for a long time, has recently benefited from a remarkable progress in terms of institutional and constitutional¹ status, and its use has extended to new areas (teaching, communication, etc.).

Moreover, the introduction of Berber in the official fields happened after a long struggle. Indeed, two departments of the Amazigh language and culture were created by the struggles of the users of this language: one at Mouloud Mammeri University of Tizi-Ouzou (1990), and the other at the University of Bejaia (1991). During the school years 1994-1995, a school boycott forced the introduction of Berber into the educational system and the creation of the High Commission for Amazigh² (HCA), which was in charge of the rehabilitation of the Amazigh language and culture.

Article 1 – A structure called the High Commission was created and is responsible for the rehabilitation of Amazigh, and the promotion of the Amazigh language, governed by the provisions of this decree and hereinafter designated Office of the High Commissioner.

In 1996, after the revision of the Constitution, Berber is elevated, in the preamble, to the rank of National Constants, next to Islam and Arabic.

November 1st, 1954 was one of the landmarks of its destiny. The result of a long resistance to the assaults on its culture, its values and the fundamental components of its identity, which are Islam, Arabic and Amazigh, November 1st will have solidly anchored present struggles in the glorious past of the nation.

In 2001, with the tragic events in Kabylia, the Berber language was recognized as the second national language (next to Arabic) after the amendment of the constitution on April 8, 2002.

¹ Consecrated as a national language in the Algerian constitution in 2002 and official national language in 2016.

² Presidential Decree No. 95-147 of May 27, 1995, establishing the High Commission for the Rehabilitation of Amazigh and the Promotion of the Amazigh Language.

Article 2 - Arabic is the national and official language.

Article 2a - Tamazight also is a national language. The State works for its promotion and development in all its linguistic varieties in use on the national territory.

During the same period, in December 2003, the Berber language benefited from a national pedagogical and linguistic center for teaching Tamazight under the supervision of the Ministry of National Education. Along the same process, the University benefited from the opening of two departments, one at the University of Bouira (2008), and the other at the University of Batna (2012). After the revision of the constitution in 2016, Berber achieved the status of a national and official language and benefited from the creation of the academy of the Amazigh language alongside Arabic, as the Articles 03 and 04 of the Algerian constitution stipulate:

Article 3 – Arabic is the national and official language. Arabic remains the official language of the state. It is created by the President of the Republic, a High Council for the Arabic Language. The High Council is responsible in particular for working for the development of the Arabic language and for the generalization of its use in the scientific and technological fields, as well as for encouraging translation into Arabic for this purpose.

Art. 4.3 – Tamazight is also a national and official language. The State works for its promotion and development in all its linguistic varieties in use in the national territory. There is created thereof an Algerian Academy of Amazigh Language, placed under the responsibility of the President of the Republic. The Academy, which relies on the work of experts, is responsible for meeting the conditions for the promotion of Tamazight in order to implement, eventually, its status as an official language. The modalities of application of this article are fixed by an organic law.

During the academic year 2016-2017, the Berbers benefited from the opening of a Licence Degree at the ENS of Algiers. In terms of communication and media, the Berber language benefits from two important institutions alongside the national radio (channel II); the creation of a national television channel in Berber (2009) and two regional Kabyle radio stations: Radio Soummam in Bougie (2000) and Radio Tizi-Ouzou (2011). In addition, in order to accompany Berber in its new status, several researchers, academics, and activists have become involved in the process of its development. In terms of lexicon, many individual initiatives have resulted in the publication of several terminologies in different fields: legal (Adghirni, et al., 1996), computer science (Saad-Bouzefrane, 1996), religion (Nait-Zerrad, 1998), traffic laws (Khalifa, 2005), literature, geology (Kamel, 2006), grammar and linguistics (Berkai, 2009; Boumalek & Nait-Zerrad, 2009), literature (Bouamara, 2007; Salhi, 2012), media (Ameur, et al., 2009) and electrotechnics (Mahrazi, 2011).

However, in the absence of an official language planning institution, these individual and institutional attempts³ (research centers and universities) to implement terminologies have resulted in the creation of new syntactic structures that are not attested in traditional usage and have led to different choices in neological creation. Indeed, in order to respond immediately to the needs of the new fields of modern usage, new syntactic and semantic lexical structures have surfaced.

Our work is the result of about ten years of experience in teaching written and oral expressions to undergraduate students in the Amazigh language and culture department at the University of Tizi-Ouzou. We wanted to study the transition from Kabyle, as a language reserved for oral use, to new areas, such as communication, education, and various other fields. It is concerned with analyzing the linguistic

³ These are institutions that have no legal power to impose planning choices.

characteristics of the language used in new areas. Indeed, what are the linguistic means employed by authors to express the new realities in use? What are the processes used in the creation of neologisms? What are the references used when they are created? What are the syntactic characteristics of the language in use?

In order to answer the various questions, we compared the language taught with that in use to see to what extent the rules governing the modern usage of Kabyle have been applied in the media, and scientific texts, etc. As a corpus of study, we worked mainly on journalistic (audio-visual and written) and scientific (medicine) texts. We compared the language in use⁴ with that in usage to see the degree of conformity to the rules in question in the modern usage. To carry out our work, we hypothesized that the texts of the modern usage of Kabyle are characterized by structures modelled on the French language⁵, on the level of the neological creation, and the syntactic level. Indeed, some neological creations generate new structures that are unattested and incomprehensible in daily use.

Our work is a contrastive study between the French language and Kabyle. In our analysis, we relied mainly on the work of Lionel Galand (2010), Chaker (1983), and Kahlouche (1992). To achieve our goal, we have divided our research into two essential parts. The first is concerned with the analysis of neological creation processes used in the Traffic Code. The second part analyzes the syntactic structures used by journalists in information texts.

In order to better understand the social and cultural impact of the linguistic system in use, we inscribed our research in a discursive perspective. In this case, we relied on the work of J. M. Adam (1997), who defined speech as a statement that can be characterized by textual properties and, above all, as an act of discourse performed in a situation (participants, institutions, place, time. This is what the concept of “language conduct” performs in terms of implementing a type of discourse in a given situation.

In our case, speech is considered as the working together of contextual and cultural linguistic skills (cultural referents)

Neology in Modern Kabyle: Creation or Translation?

In the era of new information and communication technologies, neology is beginning to occupy an important place and provide unlimited creativity in languages, as attested to by the creation of many neologisms in many new areas (teaching, communication, etc.). The field of the creation of new lexical units is divided into two essential aspects: *neology*, reserved for training processes, and *neologisms*, for the results of the creation of lexical units. On the other hand, to distinguish a specific language from the general language, neonyms are used for the first term. Neologists agree that, globally, lexical formation processes are grouped into two essential categories, which are the neology of form and the neology of meaning.

Formal Neology

Formal neology is a process based on the addition of a signifier for a term that exists in the language. Indeed, lexical creation can rely on derivation and affixation and composition.

Semantic Neology

Unlike the first method, semantic neology assigns another meaning to a lexical unit that exists in the language. Indeed, that process gives the lexical unit a new meaning in the language.

⁴ The basic structures of the language of traditional use before the integration of new structures.

⁵ The layer on the French language is historically justified since the French colonization of Algeria.

The Source of Neologic Data

The analysis of the neologism formation processes used in the different texts of our corpus allowed us to show that the two processes mentioned above are used. Indeed, the authors rely mainly on morphological processes, including derivation and composition, rather than on the semantic process. On the other hand, the latter is used to choose the lexical unit for the term to be created before associating it with the morphological process (derivation and composition) in the creation of the new lexical unit. Moreover, the overwhelming majority of the adopted lexical units are borrowed from Mammeri in his *Amawal dictionary n tmaziyt tatrart* "Dictionary of Modern Berber".

Language Mixing: Linguistic Gaps or Ritual Constraints?

As linguistic competence is the set of verbal and nonverbal mechanisms used to achieve verbal communication, its mastery requires contextual acquisitions of the produced statements. For example, communicative competence involves the set of rules governing conversational exchanges of speech turns. These are the ritual constraints that interlocutors are expected to respect alongside linguistic constraints. The communicative schema contains "social constraints" and "linguistic rules"; it is a complex process of skills in which linguistic knowledge and socio-cultural knowledge form an inseparable whole, aimed at succeeding in the receptive and productive skills.

This completeness is well shown by (Roulet, 1987, p. 11):

In this conception, any intervention, that is to say any monological discourse, aims in principle at satisfying a constraint called interactive completeness. Indeed, an enunciator, whether engaged in a conversation or in the production of a written text, strives to construct an intervention that is not perceived as inappropriate, incoherent or unclear, to prevent the speaker from breaking the main thread of the speech by opening secondary negotiations on obscure points or to prevent the reader from picking up. Although it leads to different hypotheses, for which we bear sole responsibility, this essay owes much to the data, descriptions and oral suggestions of Marianne Schelling. The enunciator may attempt to satisfy interactive completeness in different ways. First of all, to prevent his intervention from being perceived as inappropriate, the enunciator can open it by metadiscursive comments aimed at specifying its illocutionary function (for example: I would like to ask you a question – see the description of Auchlin in Roulet, et al., 1985, Chapter 2.1.). "To spare the face of the interlocutor (I apologize for disturbing you, see Roulet, 1986), or by comments situating the context of the communication (I received your mail this morning, but I wanted to know, see Roulet, 1986). Then, to avoid that his intervention is perceived as incoherent, the enunciator can introduce one or more argument (s) or mention, to reject them, one or more counter-arguments, often marked by argumentative connectors, such as because or indeed, counter-argumentative, as though they are or are consecutive, as is the case (see Roulet, et al., 1985, Chapters 1 and 2). In both cases, the enunciator constructs an intervention in which the main act is based on acts or interventions, or even exchanges, subordinated. We call interactive functions the relations between the subordinate constituents and the main constituent of an intervention and we will distinguish now the interactive functions of ritual type, corresponding to the first case described above: preparation, specification, etc., interactive functions of argumentative type (in the broad sense), corresponding to the second case described above: argument and counter-argument.

The analysis of our corpus shows us that language mixtures are used as linguistic processes to obey to the ritual and cultural constraints.

Take the case of the social organization of Kabyle society, whose basic structure is the family (*axxam*); the Kabyle linguistic conversation supports this basic structure to talk about women. For example, *Wwiy axxam-iw yer tmeyra* (“I took my family to the wedding party”) turns to actually say *Wwiy tameɣtut-iw yer tmeyra* (“I took my wife to the party”). On the other hand, the first realization is used for reasons that are linked to the cultural and ritual constraints that do not tolerate evoking the woman in public. This linguistic diversion obeys the ritual constraints.

On the other hand, in the modern use of the language, circumvention is used by the mixture of languages, a process that obeys ritual and cultural constraints. Indeed, the statement *wwiy Madam yer tmeyra* (“I took my lady to the wedding party”) goes better in front of *wwiy tameɣtut-iw yer tmeyra* (“I took my wife to the party”).

The same circumvention is attested to in conversations between doctors and patients, especially between gynecologists and female patients. Indeed, in front of some taboos and ritual constraints in Kabyle, such as in a number of Kabyle lexical units, the mixture of languages is provided to circumvent the ritual constraints.

Modern Syntactic Constructions in Broadcast Journals

After having dealt with the neologism formation processes in the case of the Kabyle traffic code, we try to highlight some syntactic structures⁶ used in journalistic texts but are not attested in everyday and traditional use.⁷

The Predicative Phrase d win “It’s the One”

It is a predicative phrase composed of the predicating auxiliary *d* (“it”) and the non-verbal predicate *win* (“that”). In traditional usage, the use of the phrase in question is reserved for a use of choice and singularity. In the example of the proverb: *Tameɣtut d tin* (female of win) turns to *iherrezen* (“The woman is the one who preserves”). The use of the predicative phrase allows us to distinguish and define the woman in Kabyle. This singularity is defined by the use of the participial form of the verb that follows the predicative phrase. However, we found different uses in the journalistic texts, as in the example: *Argaz d win iruhen yer Tizi-Uzzu* (“The man is the one who went to Tizi-Ouzou”). In reality, the author simply means that “the man went to Tizi-Ouzou” (*Argaz iruḥ yer Tizi-Uzzu*).

Passive Form

Berber is characterized by a passive morpheme (*tww, m, n*) affixed to the verb. Its use makes the verb intransitive. In traditional use, the subject becomes patient. *Yettwaker means* “he was stolen”. In this statement, we can not know who did the action. However, in modern usage, we have recorded non-attested phrasal structures in everyday use. In the example *yettwaker umeddakel-is* (“he was stolen by his friend”), the agent of the action is explained in the sentence. This structure is actually modeled on the passive form of the French language in which the agent complement is, nevertheless, rare.

⁶ The works on the use of modern Kabyle have attracted several scholars of Berber: Oussalem Mohand (Ouamar 1999) and (Achour Ramdane 2011).

⁷ We mainly relied on Chaker Salem's (1983) doctoral thesis and Galand Lionel's (2010) work on the syntactic structure of the traditional usage sentence.

Abuse of Verbal Action Name Instead of Verbal Form

The morpheme *My*, prefixed to the verb, admits a plural person index whose referential expansion⁸ can always be decomposed into two or more participants. The latter performs and undergoes the trial simultaneously (Chaker, 1983, p. 314).

Msefhamen (“They have agreed”). In this sentence, it is the *My* morpheme that ensures the reciprocity of the trial of the two participants. *Yella-d um sefham gar snat n tmura* (“There was an agreement between the two countries”). In this statement, the journalist means that the two countries agreed with each other. In the traditional use of Kabyle, the morpheme of reciprocity alone allows for the simultaneous trial of both participants. On the other hand, in this case, it is a layer of a construction starting from the French language, structure which is not attested in the traditional use of the Kabyle. On the other hand, the journalist can use the structures attested in the usage by saying simply: *msefham-ent snat n tmura* (“The two countries have agreed”).

Conclusion

This work can be considered as preliminary research for an in-depth research project on the processes of formation of Berber neologisms in new areas of use. At the end of our work, we found that the Kabyle are very much influenced by the structures of French. The speaker or the journalist, as soon as he sets himself in a formal situation to treat a new field, resorts directly to the structures of French. Moreover, the Kabylophone speakers do not manage to transpose the traditional structures of language into the new areas that the Kabyle is beginning to integrate. This fact can create two different linguistic situations, one for everyday use and the other for modern use. In sum, the situation could be summarized as follows:

1. Preponderance of the neological creation to the detriment of the semantic creation;
2. Privilege is granted to the neological creation instead of searching the units of the language attested in the traditional use
3. Understanding is made difficult because of the layers of syntactic structures in French.

In conclusion, we can say that the changes that characterize the syntactic structure of Kabyle are not due to its progressive evolution; on the contrary, it is about a deconstruction of the old morphosyntactic rules as a result of the influence of other languages, especially French.

“The changes that manifest themselves at the syntactic level are not the result of an evolution that takes place for intrinsic reasons that would consist in the optimal exploitation of the resources that the language offers but they are being realized by imitating dominant languages as a consequence of a situation of linguistic competition which is clearly against Kabyle” (Achour, 2011, p. 632).

To overcome this situation, the legal gains that the Berber language has had must be made available to researchers and practitioners of the language, institutions that have the scientific and legal power to take charge of the language system. This way, it will be able to meet the expectations of its legal status as a national and official language.

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⁸ Galand has adopted the name of explanatory supplement.

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Legal Principles and Literary Language in Verdicts in the Ming Dynasty – An Investigation Based on *Zhe Yu Xin Yu*

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[Abstract] *The verdicts in the Ming dynasty (1368-1644 A.D.) were the fruits of ancient legal wisdom. Representative works of that time are Zhe Yu Xin Yu (New Collection of Verdicts), which incorporated legal principles into a literary language, marking the maturity of verdicts in China's history. By inheriting and transforming excellent ancient verdicts in a critical manner, today's judicative paper could be more refined, thus contributing to the fostering of today's legal culture.*

[Keywords] *verdicts in Ming dynasty; Zhe Yu Xin Yu; legal principles; literary language*

Introduction

The ancient court verdict, called “Pan Ci” in Chinese, is a kind of legal instrument produced by the ancient judiciary authorities to solve civil conflicts and settle disputes and lawsuits. Its function is similar to today's written judgment from the court (Wang, 1997). Those ancient verdicts, on one hand, reflected the authority of state law and represented the compulsory adjudication of the government; on the other hand, a well-written verdict requires excellent language skills to convince the parties involved to accept the judgement (Yang, 2013). Studying ancient verdicts can enlighten us a great deal in understanding ancient laws and language.

Zhe Yu Xin Yu (New Collection of Verdicts) is the only Ming verdict collection that has been passed down in China. Li Qing wrote this book while he had been serving as a judge in the government of Ningbo during the reign of Chong Zhen (1628-1644 A. D.). The book contained 211 verdicts in ten volumes, themed as marriage, inheritance, property, cheating, rapes, stealing and robbing, money and food, faults, major criminals, and the unjust-judged criminals. At the end of the book, an article titled *Yi Yu Shen Yu* (which means “Remarks to Doubtful Cases”) was attached. This book has great study value. All the verdicts in the book were from true cases recorded in the judicial office of the government of Ningbo in the late Ming Dynasty. “The various cases indicated the diverse conditions of all works of life during that time, mirroring the various relationships and conflicts in the end of China's feudal society, thus making it a precious book at first hand for the current jurisprudential circle and historian circle to study the history and laws in the Ming dynasty” (Li, 1987, p. 1). Meanwhile, the author, Li Qing, “was reasonable and understanding; committed to observing rightness and justice, he never made cases stocked and always decided cases promptly” (1987, p. 3). The verdicts he wrote combined parallel sentences and loose sentences, manifesting a strong literary language sense. *Zhe Yu Xin Yu* also has great application value. By observing the expressions used in this book, we can have a glimpse at the language writing style in the Ming verdicts; following such a lead, we could learn how it has impacted and how it has been inherited in today's court judgement writing.

Currently, most of the studies by the academic circle on *Zhe Yu Xin Yu* are scattered in various books, like *Study on China's Ancient Verdicts* by Wang Shirong (China University of Political Science and Law Press, 1997), and *Study on Ancient Verdicts in the domain of Rhetoric*, by Zhao Jing (2008). As there has

been little study focusing on the law and language perspectives of *Zhe Yu Xin Yu*, this paper is delivered to address this insufficiency.

Legal Principles in Verdicts of the Ming Dynasty

Quoting legal principles to support a judgment is an essential part of ancient verdicts. In the Ming dynasty, the verdicts (hereinafter referred to as the Ming verdicts) not only quoted the stipulations in *Laws and Decrees of the Great Ming Dynasty*, but also doctrines from Confucian classics. On one hand, *Laws and Decrees of the Great Ming Dynasty* is an epoch-making statute book in the history of Chinese law; on the other hand, Confucianism's authority in the Ming dynasty was still unrivaled and was legalized gradually. Therefore, the two were both reflected in Ming verdicts.

Confucian Classics: Soul of the Ming Verdicts

The laws and legislations in the Ming dynasty were completely Confucianized, as evidenced by verdicts at that time, in which the Confucian doctrines were reflected throughout, becoming the main basis, even the soul of verdicts. First, Confucian's proposition of dropping lawsuits was reflected clearly in the Ming verdicts. In *The Analects of Confucius*, by Yan Yuan, the suggestion of dropping lawsuits was proposed in the beginning of the article. Confucius (2006) said: "I am as good as anyone in hearing a case; if there is ever a difference, it should be that I can make people stop filing suits!" (p. 128). In an article titled "Xiang Lin Zhi Zheng Quan Yi He Mu" ("Persuading the Quarreled Neighbors To Get Along in Peace"), the author, a man in the Song dynasty named Hu Shibi (1987), explained the reasons for quitting lawsuits: "People always care only the gain and loss at present but fail to see afar. They go to the court for only a little quarrel... Can going to the court bring any benefit? Instead of making money from your work, you have to spend money on the road; you have to favor the government personnel with money or goods. Your husband got frightened in the court hall by suffering bundling and beating. To lose or to win the case all depends on the official's judgment. So, is everything really worth it? Even if you win the case, you will be revenged on later and will never be able to live in peace" (p. 394).

In *Zhe Yu Xin Yu*, there is a verdict titled "Mie Qin Shi" ("Maltreating the Family Member"), which described such a case: Mrs. Yuan, wife of Zhou Ding, was so jealous of her husband's concubine, Mrs. Lan, that she asked her brother, Yuan Xin, for help, who treated Mrs. Lan with violence. Zhou Ding, in a rage, sued Yuan Xin to the court. After hearing the case, Li Qing (1987) gave the following judgement after hearing the case: "However sweet the wife is, she can never outshine the new concubine in her husband's heart, so the wife gets discontented! While the wife and the concubine will be exempted from punishment, Yuan Xin and Zhou Ding shall be punished lightly as a warning for their improper mediation. If Mrs. Lan stops requiring exclusive devotion from her husband, she and Mrs. Yuan will soon get along well like sisterhood. 'Everyone has its own fate and there is no need to complain!' I hope you can truly understand the meaning of such words!" (Li, 1987, p. 62).

In the verdict, Yuan Xin and Zhou Ding were reproached for handling family affairs improperly, which led to a lawsuit, so they incurred a light punishment for warning purposes. Mrs. Lan was advised to stop monopolizing her husband and Mrs. Yuan to learn to perform gentle female virtues; the two should love and respect each other like sisters. In this verdict, the involved parties were keenly persuaded to settle the dispute.

Another example can be found in a verdict titled "Hei Yuan Shi" ("Truth in the Dark"): The adopted daughter of Li Yi went to Li Fang Lu's house to work as a maid; later, she died of illness. Li Yi, without

knowing the truth, thought her daughter died of maltreatment from the Li Fang Lu' family, so he filed the case to the court. Li Qing (1987) ascertained the facts and settled the case by making the two be reconciled, as written in his verdict: "In the court hall Li Yi and Li Fang Lu reconciled with each other and stopped to fight any more" (Li, 1987, p. 52).

Second, Confucius' thoughts of prudently using punishment, sentencing light punishment, and cautiously applying capital punishment were also fully reflected in the Ming verdicts. Confucius set store on human's lives in *The Analects of Confucius* (2006); there were sentences like this. After Confucius went back, he found the stable was burned; hastily, he asked: "Is any one injured?" (2006, p. 195). He asked nothing about the horses. Taking the verdict titled "HuoJie Shi" ("The Fire Disaster") as an example, in a case of robbery by committing murder and arson, Li Qing (1987) sentenced the two prime culprits to death, but for the accessory criminal, Yuan Xuan, he imposed a lighter sentence because Yuan Xuan was not involved in dividing the plunder and committing murder: "Leniency is granted here pursuant to the principle that while the fierce jackal shall be dismembered, the tricky rabbit can be let off; this is also to show my mercy!" (Li, 1987, p. 483).

Laws and Decrees: Basis for Judging a Simple Case

If a case is clear and only involves a single charge, the Ming verdicts would judge the case in complete accordance with the *Laws and Decrees of the Great Ming Dynasty*. In ancient judicial acts, if a judicial official judged a minor crime as a grave one or otherwise in the opposite, he had to undertake the accusation of "being unfair in judging a case." To avoid this, the *Laws and Decrees of the Great Ming Dynasty* stipulated that "If any judicial official deliberately judges any case unfairly, he shall bear the full crime if he judged any innocent person as guilty or any guilty person as innocent. If he made a minor crime as a heavy one or made the opposite, he shall be punished based on the degree of his mistake. If he made a mistake in sentencing someone to death, he shall also be sentenced to death" (Huai, 1999, p. 218). In *Zhe Yu Xin Yu*, the judgement was commonly written as "flogging based on the law" or "imprisonment based on the law," which proved the fairness of the punishment and, thus, avoided the accusation of "being unfair in judging a case." For example, an article titled "Mou Ming Shi" ("A Murder") described that Cheng Junzhong, coveting the money of Jin Dali, lured him to stay in a prostitute's house and then killed him. After ascertaining the facts, Li Qing (1987) judged Cheng Junzhong as "beheaded as per the law" (p. 486).

Situation Observing: Approach to Solve Complex Cases

When a case is relatively complex, or the facts involved are complicated or multiple charges that need clarification are involved or there is a conflict between the law and the Confucian classics, the Ming verdicts would normally observe the situation carefully and make the judgement with certain flexibility. For example, in an article titled "Sha Fu Shi" ("Killing of One's Father"), Han Mengri killed his father, Han Wenliang, while he suffered insanity and in accordance with the law: he should be beheaded in the morning market; but Li Qing (1987) thought that from a Confucian's ethical perspective, the love between father and son was like that between a cow and a calf, so he altered the sentence and issued flogging to death in the court hall to Han Mengri. He wrote in the verdict that "Anyway, to kill someone due to insaneness is different from to kill someone brutally. This father and son may be bound to have such fate, so the God may show some mercy to the son's inhuman act. It's hard to say" (Li, 1987, p. 484).

Literary Language in Ming Verdicts

Most of the judicial officials in the Ming dynasty were selected through rigid imperial examinations, which proved their wide knowledge and profound insights. As those officials had been learning poems and prose for years and were familiar with judicial practices, the verdicts they wrote always shone with a literary beauty, were convincing and were influential.

Fixed and Orderly Structure

In *Zhe Yu Xin Yu*, every verdict is started by “Shen De” (which means “The accuser is...”) to state the identity and relations of the involved parties; the narration of the case and the comments followed; after that, the judgement basis is proposed and the judgement made with reference to the *Laws and Decrees of the Great Ming Dynasty* or the Confucian classics. At the end, based on the principle of settling disputes, the official will often give his keen advice to the involved parties. Such fixed and orderly structure, “Manifesting that Ming verdicts not only absorbed achievements in previous verdicts, but also had its own innovation and progress, thus had entered the maturity era of verdicts” (Wang, 1997, p. 77).

Taking the article “Jie Qi Shi” (“Lost of the Fiancée”) as an example, in this verdict, the relations between the four involved parties are introduced first: Li Ma promised his daughter to Shen Bin first; before Shen Bin could marry his daughter, he re-betrothed his daughter to Fang Desi. The case is explained later: Shen Bin accused Lima of breaking the promise and hoped he could fulfil his word by giving his daughter back. The judgement basis is expressed then. Although Shen Bin asked for Liunv’s hand in the first place, Liunv was first married to Fang Desi. So, it’s not reasonable to ask her to remarry Shen Bin. The judgement is then given: Liunv should remain the wife of Fang Desi, and Fang Desi should compensate Shen Bin the bride-price he had paid. At the last, the official reproached the dirty trick of Li Ma and punished Fang Desi by flogging for his carelessness in proposing marriage (Li, 1987).

Ming verdicts were written in a fixed and orderly structure, enabling the audience to rapidly understand the cause of the case, the judgement basis, and the results.

Proper Rhythm of Writing

In *Zhe Yu Xin Yu*, literary quotations were used skillfully, which explained complex things clearly in brief words. For example, in the article “Huan Peng Shi” (“Dying of the Concubine”), the relations between Wang Junshi, his wife, Jiang, and his concubine, Xiejie, were described by three literary quotations (Li, 1987). The first is to build a golden house for the beloved; it is said that Emperor Wu of Han dynasty admired his cousin Chen A’jiao a lot and once stated that if he could lead her to altar, he would sure build a golden house for her to live in. Here the allusion was quoted to show that Wang Junshi didn’t make a pet of Xiejie. The second one is to like the concubine at first sight; a senior general named Huan Wen in the Eastern Jin Dynasty (317-420 A.D.) once took a concubine on the outside; his wife upon hearing this, carried a knife with her and went to the living place of the concubine. After she saw the concubine, who was so charming and elegant, she put away the knife and said, “Even I after seeing you can’t help liking you, let alone the old man (Huan Wen)” (Liu, 2007, p. 815). She discarded all the grudges and treated the concubine kindly. The third allusion is to roar at one’s husband like a lion. Chen Jichang, a scholar in the Song dynasty, had an extremely jealous wife, Liu. Whenever Chen Jichang entertained his friends with a banquet at home and invited some sing-song girls for drinking company, Liu would become jealous and hit the wall on the other side with a club; the guests were so embarrassed that they left the banquet (Hong, 2005). Li Qing used the second and the third allusions to indicate the relations between wife Jiang and

concubine Xiajie, showing that they neither got along well nor badly. By using those allusions, the emotional relationships between the involved parties were presented clearly in only a few words.

Second, in *Zhe Yu Xin Yu*, pairings were nicely used to repeat the previous meaning and enhance the effect. An example can be found in the same article “Huan Peng Shi” (“Dying of the Concubine”). Xiajie was drowned while she was washing clothes beside the pond. Someone wrongly accused the wife, Jiang, of killing the concubine and beat the drum outside the court to lodge the suit. Li Qing (1987) wrote as follows in the verdict: “Does the wronged ghost carry a bowstring and appear in the daylight and speak in front of the stairs? Is there a woman who told the story of her family being murdered in front of the official’s place in the midnight? If someone could use the pen as a sword and the words a drum to wash away the grief and vent out the resentment, it’s because he accuses the crime with firm grounds” (Li, 1987, p. 35).

Both sentences “Does the wronged ghost carry a bowstring and appear in the daylight and speak in front of the stairs?” and “Is there a woman who told the story of her family being murdered in front of the official’s place in the midnight?” came from historical stories. The first story is that a wronged ghost appeared in the day and shot his murderer. The second story is that a woman cried in front of the official’s house’s door in the night and complained to her family of being murdered. The two stories have similar meanings, and both refer to “beat the drum outside the court to express the injustice”. “To wash away the grief and to vent out the resentment” have the same meanings, indicating the desire to reveal the truth and right the injustice. The power of the language was shown and enhanced in the pairings and repeating, making the verdict extremely convincing.

Narration with Emotion

Pu Andi (1996) pointed out in the *Narratology of Chinese* that in West, the narration evolves with time; events follow each other in the sequence of time. To present the whole progress of the case clearly in front of the audience, the verdict also needs to narrate the case based on time sequence. In the Ming verdicts, in addition to the time-leading narration, a lot of sentences and poems were inserted for depiction, which stilled the event’s evolution and emotionalized the narration.

For example, in the article “Peng Jian Shi” (“Rape by Turns”), three defendants abducted the victim, who was washing clothes by the river, to a tiliary by force, and then raped the victim in turn with one defendant covering her mouth, one pressing her hands and one performing the rape. The crime was quite vicious. In narrating the case, Li Qing (1987) used many verbs to express what had happened and used a poetic language to assist the depiction. For example, “The lady was so scared and frightened, like a fresh flower being torn apart, like a tender bud being attacked by vicious bees” (Li, 1987, p. 371). He used such vivid language to illustrate the miseries the lady suffered when she was violated, so that the audience could comprehend the victim’s sufferings more easily, accept and support the final judgement.

Impact of Ming Verdicts on Today’s Court Judgements

If we spend some time reading today’s court judgements, we could easily find traces of the Ming verdicts’ influence on their writing style. The Ming verdicts’ language still deserves our learning and stimulates us to ponder over the language pattern we have been using in today’s judgement papers.

Impact on the Court Judgements in Taiwan

Some scholars have pointed out that “Taiwan, as a region in China that has also been influenced by the traditional Chinese culture, has inherited in some of its judgments the elegant writing style of ancient verdicts” (Yang, 2013, p. 158). Here, we’d like to take the criminal judgment of Chen Shuibian, the former

leader of Taiwan, as an example, with the purpose of exploring the things in common between it and the Ming verdicts in the language writing aspect. “The accused is named Chen Shuibian. Once a lawyer and a legislator, he was praised as the symbol of justice. With his charming look, he was fortunate to win people’s trust and was elected as the ‘Head’ by serving as the 10th and 11th ‘President’ of Taiwan. After leaving the post of the President, he still enjoyed the various courteous treatments for the ‘President.’ Such a man should bear in mind the duty of being a leader and a master, adhere to the presidential level, make a good example for the people, and devote himself to enriching the ‘state’ and benefiting the generations. He, instead, for his private ends, indulged his family members and trusted followers to profit from power, thus failed to observe his initial principles of being honest, clean and loyal to the ‘state.’ He misused and occupied at will the state special cost that could be handled by the ‘President’ which was supposed to be used in important national affairs such as politics and economy construction, military interview, reward and bonus, guest reception and gift delivering, etc.; he even put such money as his own by illegal cheating and used such money intended for ‘state’ use as his own family cash. Moreover, the accused Chen Shuibian, as the ‘head of a state’, should know well the morality that “benevolence can prevail in a state only if a family acts benevolently; humbleness can flourish in a state only if a family acts humbly; a single leader’s greed and tyranny can lead to a country’s chaos as well as that a superior’s virtue will be carried out by his subordinates just like the growing grass bends to the blowing wind. Yet instead of obeying those virtues, he feigned his support to the reform and performed corruption in private; he misused the power of ‘President’– from the policies for the development of the economy and scientific technologies to a post in the investment of government share, he traded his power for private gains. Such acts of Chen Shuibian showed his failure in making a clear distinction between public and private interests and his intention to violate laws while he is well aware of them. He not only went against his conscience as a legal professional but also betrayed people’s trust and expectation to him. There is no way for him to be a leader anymore” (Cai, 2013).

In this verdict, the pairings and repetitions are well used. Such a man should bear in mind the “duty of being a leader and a master,” adhere to the “presidential” level, be a good example for the people, and devote himself to enriching the “state” and benefiting the generations. He, instead, for his private ends, indulged his family members and trusted followers to profit from power, thus failed to observe his initial principles of being honest, clean and loyal to the “state.” The pairings and repeating here stressed Chen Shuibian’s violation of laws as a man well aware of the law and his betrayal to people’s trust, making the language more convincing. Moreover, the verdict cited words from *The Book of Rites · The Great Learning* (benevolence can prevail in a state only if a family acts benevolently; humbleness can flourish in a state only if a family acts humbly; a single leader’s greed and tyranny can lead to a country’s chaos) and words from *The Analects of Confucius* (a superior’s virtue will be carried out by his subordinates just like the growing grass bends to the blowing wind) to indicate how badly Chen Shuibian, as a “President,” had influenced the Taiwan region with his misbehaviors. Such emotionalized narration is extremely influential and appealing.

Reference for Court Judgement Writing in the Mainland

Although writing of court judgements on the Mainland has also been deeply influenced by ancient verdicts, as shown by those keywords commonly used in today’s court such as “chuanhuan” (summon to court), “weizao” (fake an evidence) and “wangfa” (pervert the law), which all date back to ancient verdicts, the court judgement in the Mainland still, compared to those in Taiwan, present “a kind of restricted and format

state”; “the legitimacy of judgement is doubted and even criticized by the parties involved; the accuser, though won the case, felt not so much a victory and the losing party had no idea at all why he was defeated” (Zhao, 2008, p. 321). This implies that the court judgement in China still has space to be improved in terms of appeal and convincing ability, which is just what the Ming verdicts excel at. Thus, the Ming verdicts could provide good references for today’s court judgement writing.

Conclusion

As described above, the Ming verdicts have achieved an extraordinary harmony in legal principle quotations and literary language use. While quoting laws and regulations, as does by the continental law system, the Ming verdicts also gave reasoning based on laws that is typical of the Anglo-American law system. Although today’s judicial practice has changed a great deal, the legal and language value embodied in the Ming verdicts can still be inherited in modern written judgements. By inheriting and transforming excellent ancient verdicts in a critical manner, especially in this present era of "the problem of language and reconstruction of judgements writing" (Zhao, 2008, p. 13). It is useful for today’s judicative paper to be more refined and, also, helpful in fostering today’s legal culture.

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Judicial Protection of Economic, Social, and Cultural Rights in China

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[Abstract] The justiciability of economic, social, and cultural rights has been widely recognized by the Committee on Economic, Social and Cultural Rights and the international community. Under China's legal framework, economic, social, and cultural rights in the domestic courts cannot obtain full judicial relief. Mediation contains a variety of ways for effective integration, emphasizing the participation of the relevant functional departments to resolve disputes. In the mediation of judicial relief for economic, social, and cultural rights, the courts shall determine the priority to fulfill core obligations, play a dynamic and flexible role, and promote legislation reform to enhance the judicial relief.

[Keywords] mediation; justiciability of economic social and cultural rights; judicial protection of human rights; International Covenant on Economic, Social and Cultural Rights

Introduction

After its ratification of the International Covenant on Economic, Social and Cultural Rights (ICESCR, hereinafter referred to as the Covenant), China has been actively fulfilling its obligations under the Convention at the international level and has submitted its reports to the UN Committee on Economic, Social, and Cultural Rights (CESCR) on time (CESCR, 2010). At the domestic level, China formulated and revised law and developed policies for the protection of human rights. In May 2013, a list of issues in relation to the second periodic report of China was adopted by the Pre-sessional CESCR Working Group at its 51st session. According to the list of issues, the Chinese government was required to indicate whether these rights contained in ICESCR can be directly invoked before domestic courts. It shows that domestic judicial remedies for human rights violations in China have already aroused great concern from the Commission. Judicial remedy is the most basic and effective remedy to victims of human rights violations. In its general comment No. 9, CESCR stated that, in many cases, other means used could be rendered ineffective if they are not reinforced or complemented by judicial remedies (CESCR, 1998).

The Justiciability of ESC Rights

During the course of drafting the ICESCR, the justiciability of economic, social, and cultural rights (ESC rights) was one of the biggest disagreements. A considerable number of people argued that the International Covenant on Civil and Political Rights (ICCPR) provided effective judicial protection of human rights (Kotrane, 2003). Civil and political rights were considered absolute and immediately achievable because civil and political rights could be enforced through judicial means. In addition, the Optional Protocol to the International Covenant on Civil and Political Rights includes a personal communications system that allows individuals to make a complaint against a state. This clearly demonstrates that civil and political rights are justiciable; however, ESC rights cannot be adjudicated and enforced by courts.

Because, first, ICESCR provides a broad definition of ESC rights, and second, enforcing the ESC rights will enable courts to get involved in reviewing the policy objectives, that is, priority setting and resource allocation, which are determined by governments rather than by courts in a democratic society.

Egbert Vierdag argues that ESC rights are not genuine rights, and the implementation of some social rights is a political matter, not a matter of law and, therefore, not a matter of rights (Vierdag, 1978).

This view has received strong criticism from some scholars. An independent expert, Hatem Kotrane, drafting Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (hereinafter referred to as the Optional Protocol), considers that in the light of the experience gained in recent years from the application of international, regional and national human rights instruments and mechanisms, the independent expert notes that there is no longer any doubt about the essentially justiciable nature of all the rights guaranteed by the Covenant (Kotrane, 2003). There are, also, established practices of litigations of economic, social, and cultural rights in many countries. As in the case of *Oposa v. Factoran*, the Supreme Court of the Philippines announced that some of the socio-economic rights cases in the 1987 Constitution could be heard in the courts (Philippines Supreme Court, 1993).

Nowadays, the international community has come to acknowledge the justiciability of ESC rights. In June 2008, the Human Rights Council adopted the Optional Protocol. In accordance with the provisions of the Protocol, communications may be submitted by or on behalf of individuals or groups of individuals under the jurisdiction of a state party, claiming to be victims of a violation of any of the ESC rights set forth in the Covenant by that state party (UN General Assembly, 2008). It could be said that the adoption of the Optional Protocol is the best example of refuting the argument against justiciability of ESC rights.

The Application of Human Rights Conventions by Chinese Courts

The application of international treaties is not expressly provided for in the Constitution of the PRC. The General Principles of the Civil Law of PRC stipulates that the international treaties concluded or acceded to by the PRC contain provisions differing from those in the civil laws of the PRC; the provisions of the international treaty shall apply, except those clauses to which China has made reservation. While Chinese law and international treaties concluded or acceded to by China do not contain provisions in relation to civil matters involving foreigners, international practice may be applied. Other laws and regulations have also made a similar provision. However, in fact, China has not established a priority of international treaties over the domestic laws, and there is no uniform practice concerning the application of treaties.

In practice, there are many precedents where international treaties have been invoked and applied directly in Chinese courts in the field of economic law. While, so far, there have not been any cases in which Chinese courts applied international human rights treaties, although China has joined most of the international human rights treaties. On the other hand, it is unclear whether Chinese courts can apply human rights treaties instead of domestic law when domestic law differs from the human rights treaties to which China is a party. Similarly, in the light of the interpretation of domestic law, Chinese courts have never invoked the Convention when interpreting the relevant human rights provisions of domestic law. In the second report on the implementation of the Convention, the Chinese government made it clear that, in accordance with the practice of international treaties application in China, international treaties do not directly function as the legal basis for the trial of cases in Chinese courts, and international human rights treaties are no exception; rather, they are applied after being transformed into domestic laws through legislative procedures (China, 2010).

Dilemmas of Judicial Protection of ESC Rights in China

The Justiciability of ESC Rights in Constitution of China

China's human rights rules are mainly stipulated in the national constitution. The ESC rights entrenched in the Chinese Constitution mainly include the right to health, the right to education, the right to social security, the right to work, the right to rest, and the rights of the elderly, children, and the rights of persons with disabilities. The Constitution provisions have seldom been directly applied as a basis of judicial enforcement, while judicial remedies to violations of all the rights are much easier to obtain. It is not difficult to find relevant examples in our judicial practice.

In *Fennv Wu v. Changning District Municipal Engineering Management Office*(1998), the people's court of the Changning District held that it was inappropriate for the defendant to dismiss the plaintiff for criminal conviction during his retirement, and it lacked sufficient grounds for refusing to provide a pension after the release of the plaintiff (Shanghai Changning District People's Court, 1997). However, the decision of the case is based on the "Regulations on Rewards and Punishments for Enterprise Workers and Staff Members" and other interim regulations concerning retirement, which gave a vague answer to the question of the constitutional application.

The *Qi v. Chen* case (2001) was considered as China's first constitutional case, which brought new hope for judicial application of constitutional rights (Supreme People's Court, 2001). The High People's Court of Shandong Province made a second judgment in the plaintiff's favor, upholding the defendant's conviction as affirmed, requiring the defendant to immediately stop infringing on the plaintiff's right and to pay compensation for the economic losses and spiritual loss caused by the defendant.

However, according to the judicial practices in China, there is no such case in which the court directly applies and bases on constitutional provisions alone. Also, there are few cases in which the limited application of the constitution is based mostly on specific laws could be found. The non-justiciability of constitutional rights is tantamount to depriving citizens of effective judicial remedies.

The Justiciability of ESC Rights in Other Domestic Law

In addition to the specific rights legislation, "Criminal Procedure Law of PRC," "Civil Procedure Law of PRC," and "Administrative Procedure Law of PRC" provide a comprehensive protection mechanism for the ESC rights in Criminal Procedure Law of PRC, 2017; Civil Procedure Law of PRC, 2017; Administrative Procedure Law of PRC, 2017).At present, the vast majority of guarantees for ESC rights are enforced through civil and administrative procedures, while criminal procedure remedies are usually available for victims of serious crimes. Civil litigation deals with legal actions between equal subjects. Because the constitutional litigation system has not been established in China, civil rights claims against the government can only be settled through administrative procedure. However, the limited application scope of the Administrative Procedure Law of China has hindered the full enjoyment of ESC rights. In many cases, victims whose ESC rights are infringed by abstract administrative acts find it difficult to obtain judicial protection.

Improving Effectiveness of Judicial Protection of ESC Rights

Considering the limited judicial power of the courts and the lack of resources to address systemic socio-economic claims, it is a good choice for China to integrate all stakeholders (including the government and party officials, judges, non-governmental organizations, and citizens) to jointly address resource allocation issues and overcome political and economic barriers to resolving disputes over ESC

rights. In contemporary Chinese society, it is not just the subjective desire and pursuit of the ruling party to strengthen the role of mediation in settlement of disputes involving human rights violations, but a public choice responding to a considerable part of the community at the institutional level. Mediation does not mean that mediation has priority over justice proceedings, nor that mediation takes the place of justice proceedings. In administrative human rights litigations involving government agencies, the judiciary should consider a more active and multidisciplinary approach, including cooperation with government departments.

Setting Priorities in Performance Obligations under ESC

The CESCR noted that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every state party. Thus, for example, a state party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant (CESCR, 1991). Therefore, Chinese courts should pay more attention to the obligation to respect and protect ESC rights rather than expensive and vague obligations to fulfill ESC rights. When these minimum core obligations are not fulfilled, the court should provide relief for people whose fundamental rights have been violated in a decisive manner.

Moreover, the courts should fulfill the obligation to protect, which means taking measures against third parties from invading such rights. For example, the Chinese government has repeatedly issued regulations that prohibit schools from charging arbitrary fees or deprive children of the right to free primary education. In dealing with such cases, the courts should enforce government regulations and ensure that all children enjoy reasonable and fundamental rights, particularly by preventing private schools from violating these rights.

In this process, the courts should pay special attention to the needs of particularly vulnerable groups. Therefore, if plaintiffs claim a violation of a minimum core rights, the courts may ask the government to prove that it has taken reasonable legislative and other measures to use the maximum available resources to realize people's ESC rights and that all restrictions are reasonable and legitimate. The courts should pay attention to the legitimacy of local governments' justifying their policy on the grounds of insufficient resources. In such cases, the courts may require the government to provide detailed information on such measures as to whether the rights of migrant workers to education and health are adequate and whether the measures are sufficient. The government may also be required to provide the analysis of the cost of enforcing this right and promote a cost-benefit analysis. The courts can encourage government agencies to clarify minimum national and local standards so that the court can effectively assess the government's response to the plaintiff's claims. Also, the court can compare the performance of the prosecuted government with the performance of other authorities in the same district by using empirical data and objective indicators to make objective assessments.

Enhancing Dynamic Capacity of Active Justice

The establishment of a framework and mechanism for judicial mediation is based on the theory of active justice advocated by the Supreme Court. In some communities of China or for particular type of the dispute, active justice could be more effective than adversarial system of justice, and better results could be achieved from a moral perspective rather than from a legalistic perspective. However, active justice does not amount to unlimited expansion of judicial power. Some judicial expansion based on over trust in

justice may lead to inappropriate judicial intervention in some cases where the judiciary cannot address multiple problems. For example, in many cases involving the application for civil service positions, it is very difficult for courts to pass a verdict ordering local authorities to hire someone against their will. In cases involving employment discrimination, the court can confirm that the employer violated the relevant laws and regulations but cannot provide the plaintiff with a job offer. In labor dispute cases, the court could grant a judgment for the plaintiff, but the form of relief could only be limited to monetary compensation. Therefore, the courts should avoid widespread relief and adopt reasonable methods to show respect for other state authorities.

In the form of relief, the court should focus primarily on declaratory relief. Especially in most cases that have far-reaching social impact and involve a wide range of interests, the court cannot and should not issue a mandatory order requiring the government to take a particular action. For example, many disputes over pensions and other benefits arise from the transformation of the state economy into a market economy, including unemployment insurance, the costs of rescheduling and training, personal reimbursement, and medical treatment. In dealing with these cases, the courts can and should ascertain the facts in relation to the alleged violation, but the court should leave it to the discretion of the government as to the best way to deal with the problems when it comes to general policy issues. In this way, the courts can avoid direct confrontation with government agencies on substantive issues and allow government agencies to correct deficiencies in the decision.

Promoting Judicial Reform through Direct Legislation

The most challenging part of the protection of ESC rights is rights infringement by the government. It is undoubtedly the best way to establish judicial review of human rights by breaking the limitation of the administrative procedure law and revising its constitution. With the progress in judicial system reform, rational legislative decision-making can be achieved. As far as the current legal framework is concerned, the courts can promote national legislative reforms through judicial activities to reduce the current judicial difficulties. In China, when local government's rules and regulations are inconsistent with the constitution or laws, the courts at all levels may review these rules and regulations. This is a kind of judicial review of administrative procedure, which is different from judicial review in the conventional or constitutional sense. In 2005, in *Jululi v Ningbo Yuyao Planning Bureau*, the Ningbo Intermediate People's Court held that the "Approach to Violation Ningbo City Planning and Construction" violates the provisions of the Urban Planning Law and cannot be considered as the basis of implementation of the People's Government of Yuyao City (Intermediate People's Court of Ningbo Municipality, 2007). The court ruled that the government conducted illegal compulsory demolition.

In many cases, the court's verdict could have positive effects: drawing public attention and prompting new legislation to introduce or make any necessary changes to the original law to resolve the problems. Therefore, in the absence of a constitutional review mechanism, if the ESC rights protected by the Constitution are fully incorporated into the relevant laws through legislation, there is less need for court's direct application of the Constitution. To a certain extent, these complementary legislations can properly compensate for the adverse consequences due to the absence of constitutional review. It is also possible to make a separate human rights law that clearly defines the legal status of these rights and provides a direct legal basis for human rights claims.

Conclusion

Although it is unrealistic to expect China's courts to play the same role as Western courts do in implementation of ESC rights, the Chinese judiciary still plays an active role in ESC rights protection. Mediation will be an effective way for Chinese courts to resolve disputes over ESC rights, emphasizing relevant functional departments participating in disputes resolution. To some extent, the mediation system can overcome the deficiencies of judiciary remedies due to legal limitations and a lack of resources. However, mediation is not a universal solution to the judicial guarantee of ESC rights. In the reform of the judicial system, Chinese courts should set priorities for rights protection, play an active role in resolving legal disputes, promote judicial reform through legislation, and realize human rights in the field of justice.

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Research on Establishing a Compatible Relationship Between Interrogators and Suspects

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[Abstract] Establishing a compatible relationship between interrogators and suspects is an important part of the professional interrogation of a criminal subject, as well as the basis for an efficient criminal interrogation. Despite the natural antagonism between the two parts, the suspects' expectancy for leniency and sense of security constitute the foundation for a compatible relationship. Therefore, by enhancing and building professional capabilities and by using normal language and non-verbal behavior properly, interrogators can win the confidence of suspects, establish a compatible relationship, and then obtain a true confession.

[Keywords] compatible relationship with suspect; professional quality; normalized language; non-verbal behavior

Introduction

In recent years, with the perfection of law and rapid development of sensitivity to the rule of law, criminal interrogation is growing more and more regulated. This tendency helps the implementation of suspects' rights prescribed in the Criminal Procedural Law of PRC and sets higher requirements for interrogation techniques. "In fact, investigation art and science haven't yet developed to the extent to provide clues and lead to conviction only by searching and examining evidences in cases- hardly in most cases. In crime investigation, even the most efficient investigation, it's not rare to see no evidence at all to be detected, which makes custodial interrogation on suspect and interview with other insiders the only way to solve cases" (Inbau & Reid, 1992). That is to say, today is characterized by rapid development of investigative techniques and science, but criminal interrogation remains an important investigation method to solve cases. Unfortunately, the present detecting work shows a contrary situation: investigation technology goes forward while interrogation skills go backward. Suspects' determination to stay silent is getting stronger, and retractions of confessions are more frequent. This situation can be partly attributed to the strengthened sensation of anti-interrogation, but the deeper reasons is due to interrogators' lack of profession skills, their single method of interrogation, their wrong attitudes, their deficit in verbal skills, etc. Establishing a compatible relationship for the both parties is a key to the efficacy of criminal interrogation.

Concept and Characteristics of Compatible Relationship

Concept of Compatible Relationship

A compatible relationship is not just a simple Q & A model between interrogators and suspects. It is a dynamic relation based on the global knowledge about criminal facts, living background, social experience, and psychological activities of suspects. It reflects the dynamic process of mutual cognition to form a compatible relation, which leads to confession. A compatible relationship is the basis of interactivity, as well as an important promoting of interrogation progress.

Characteristics on the Relation between Interrogators and Suspects

Antagonism. The goal for law enforcement officers in conducting a criminal interrogation is to obtain suspects' confessions, expose their accomplices, and provide criminal clues in order to bring them to justice, while suspects take all measures to defy, trying to escape judicial sanction. This antagonism is the major obstruction for criminal interrogation, especially when the interrogation is not handled well; it is easy to create a fluky mentality and the antipathy of suspects, which makes it even harder to obtain true confessions.

Temporariness. The temporariness is decided by criminal law procedures. Criminal interrogation, as one of the investigation measures, whose frequency and duration are prescribed by the criminal law procedures, according to which the communication of both sides is a temporary process. Different coercive measures mean different maximum durations of criminal interrogation. For example, for those who are summoned to interrogation by force, the maximum duration is no longer than 12 hours for general cases and no longer than 24 hours for important and complicated cases; for those who are detained, the longest detention time is 37 days, during which suspects can be arraigned as needed; even after arrest, the duration of the investigation is limited. How to gain suspects' trust and break their psychological barrier is the core issue for interrogators.

Purpose. In the process of criminal interrogation, the relationship between the two sides follows the "active-passive" pattern, which means the compatible relationship is established by the active pushing of interrogators. Although, in practice, some individuals cooperate in the investigation and an interrogation actively in return for mitigation of punishment, they are isolated cases. A more frequent scenario is that interrogators show evidence, persuade, and educate while suspects refuse to talk, vacillate, hesitate, and, after several rounds of being persuaded, and confess. The main purpose for this hard try is to prompt suspects to form a correct understanding of their behavior, to realize the futility of trying to avoid legal sanctions and realize that the only choice left to them is to cooperate with law enforcement officers for leniency.

Effect of Compatible Relationship for Criminal Interrogation

A compatible relationship is not only the basis of efficient use of criminal interrogation but is also the foundation for the smooth progress of penal suit, as well as the re-molding of criminals.

A Compatible Relationship Helps Gain the Trust of a Suspect and Helps Obtain a Confession

In present interrogation practices, the rivalry feelings in suspects is very strong in interrogations. Though the antagonism is decided by the nature of the criminal interrogation, wrong methods and unregulated verbal terms aggravate it. Clearly knowing that once he or she confesses, he or she will be punished by law, the only reason for criminals to confess is to seek for leniency and inner relief, which is based on the confidence of interrogators. By explicating the leniency-for-those-who-confess policy, "justifying" his or her criminal act, interrogators may give suspects the impression of helping to solve the problem of their situation instead of solving the case for their own good. This can win the confidence of suspects and finally get a true confession. On the contrary, inappropriate methods, such as disrespectful words or acts, can worsen the situation and deadlock the criminal interrogation.

A Compatible Relationship Helps to Dig Out Crimes and Expand Victories

Digging out crimes is an important mission of criminal interrogation; however, in the practice, suspects make selective statement according to the evidence investigators have obtained. By the confess-minor-

offense-and-conceal-grave-ones and confess-small-part-of-crimes and conceal-most-part anti-interrogation skills, suspects attempt to slip away unpunished. Actually, these suspects may have carried out more numerous and severe crimes. A compatible relationship lays the foundation for further interrogation.

A Compatible Relationship Helps Smooth the Progress of the Whole Penal Suit

By persuading and educating, interrogators make suspects realize the nature of their acts and the harm they have done to their victim(s), to their relatives, themselves and their families, and to the whole society. A compatible relationship helps criminals see that their crimes are against social virtue, moral principles, and laws and will arouse a sense of guilt and remorse, thereby causing them to cooperate in the interrogation. This process is not only a procedure for obtaining confessions, but also for the transformation of inner ideology of the suspects. In this sense, criminal interrogation is the first step to helping criminals shun evil and do good. The persuasion and education based on a compatible relationship can be more easily accepted, and confessions obtained this way are less likely to be withdrawn. Suspects will be more cooperative in the following penal procedures.

Basis of Compatible Relationship for Interrogatory Participants

Expectancy for Leniency

Despite the intense conflict of interest between the two parties, interrogators may still try to persuade, educate, and reclaim, for suspects' confessions and their reform to be a better person. Whether suspects have a correct understanding of the "leniency-to-those-who-confess" policy, the mentality to draw on advantages and avoid disadvantages decides their eagerness for extenuating guilt by confessing; on this precept lies the "common good" of both parties. "That is to say, interrogators should respect the suspect's personality, allow him to justify and explain, understand his action and the circumstances he was in, make the spiritual communication with suspect. Only being mentally compatible can help to start a dialogue, to shroud the interrogation in the atmosphere of 'harmony under dissuasion'" (Zhou, 2010).

Need for Sense of Security

A social attribute is the greatest attribute of a human being. The key characteristic of human's social attribute is relationship, which embodies several significances: on one hand, any individual who lives in social circumstance is bound to social relationship, as component and influential element of which; on the other hand, human's social attribute suggests that it doesn't exist an individual who act completely on his will. Any human behavior in the society is restrained, by all kind of relationship, by the regulations that adjust those relations. It can't be ignored when we struggle to achieve our goal (Ma, & Zhang, 2008).

The social attribute explains humans' aspirations for being sociable, while being judicially punished is a sign of negation from the society, from people, and from oneself. Once arrested, the anxiety mounts and the sense of security is lost due to segregation, fear of legal sanctions grows, internal pressures of guilt mount because the criminals' aspirations for being sociable is extremely strong. For example, in 2014, I participated in an arrest operation in a faraway province. On the way back, the suspect showed a strong desire to communicate. He told me that, once arrested, he would not be exonerated from imprisonment; since we were so far away from home, he just wanted to talk to someone, hoping his good attitude could get him a lighter sentence. That is to say, the need for the sense of security drives suspects to establish a favorable relation with police officers and jail mates. Interrogators should take advantage of

this emotional need to persuade, educate, and satisfy the suspects' reasonable requests, in order to gain the respect and gratitude of suspects, and finally to establish a compatible relationship.

Methods to Establish Compatible Relationship in Criminal Interrogation

Although a compatible relationship with a suspect plays an important role in criminal interrogation, in practice, many interrogators haven't realized its importance. Interrogators often begin a criminal interrogation hastily after suspects' arrest, using inappropriate methods and strategies, such as using provoking language, committing disrespectful behavior, which may arouse animosity in the suspects. In an interrogation I once was participated in, the suspect was a very fat man. Some investigators made fun of his figure, pinched him, and took photo of him. Before those disrespectful behaviors, he answered several questions, but afterwards, he kept silent and showed a strong enmity to the investigator who had laughed at him. No progress was made in the following arraignment, and, finally, the case "miscarried" for lack of a valid statement. This is a negative example that shows how misbehavior can ruin the preliminary work and what poor interrogation can do to a whole case. Besides, the randomness of staffing and free participation of auxiliary police may, also, create a poor interrogation relationship How should a compatible relationship be established? Improve professional capacities of interrogators to deploy an efficient criminal interrogation We may begin in the following aspects:

Professional Capacity of Interrogators – Basis for Establishing a Compatible Relationship

A criminal interrogation is a face-to-face communication based on a good understanding of suspects' psychology. Lack of professional capacity will make it difficult to grasp their psychological activities and changes, to adjust interrogation methods according to the interrogation progress, and, finally, to gain their confidence. Besides the investigation skills, political quality, psychological analysis ability, and psychological sustainability are required for law enforcement officers. "During criminal interrogation, interrogators should stay calm and hold the overall situation. They could enter the inner world of their interlocutor and control themselves well knowing the facts. It's not simply to ask the interrogee to make statement, but to present the facts, reason things out, and distinguish right from wrong." (Bi, 2013). These capacities are the basis of winning the respect of suspects and establishing compatible relationships. Therefore, seminars for interrogatory capacity building should focus on facial micro-expression, psychological analysis, and persuasion skills.

Make preparation for interrogation – Premise for Establishing a Compatible Relationship

In the interrogation practice, interrogators often began the interrogation hastily, partly because the time from the suspects' arrest to sending them to the detention center is relatively short; usually it is only 12 hours or 24 hours for special cases. However, the 12 or 24 hours is trial prime time. Some interrogators want to make full use of the time, so they start interrogating anxiously, ignoring the case and the suspect's detailed information, which results in the confusion of the thinking, a scattershot approach, and gathering of unclear information. The result is just the opposite.

If the interrogators are not clear about the case information, the suspect will think that the interrogators are not paying attention to this case, thus aggravating the fluke psychology. It will be difficult to build a trust relationship with the suspect. So, making preparations for interrogation is a premise for establishing a compatible relationship. Preparations should be made, including becoming familiar with the case, understanding the suspect's personal information, family background, work

experience, hobbies, and so on. On this basis, the interrogation plan is formulated. The interrogation plan does not need to be in written form, but the interrogator should be aware of it.

Normalized Interrogatory Language – Key for Establishing a Compatible Relationship

Language, the most important carrier of interrogation strategy, is also a useful tool to build a compatible relationship. “In practice, the use of interrogatory language by investigators is a demonstration of interrogatory strategy in conformity with regulations” (Bi, 2014). Normalized interrogatory language requires:

1. To conduct criminal interrogation strictly in conformity with law. Clause 50 of criminal law procedure prescribes the following: it is forbidden to collect evidence by threatening, alluring, and cheating. However, it doesn't stipulate the exact meaning of “threatening, alluring, cheating,” which means, in a certain sense, it can't be defined. Theorists and practitioners always argue the legal boundaries of these three verbs. I believe the boundary to judge whether interrogation language is legal lies in whether or not the linguistic strategy used jeopardized the free will of confession. To confess voluntarily is a key sign that the statement can be adopted as evidence; that is to say, the suspect made a statement disadvantageous to himself under the circumstance that he/she has the right to choose whether he/she confesses or not and what to confess.
2. To respect suspects' personality. Establishing a compatible relationship is the key to attenuating the natural opposition between the two parties of criminal interrogation. With the advancement of rule-of-law construction in China, law enforcement officers have a more profound understanding about human right of suspects and criminals. However, many of them still do not realize that suspects, also, have independent personalities during criminal interrogations and demonstrate rude manners or spit out provoking words, which intensify the hostile atmosphere and make the dialogue even more difficult. We should not deny that, sometimes, we may use language that can cause strong mood swings as a kind of strategy to provoke suspects to disintegrate the coalition inside criminal groups and instigate contradictions between them by using abetting or depreciating words and encouraging mutual disclosure. Nevertheless, in most cases, the interrogatory strategy should be “dredge” instead of “press,” considering the high psychological pressure that suspects are suffering from after being put in custody. Thus, interrogation language should reflect the “reasonable” strategy of interrogators, avoiding words like “thief,” and “rapist” that may make them uncomfortable; instead, interrogation language should show respect to gain suspects' confidence and pave the way to a compatible relationship.

Properly Used Non-Verbal Behavior – Booster for Establishing a Compatible Relationship

Properly used body language plays an irreplaceable role for bringing closer psychological distance between investigators and suspects, creating a favorable atmosphere for affective communication. When suspect hesitates, investigators should make expectant, encouraging facial expression and action to stabilize his sentiment and put him in a mental position ready to make true confession. (Ma, 2012).

Non-verbal behavior mainly includes eye looks, facial expressions, body postures, gestures etc. Using non-verbal behavior properly is an important booster for establishing a compatible relationship. The look of interrogators should be firm enough to form a dissuasive force to suspects. On one hand, if the interrogators' eyes are wandering around, suspects may get the impression that interrogators are not self-confident. On the other hand, interrogators cannot hold suspects in awe. While deterring suspects

from fluke-like behaviors and holding him in respect, it is also time to minimize the psychological distance through eye contact or nodding when the suspect shows the slightest sign of willingness to talk.

Appropriate body contact can also show an affirmative attitude towards suspect. For example, when a suspect gives a true statement, a slight pat on the back or shoulder or a chair-to-chair, face-to-face posture may generate favorable feelings. However, touching the suspect's head or body if the suspect is of suspect of opposite sex may induce aversion.

Conclusion

All in all, a compatible interrogation relationship is an important component of professionalizing the subject of criminal interrogation, and it is a solid foundation to guarantee the smooth progress of the criminal interrogation process. Operational departments should realize its importance and strengthen the professional capacity of interrogators so that they make verbal and non-verbal behaviors properly, establish a compatible relationship with suspects, and, finally, obtain true confessions.

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Human Rights and the Judicial Subjugation of a Nation's Legal Language: A Case Study on the Impact of the *Canadian Charter of Rights and Freedoms* on the Dynamics of Québec Private Law

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[Abstract] A national community's legal language, intrinsically linked to the notion of legal traditions and being one of its core defining features, is characterized by several epistemic elements that shape its normative structure through a series of fundamental premises and a particular way of understanding the nature and purpose of law. This paper, through a case study of Québec private law (of civil law tradition) within the Canadian Federation (of common law tradition), addresses the fate of distinctive legal languages and traditions of federated communities within greater federal structures when confronted by a standardized interpretation of human rights at a constitutional level.

[Keywords] legal traditions (civil law/common law); legal languages; epistemics and construction of law; private law; Québec/Canada

Introduction: Legal Languages and Legal Traditions

Legal languages share intricate sociological bonds with the communities from which they stem, carrying an epistemic charge that entails not only a particular way of conceiving the nature and purpose of law, but also a distinct thought process in itself (Benyekhlef, 2015; Paradelle, 2013). Through centuries, different societies developed and embraced different perspective of the rule of law, characterized by distinct constructive rules and fundamental premises forging different invisible intellectual frameworks behind the various visible rules of positive law, which gave rise to various legal traditions shaping human normative diversity throughout time, place, and spirit (Glenn, 2004). While the preservation of a given legal tradition is generally not an issue within a single-tradition unitary state, the matter gains in complexity in pluralist states where at least two legal traditions coexist, all the more so when one legal tradition is placed in a minority position. Are minority legal traditions at risk in such a context? This paper, continuing our previous studies on the matter (Côté, 2016a; 2016b), will address the issue through a case study of private law in Québec as a minority province within the Canadian Federation. After some brief ground-laying comments on legal pluralism and federalism in Canada, we will address one field of law in which legal pluralism is particularly vulnerable to epistemic standardization: constitutionally recognized human rights, both in theory and in practice.

Federalism and (A)Symmetric Legal Pluralism

As a general rule, pluralists states are often organized around a federalist state model in which a central government addresses nationwide legal issues while federated entities (such as provinces) have sovereign jurisdiction over more local matters. This state model is generally founded as the historical result of a political compromise between different founding national communities to address grand-scale common challenges that go beyond their local specificity while preserving the federated entities' local distinctiveness when it comes to matters of law more closely related to their specific individual and community life (Brun et al., 2014; Obran, 1984). In theory, Canada would be an example of such state

organization, being a federalist State organized by the *Constitution Act, 1867* (still in force today) that provides such a distribution of legal jurisdictions (s. 91-92).

More so, Canada is also a pluralist jurisdiction, as one of its provinces, Québec, historically founded and developed by French colonists for centuries before being ceded to the British crown in the wake of the Seven Years War in 1763, is sociologically and legally very distinct from the rest of the country, which is mainly of British descent. Specifically, in matters of private law (i.e., legal rules encompassing relationships between individuals and that do not involve the state), Québec belongs to the civil law legal tradition, while the rest of the Canadian provinces' law and (to some degree) federal law, belong to the common law legal tradition. As the 1867 Constitution, save for organic matters of statecraft, did not contain substantive legal dispositions, both provinces and the federal government maintain normative sovereignty in their respective jurisdictions in accordance with their own legal traditions, a situation we call "symmetric legal pluralism" (SLP) (Côté, 2016b).

However, as many other states did over the course of the last decades, Canada modified its constitution in 1982 (despite Québec's refusal) by adopting a declaration of human rights in its constitutional law through the *Constitution Act, 1982*, namely the *Canadian Charter of Rights and Freedoms* (the "Canadian Charter"). Distinguishing itself from its 1867 counterpart, the 1982 Constitution (which adds to the former) proclaims those human rights as supreme substantive law, situated above and beyond fields of competences. Given that the 1982 Constitution provides that any rule of law deemed contrary to the human rights, it proclaims it can be invalidated by judicial authorities (ss. 24, 33 & 52); normative sovereignty on this matter is no longer determined by separate fields of jurisdiction but rather placed into the abstract hands of the Constitution, with the Supreme Court of Canada acting as its single interpreter and guardian. Moreover, the Canadian Charter makes no epistemic distinction between legal traditions in Canada; on the contrary, it is construed as a unifying instrument declaring that human rights go above and beyond legislative particularities (Allard, 2006). As this situation no longer provides a clear-cut normative sovereignty formally protecting the minority legal tradition and actually places the majority tradition in a dominant position towards it, we qualify it as "asymmetric legal pluralism" (ALP) (Côté, 2016b).

When it comes to distinctions between the legal language of the civil law tradition and that of the common law tradition, both legal traditions indubitably feature many common elements, but they also remarkably distinguish one from the other through several important conceptual differences as to the political, philosophical, and intellectual approach of what "Law" is as a social concept, leading to, sometimes remarkable differences on how it should be *applied* in society. In this perspective, Tremblay summarizes that "The general economy of both systems is so different that it can lead to different manners to conceptualize what law is [...] To simplify a bit, we could say that Civil Law rules are laid *a priori*, while Common Law rules arise *a posteriori*. Civil Law employs general principles, cartesian logic and deductive reasoning, while Common Law reasoning is casuistic and inductive" (Tremblay, 2009). In a likewise logic, other authors qualify the civil law tradition as fundamentally objective and rationalist, while the common law is subjective and empirical in nature (Grenon & Bélanger-Hardy, 2008a & 2008b).

Let us illustrate this contrast concretely by a revealing international example when it comes to human rights. In France, a civil law state, the *Loi n° 2010-1192 du 11 octobre 2010 interdisant la dissimulation du visage dans l'espace public*, which forbids the wear of full face-concealing religious garb in public spaces, has been judged by France's Constitutional Council as constitutionally valid and not illegitimately infringing on the fundamental right to religious freedom because individuals must accept some

restrictions to their behavioural liberties in the name of objective collective interests (*Décision n° 2010-613 DC du 7 Octobre 2010*). In the United Kingdom, a common law state (for our example's purpose), however, the wear of face-concealing religious garb has been judged (*The Queen v D (R)*) as absolutely protected by religious freedom and, thus, cannot suffer any sort of similar general restriction, because the common law conception of human rights is more focused on the individual and subjective effect experienced by a citizen whose personal religious practices would be frustrated by an act of law. Both France and the United Kingdom recognize the same fundamental human right to "religious freedom"; yet, they understand and apply it very differently because of fundamental divergences in the base premises and epistemics of their respective legal traditions. Is one tradition "right" and the other "wrong"? While there is ample room for political discussion on this question, it is irrelevant as far as legal science is concerned; all we can do here is to bear witness to the fact that they differ from one another, both as matters of upstream epistemics and downstream results. To qualify one result as "better" than the other in matters of legal science would dangerously borderline on value judgement.

This given, one can now wonder, with human rights raised to constitutional status and granted nationwide supremacy over any contradicting rule of law, is there not a risk that a singular interpretation of those human rights by supreme tribunals could lead an epistemic deviation of a minority legal language in a pluralist state? We submit that this risk is not entirely academic in Canada where the Canadian judiciary apparatus is developing a growing epistemic trend to interpret and apply the content, reach, and application of human rights in a manner consistent with the common law tradition (Popovici, 2000), even when concerned with private law matters of civil law tradition in Québec.

Theoretical Epistemic Standardization Through Human Rights

First, despite being a constitutional document in a pluralist jurisdiction, the Canadian Charter is, by nature, a common law instrument, obeying the epistemic standpoint of the common law legal language. According to the preamble of the 1867 *Constitutional Act*, it is "similar in Principle to that of the United Kingdom." For Dicey, a pillar author in UK constitutional law, the British constitution is founded on "uses and institutions of the nation" to such an intricate extent that it is actually *part* of the common law tradition (Dicey, 1889). More locally, the Supreme Court of Canada explicitly stated, in the *Re: Resolution to Amend the Constitution* case, that the Canadian constitution "rests on Common Law rules and principles." Moreover, according to Barry L. Strayer, leading legal drafter of the *Canadian Charter*, it has been created with a common law mindset, projected as an empirical instrument holding individual experience in high regard (Strayer, 2013). For Peter W. Hogg, a leading author in Canadian constitutional law, human rights and freedoms in the Canadian Charter are based on "common law ideals to protect individual freedoms from legislative intervention" (2011).

This said, let us now turn to how this constitutional instrument is theoretically construed when faced with legal pluralism and civil law matters. In the early years of the Canadian Charter, there was an ongoing debate in Canada to determine if it applied only to state action in the form of public law, or if it reached private law, as well, since its scope of application is supposed to encompass government action only (s. 32). In 1986, four years after the Canadian Charter's entry in force, the Supreme Court decided, in the *SDGMR v Dolphin Delivery Ltd.* Case, that while the Canadian Charter did not directly apply to private law matters per se, it still indirectly did through judicial construction. Given that private law is, in the large sense, a "rule of law" (even when not specifically enacted by the state), it would be contrary to constitutional primacy, from which judges draw their powers, to interpret a rule of law in a way which

would be at odds with the Canadian Charter. This early case determined that rules of private law in Canada may not be read or adjudicated in a way which would be contrary to the Canadian Charter and must comply with the values and principles of the Canadian Charter (Allard, 2006). This not only includes positive rules of law, but also unwritten rules such as uses, customs, doctrine and principles (Allard, 2006). Within common law provinces in Canada, this situation is not problematic at all; on the contrary, it is highly coherent with a global common law approach of a common law legal language. However, in Québec, this warrants the peculiar situation that its judges should read and construe its civil law private law with the intent and purpose of complying with the values and principles of a common law document.

A few years later, the Supreme Court of Canada cemented the *Dolphin Delivery* decision and went further in the *McKinney v University of Guelph* case by explicitly declaring that all written law should be, for constitutional matters, construed as public law. Confronted with the question of determining what “government actions” fall under Charter scrutiny, the Supreme Court answered that “government action” notably includes every and all kinds of written laws and regulations. From a common law perspective, this works just fine: as private law is by nature unwritten in this legal tradition, any government attempt to edict statutory rules and regulation in private matters through law is rightly seen as an exercise of political power and policy direction which must be understood as “government action.” This approach, however, is incoherent with the formal nature of private law in a civil law jurisdiction, where it is written down in a civil code, which, technically, is a law that has been sanctioned and formally adopted by the legislature. This issue was raised in front of the court: if the Canadian Charter normally applies only to written law and is only supposedly concerned with state action of public law matters, how does this reconcile with the private law in Québec, which, despite being private, is codified in the form of law? The Supreme Court settled the dilemma: it doesn’t. “[I]t seems inescapable that all legislation including the Civil Code of Québec is subject to Charter review under s. 32(1). I see no basis on which the Civil Code can be distinguished for this purpose from other legislation.” From this point onward, it stemmed that the entire corpus of private law codified in the civil code of Québec, despite being of civil law tradition, became subject to the permanent control of its conformity with the Canadian Charter. This constitutional obligation for the legal language of civil law to align itself with the idea of law according to the common law legal language sealed its permanent vulnerability in ALP context.

Another element of high importance must be taken into consideration when studying the effects of the Canadian Charter on the legal language of Québec’s civil law tradition in private law matters: that of Québec’s own provincial charter of rights and freedoms, the Québec *Charter of Human Rights and Freedoms* (the “Québec Charter”). Adopted in 1976, several years before the Canadian Charter, the Québec Charter officially declared and recognized, globally, the same human rights than those of its Canadian counterpart and, an important distinction, explicitly widened the scope of its application to both public law and private law matters. At the Québec Charter’s inception, it was clear that the application and construction of those human rights was to be made in a coherent manner with Québec’s civil law tradition in private matters, in a “complementarity” relationship (Allard, 2003). In this respect, Allard speaks of the necessary “harmony” between the Québec Charter and the civil law tradition in private law matters, each “complementing” one another. For an initial period of time, human rights cases only involving the Québec Charter in private law matters were indeed treated from a civil law perspective (e.g.: *Béliveau St-Jacques v Fédération des employées et employés des services publics Inc. (CSN)*; *Doré v Verdun (City)*). However, as time passed, the situation complexified. Given than the Québec Charter

applies not only to private law, but to public law, as well, this latter aspect of the Québec Charter allowed for a common law interpretation of its human rights in public law matters to align itself with the Canadian Charter's interpretation of those same rights, under a single common law perspective.

This trend started in 1989, with the highly difficult and controversial question of abortion in the eyes of the law, in the *Tremblay v Daigle* case. In this case, the question arose to determine if, yes or no, a foetus could be considered a "person" in the eyes of the law and, therefore, claim a "right to life," which was there invoked through Section 1 of the Québec Charter. In 1989, this question was not yet settled in Québec, and the civil law perspective was hesitant. On the one hand, it did recognize great freedom to individuals, weighing in favour of the "pro-choice" option, but on the other hand, the civil law tradition also recognized that an unborn child can very well be a subject and beneficiary of rights and remedies in several fields of law (such as estate law, torts law, contracts law, etc.), militating for its legal recognition as a person. To settle the question (in favour of the "pro-choice" option) the Supreme Court of Canada imported a common law conception of human rights, judging that "in light of (...) the consistency to be found in the common law jurisdictions, it would be wrong to interpret the vague provisions of the Québec Charter as conferring legal personhood upon the foetus." From this point onwards, the idea of direct importation of human rights interpretation from Common Law cases was decisively admitted and the Supreme Court of Canada started to directly import human rights law constructions based on the Canadian Charter to apply them to the Québec Charter to the point that, since the 2004 case *Syndicat Northcrest v Amselem*, both Charters are judged by the Supreme Court as equivalent and interchangeable. Therefore, as of today, while still distinguishing itself from its Canadian counterpart in matters of form and technicality, the Québec Charter has all but crossed over from being an independent instrument of civil law construction of human rights in private matter to being subjugated to the common law epistemics through standardized interpretation.

A Practical Judicial Trend of Applied Standardization

Given the previously described context, the open door to epistemic osmosis from the dominant common law legal language in Canada into the dynamics of the civil law legal language of private law in Québec has effectively been traversed several times in fact and law. Let us here propose three significant examples of how the common law epistemic framework of human rights (here, the right to equality and protection against discrimination) deriving from the Canadian Charter was actually employed over the years to set aside the core principles of civil law in private matters in Québec.

First, we consider the case of *Commission scolaire régionale de Chambly v Bergevin*. In this case, a school board employee successfully mobilized a common law conception of human rights to obtain additional holiday leaves in the course of a labor dispute (which is a private law matter). The facts of the case were quite simple: a collective employment contract provided that all employees would be granted paid leave during national civic holidays, and in Québec, for historical reasons, many civic holidays actually coincide with Christian holidays, such as Easter or Christmas. The employee successfully pleaded that since this private contract led to the experienced effect of letting workers of Christian faith off work during Christian holidays, it would be discriminatory from an individual's perspective not to grant additional leave to a worker of another confession (Judaism) to attend his or her own religious holidays. A civil law reading of this situation in lower Québec courts did not lead to a conclusion of discrimination or human rights violation. According to the civil law perspective, civic holidays were not granted on religious holidays dates because of religious considerations but rather for historical reasons

anchored in centuries. It became part of use and custom in Québec to grant paid leave on those days, regardless of one's faith. Since the civic holidays were not granted in the name of religion, and since all workers, regardless of their personal faith (or absence thereof), would benefit from them, from an objective and rational civil law perspective, they were not discriminatory. However, the Supreme Court of Canada disregarded the civil law reading of "religious discrimination" and ruled that since the experienced effect of a private law contract amounted to a lived and felt feeling of discrimination, then it was discrimination, in accordance with a common law conception of the notion. This case is of particular significance because it is one of the first major instances in which, when deciding a matter of private law under the scope of the Québec Charter, the Supreme Court of Canada interpreted it in accordance with the Canadian Charter. Indeed, out of the 21 judicial references to case law made in this instance, 15 of them directly referred to decisions rendered in the name of the Canadian Charter or other provincial human rights charter of common law provinces; out of the other 6, only 2 were concerned with Québec Charter case law.

A decade later, in 2004, another landmark decision came in the form of the *Syndicat Northcrest v Amselem* case. This case, as we previously mentioned, was not only of high significance because it opened the door of interchangeability between the Québec Charter and the Canadian Charter in matters of private law, but also because of the way it apprehended the facts of the case. In this instance, question arose to determine if a co-property declaration, which is a private-law instrument, could validly feature a clause preventing co-owners in a shared property building from affixing any kind of decoration on common areas. In the instance, the plaintiff first signed the declaration and later opposed against its content on the ground that banning all decorations would also include banning religious decorations, which would amount to a negation of religious freedom. A civil law reading of the situation would have led to a dismissal of the plaintiff's case for two reasons. First, because of the principle of contractual freedom and the will-based conception of contractual genesis. Not only was civil law expecting a degree of individual autonomy and responsibility when entering contracts, it would also loathe to bypass the defendant's own will and impose on him contractual terms to which he never consented for himself in order to satisfy the plaintiff. Second, in accordance with the objective perspective of law in the civil law tradition, given that the contractual clause forbidding any kind of decoration was neutral and without any form of discriminatory intent, it would go against the founding epistemics of civil law to bend a general rule for a subjective and individual consideration where no duress is present. Yet, in this case, the court, applying Canadian Charter case law to a private law matter under the Québec Charter decided that, in accordance with the common law view, since a contractual effect was empirically experienced by someone in a way that encroached on his or her religious freedoms, then it must be set aside, imposing, here again, common law epistemics to a private law matter.

Another decade later, in the 2013 family law case of *Québec (Attorney General) v A*, the situation went even further. This recent case law epitomizes how, in the name of a single conception of human rights, a centralized judicial body can purport to set aside a legal language and, with it, the social values of an entire population. In this instance, all the way to the Supreme Court of Canada, a plaintiff invoked the Canadian Charter to seek constitutional invalidation of capital civil code provisions pertaining to family law by submitting that she felt and experienced discriminatory effects. Under Québec private law in the Civil Code (s. 585), only officially married couples are entitled to sue one another for alimony after a divorce and no alimony obligation was being imposed on former members of unmarried couples. The plaintiff claimed that it was discriminatory not to recognize her the right to sue for alimony a partner she

was not married to. Of keen importance in this matter was the fact that all common law provinces in Canada have adopted, over the years, statutory provisions providing for alimony obligations between unmarried partners, while Québec chose not to. At trial level, the case was dismissed in accordance with a civil law interpretation of human rights: this situation did not amount to discrimination; the challenged rule was judged as egalitarian, of universal and a priori application, and entirely left to individual choices and autonomous wills. Recognizing the sovereign right of Québec to enact its own laws in accordance with its formal constitutional powers and with its own social values, the plaintiff's claim was at first dismissed; she never was under any form of duress and had plenty legal options during the relationship's life; the defendant had committed no fault in the instance, so it was seen as contrary to the basic premises of civil law to impose an obligation upon him that he never consented to. However, when raised up to the Supreme Court, the majority ruling of highest tribunal of Canada dismissed the civil law approach to favor an epistemic standpoint focused on the subjectively felt and a posteriori experience of individuals, considering the civil code not as a declaration of social values, but rather as a legislative policy that needed to be controlled by the courts in the name of human rights. As such, the majority of the Supreme Court saw fit to mobilize an overwhelming proportion (over 80%) of Canadian Charter and common law case law to decide the case, reading in civil law as necessarily compliant with a global Canadian approach anchored in common law. Québec social values and collective choices were set aside all but completely to approach its private law with the subjective perspective of an empirical problem-solving tool – denying social legitimacy of the civil code as a public choice to, rather, consider it an exercise of political power by the government, which must be monitored, as any public statutory law would be in common law provinces. In extremis, the case was narrowly dismissed at the end of the scrutiny, not because of a change of heart in the Supreme Court and the adoption of a respectful approach considering the distinctiveness of civil law epistemics, but rather, because, after its analysis from a common law standpoint, the court concluded that there was not sufficient unconstitutional discrimination in the code to warrant judicial invalidation of its challenged provisions. From this day, human rights in the name of the Canadian Charter are now openly invoked by the Canadian judiciary to set aside the specific of Québec ALP minority civil law tradition in Canada in favour of a standardized legal language (Côté, 2016a).

While these are only 3 examples in a larger growing trend in Canada, they illustrate a tendency for the judicial apparatus of a pluralist federal state to embrace a standardizing approach when faced with human rights issues in accordance with its dominant legal tradition, even to the detriment of the minority tradition that may view them differently. Moreover, and more unsettling, a detailed reading of judges' decisions in such cases indicate that this situation is frequently not the result of a sentient decision. Almost to a systematic point, epistemic challenges are simply not raised; judges will not weigh and consider each legal tradition and then make a choice; tribunals simply assume that common law precedents on human rights matters can and must apply in Québec, without even considering epistemic and traditional distinctions.

Conclusion

In the words of Emile Durkheim, law essentially amounts to the “fundamentals of collective consciousness” of a given society (Durkheim, 1895). Just as there are many societies in the world, there are also many legal languages, each deeply rooted within the myriad facets of human history through, notably, legal traditions. This legal diversity is endowed with an intrinsic value, one that is intimately related to the necessity of preserving cultural diversity throughout the world. As such, while the cultural

enrichment of a given legal language through the contribution and integration of any and all kind of influences allows for its evolution and maturation, its subjugation by another entails an entirely opposite effect: that of a loss through standardization, a loss of what it means for a given group to call itself a “culture.” Cultures can – and many times do – coexist within the borders of a defined state. Yet, to endure and thrive, cultures must be granted the power and ability to maintain their own identities and sociological existence; they must be allowed to evolve by themselves on their own terms without being marginalized or assimilated by an outside influence.

It is quite ironic that this very cultural diversity of law as a language is now put at risk through one of the greatest legal instruments of humanity, human rights, whose defining purpose is precisely to recognize the sacrality of the human experience. Indeed, as the short case study we presented indicates, there is a concrete risk for minority legal traditions in asymmetric legal pluralism jurisdictions to see the epistemic framework of their legal language standardized and centralized by a supreme authority in accordance with the parameters of another legal tradition, all in the name of constitutionally recognized human rights of nationwide reach. This leads to the imposition that there is only one “correct” conception of the law: one that fits the narrative of the dominant legal language, setting aside in the process one of the core cultural features that makes a people a people and its ability to think law by itself. Such is the case currently happening in Québec, where its civil law legal tradition is more and more set aside in the name of a single common law interpretation of human rights, imposed in the name of the Canadian Charter of Rights and Freedoms.

Human rights are definitely one of the most important features in the modern rule of law. This reality must never be challenged, and human rights must never be denied. However, through their very nature, human rights are also intimately linked with human experience, or rather, with human experiences. Within pluralist jurisdictions, especially asymmetric pluralist jurisdictions founded by different social groups where there is more than one legal language in legitimate force, would there not be a necessity to recognize that a particular minority legal language may have its own legitimate approach to those human rights? In a globalized world such as ours, human diversity demands that such challenges be addressed. Failure to do so, failure to recognize that a founding group within a greater entity may see and understand law differently than the majority of its counterparts, amounts to, as Eugénie Brouillet demonstrated in the case of Québec in post-1982 Canada, the outright negation of a nation (Brouillet, 2005).

This can never be a good thing.

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Due Process and Confiscation of Illegal Gains in the Context of Rule of Law in China

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***[Abstract]** The 19th National Congress of the Chinese Communist Party further emphasized the rule of law in China. Against this background, this paper will review a special forfeiture procedure provided in the Criminal Procedure Law of the People's Republic of China in 2012 (CPL 2012), which aims to better fulfill the obligations under the international conventions, to prevent the loss of state assets and discuss how to make improvements in this regard from the due process perspective and protection of human rights.*

***[Keywords]** due process; coercive measures in rem; confiscation preservation; procedural sanctions*

Introduction

In corruption cases, when a criminal suspect conceals or transfers illegal gains abroad after committing a crime, it may cause economic loss for the state, the collective, or victims if the suspect or defendant is not punished in a timely manner. To address this problem, the common practice in the international communities is to separate the conviction of the accused from the property concerned in the case (Article 54 of the UN Convention against Corruption; and Article 12 of the UN Convention against Transnational Organized Crime) (Baiké, 2005; Baiké, 2000). Accordingly, China established a special confiscation procedure after the reforms of the 2012 CPL against the property of those suspects or defendants who are not convicted in court so as to recover the economic loss of the state, the collective, and the victims and, mostly, to connect with the international practice (PKU Law, 2012). However, some scholars have argued that such procedures in the 2012 CPL stressed procedural proficiency more than than judiciary fairness, as it disposed of the property of the accused before the trial, which, in fact, derogated the requirement of due process in China (Chen, 2011). Therefore, this paper will review the confiscation procedure provided in the 2012 CPL and discuss how to make improvements from the due process and protection of human rights perspective.

Confiscation Procedures for Illegal Gains: Choice of the Basic Model of Criminal Process

A major challenge in the process of reforming the criminal procedure is to expedite the judicial process while ensuring judicial justice (McConville, & Wilson, 2003). The two models proposed by Herbert L. Packer (1964), due process and crime control, have been playing important roles in examining the criminal justice of the country. According to Packer, the due process model is featured with the presumption of innocence, and the proof of guilt must meet the requirement that the evidence is beyond a reasonable doubt. Suspects and defendants have safeguards against self-incrimination, which makes the police and prosecutors face obstacles in prosecution. In contrast with the due process model, the crime control model

seems to replace judicial procedure with administrative procedure and formal procedure with informal procedure, which places extreme trust in facts found informally and found by the police, rather than the content adopted by formal adjudication. Conclusions made by the police, the finders of the facts, are fundamental and decisive to the conviction, and the most important function of the model is to fight against the crime. Criminal procedures have become a method of meeting the needs of speeding up of interrogation of criminal suspects and defendants.

In China, the 1996 CPL introduced some daring measures that departed from its criminal control model and moved toward the adversarial system because of the due process elements. The 2012 CPL provided a special confiscation procedure against illegal gains of those criminal suspects or defendants who were not caught or dead after the crime, which can be deemed as the return of some crime control elements to the old practice. The suspects or defendants can be deprived of their property, or their property can be confiscated without their presence or assistance of a lawyer to defend their rights. Andrew Ashworth (1998) provided a good answer to this issue by arguing the fundamental values and making necessary and balanced tests between protection of human rights and safeguarding individual liberties need to be identified. However, given that there are more and more crimes of corruption and terrorisms worldwide, which may endanger national stability, social justice, and sustainable development, partial modifications to the due process aspect of the criminal procedure are required to respond to the new challenges, just as China did in its 2012 CPL.

Loopholes of Due Process: Coercive Measures *In Rem*

According to Article 280 of the 2012 CPL, the procuratorate may file an application to a people's court for confiscation of illegal incomes in cases where a criminal suspect or defendant escapes or dies (PKUlaw 2012). The application of such special confiscation procedure mainly applies to those involving corruption, bribery and terrorism in which the criminal suspect or defendant flees away after a crime and cannot be in custody after being wanted for more than one year, or being dead after the crime. Such cases often occurred in the remote bordering areas, or most economically developed or ethnic minority regions (Sun, 2017). When the procuratorate applies for the confiscation of illegal incomes, it shall provide evidence and materials related to the facts of a crime and illegal incomes, and state types, quantities, and locations of the property, as well as any seizure, sequestration, or freezing measures taken. This indicates that the seizure, sequestration, and freezing measures are the prepositional process of confiscation to the relevant incomes.

Seizure, Sequestration and Confiscation

Article 282 (1) of the 2012 CPL states that the court shall render a ruling to confiscate illegal incomes and other property involved in cases that are confirmed at trial, except for those incomes legally returned to the victims or for property that shall not be recovered; in that case, the court shall render a ruling to dismiss the application and terminate the seizure, sequestration, or freezing measure taken. According to the international conventions (e.g. the UN Convention against Corruption and the UN Convention against Transnational Organized Crime) (Baiké, 2005; Baiké, 2000), the state parties shall adopt such measures as may be necessary to enable the identification, tracing, freezing, or seizing of any item for the purpose of eventual confiscation. Comparatively speaking, sequestration and freezing measures emphasize the "temporary" and "staged" nature, while confiscation seeks the "permanent" and "final" disposition of the property in question by the state. The purpose of seizure and freezing measures may be various, e.g. to prohibit or deprive a holder of controlling, using, and disposing the property (Lang, & Xiong, 2003).

Since the main object of seizure is property and the main object of freezing is the bank account, when freezing the account is compared to the aim of seizure, it appears to be more diversified. According to different purposes, some countries divide seizure into different categories in legislation, such as the preservative and preventive seizures in the *Criminal Procedure Code of the Republic of Italy* (Huang, 1994). In China, the confiscation procedure without a criminal conviction stipulated in the 2012 CPL is a kind of special procedure *in rem*, no matter when it is at the evidence-collecting stage during the investigation process or in the subsequent proceedings for the purpose of providing preservation and coercive measures, such as the search, seizure, and freezing for the “confiscation,” which is a measure for the “final” adjudication. In order to prove the case, it is the prosecution that shall be responsible for burden of proof regarding the source and purpose of illegal gains (Li, & Chen, 2016; Liu, & Hu, 2017). Therefore, the legislation in due process on the implementation of these measures is particularly important.

According to the current CPL, except that the arrest subject to the approval of the procuratorate or the decision of the court, the judiciary has no power to intervene in the investigation procedure, as the investigation power is a kind of administrative power, while the adjudicative power is a kind of judicial power (Chen, Y., 2003). However, the “trial-centered theory,” in fact, stresses that the judicial organ has the power to decide the coercive measures implemented by the investigation and prosecution organ at the pretrial stage, hear the procedural disputes of both sides, and make decisions accordingly (Sun, 1999). “Trial Centered Theory” actually emphasizes that the court has the final adjudicative power for substantive issues and procedural issues in criminal proceedings, as well as the supremacy of judicial function compared with the prosecution (including the investigation) and defense functions (Chen, R., 2000). By contrast, the legislation in Western countries has shown that the judiciary shall have the power to intervene in the issue in principle when it involves the deprivation or restriction of citizens’ rights and freedoms (e.g., see Articles 98 and 105 of the Criminal Procedure Code of Germany; Article 56 of the Criminal Procedure Code of the Republic of France; Article 218 of the Criminal Procedure Code of Japan; and Articles 317 and 321 of Criminal Procedure Code of the Republic of Italy) (Li, C., 1995; Stefani, et al., 1999; Matsuo, 2005; Huang, 1994).

In judicial practice, such compulsory investigation measures as the search, seizure, sealing up, and freezing is decided by the police in China without the need of judicial review or procuratorial approval. As far as the special confiscation procedure in criminal cases without a criminal conviction is concerned, the premise of prosecution is that the criminal suspect or defendant escaped or died, which does not have the circumstance of arrest or, in another word, the judicial intervention. In fact, such special property confiscation procedure without a criminal conviction needs judicial control not only in terms of the requirement of due process in international conventions but also according to the current litigation structure. Therefore, the author proposes following the provisions of arrest in criminal procedures when it comes to the confiscation procedure if the case is investigated by the police, which should be approved by the procuratorate where there is a need to take coercive measures like property search, seizure, sequestration, and freezing.

Confiscation Preservation Procedure

The prerequisite for enforcing the judgment on property confiscation by a court is the property available to be confiscated in a case. If the property involved is lost due to various reasons, devalued, or difficult to seize, the confiscation judgment by the court will face the risk of being unable to be executed. Therefore, successful enforcement of the procedure requires a sound and perfect confiscation preservation system. In

China, the special confiscation procedure established in the 2012 CPL for illegal gains in cases where a criminal suspect or defendant escapes or dies is the legal basis of charges. However, the confiscation procedures for illegal gains follow a comparatively simple practice, as it only stipulates the property preservation measures like sealing up, seizure, and freezing (Article 280). On the other hand, the criminal suspect, defendant, or other interested parties may change the illegal incomes into immovable properties or other property, such as the cars, ships, stocks, bonds, and futures. This means the measures mentioned in the CPL are not able to deal with the confiscation matters easily. Thus, it is necessary to establish a sound confiscation preservation system in China for the requirement of due process.

Generally speaking, the countries which set up a confiscation preservation system, such as Japan and South Korea, tend to establish an additional collection preservation system at the same time, which prohibits the prisoners from disposing of their common property (e.g. Articles 24 and 44 in the Special Drug Law of Japan). The purpose of these measures is to prevent the criminal suspect, the defendant, or the prisoner from transferring or hiding property. In fact, the confiscation preservation can be mainly found in the criminal legislation of civil law countries, while in the common law countries, such as the USA, criminal confiscation procedure follows after the conviction in court trial. In 1984, for example, the US introduced legislation for the provisions of confiscation preservation in order to prevent the guilty/accused from transferring or hiding properties; when requested by prosecutors, the court may issue a writ to ban or freeze property transfer or concealment or demand the accused pay a deposit for the property preservation (Zhang, 2012). Just as the judge in the case the *United States v. Monsanto* argued, the restraining order did not violate the respondent's right to counsel of choice as protected by the Sixth Amendment or the Due Process Clause of the Fifth Amendment¹. According to the Supplemental Rules for Certain Admiralty and Maritime Claims of Federal Rules of Civil Procedure and other relevant provisions, a court in the USA can take different preservation measures on the assets related to cases in different circumstances based on the request of the federal law enforcement agencies or on its own motion before the confiscation decision: seizure, restraining order, or injunction, *lispendens*, and interlocutory sale.

Through the review on of the countries of both civil and common law systems, we can find that there is a relatively complete confiscation reservation system in their criminal procedure law or criminal law. Therefore, the establishment of a complete confiscation preservation system is one of the safeguards of due process, which should be improved with regard to the illegal income confiscation procedure.

Procedural Sanctions in the Confiscation of Illegal Incomes

Exclusionary Rules of Illegally Obtained Evidence

If the police violate the due process requirement regarding the coercive measures *in rem* during the proceedings of confiscating the illegal gains, the judiciary may apply the exclusionary rule of illegally obtained evidence. This practice commonly exists in most countries such as the USA, Canada, the UK, Germany, France, and Italy. Actually, a fundamental reason for excluding such illegally obtained evidence lies in the fact that the illegal act of investigation by the investigators directly infringes on the basic right of the litigant or violates the basic principle of rule of law, as not every illegal investigation conducted will lead to the exclusion of illegal evidence by the court. Accordingly, the scope of exclusionary rules mainly includes the evidence obtained by false arrest, physical evidence obtained by illegal search or seizure, the

¹*The United States v. Monsanto*, 109 S Ct. 2657(1989).

confessions of the defendant obtained by illegal interrogation, and evidence obtained by illegal identification (LaFave, & Israel, 1992).

In China, Article 54(1) of the 2012 CPL provides the scope of exclusionary rules of illegal evidence that, apart from the verbal evidence illegally obtained, which shall be excluded, and “if any physical or documentary evidence is not gathered under the statutory procedure, which may seriously affect justice, the [prosecution] correction or justification shall be provided; otherwise, such evidence shall be excluded” (PKU Law, 2012). Thus, the physical evidence obtained through illegal search or seizure shall belong to the evidence excluded in the light of the exclusionary rule. As for the start of excluding the evidence illegally obtained in the confiscation procedure of illegal incomes is stipulated in Article 56: “Where a judge in a court session believes that there may be any illegal obtainment of evidence as described in Article 54 of this Law, the judge shall conduct the investigation in court regarding the legality of evidence collection. A party or the defender or litigation representative thereof shall have the right to apply to a people’s court for excluding the evidence illegally obtained. Relevant clues or materials shall be provided for an application for excluding such evidence.”

Here we can find two ways to start the investigation procedure of the exclusion of the illegally obtained evidence in the procedure of confiscation of illegal income. First, the judge can actively start an investigation *ex officio* when finding that the collection of the physical evidence and documentary evidence by investigators violates the statutory procedures and is likely to substantively affect judicial justice. Second, near relatives of a criminal suspect or defendant and other interested parties ²may start such a procedure, as they shall have the right to apply to the court for the exclusion of the evidence obtained illegally according to the law and should provide relevant clues and materials in the light of Article 281(2) of the 2012 CPL.

The System of Reversing the Original Sentence

During the trial process of confiscating illegal income cases, the superior court may quash the original judgment if the lower court has failed to make any substantive decision to punish the procedural illegal act conducted by the police and the procurator before the trial stage. Different from the exclusionary rule of the evidence illegally obtained, the system of reversing the original sentence is not against the procedural illegal act before trial conducted by the police or the prosecutor, but the illegal act conducted by the lower court during the trial (of first instance). In general, there are two kinds of procedural errors for which the court at the next higher level can reverse the original sentence. First, the trial procedure of the lower court violates the statute law or infringes the constitutional right of the defendant. Second, the lower court takes an attitude of nonfeasance concerning the illegal procedural acts of the police and the procurators, which, in fact, requires declaration that such evidence is illegal and, even, termination of the proceedings. The consequence of reversing the original sentence by the higher court is to declare the judgment of the lower court invalid, which may lead to acquittal of the defendant or remand and retrial of the case.

Article 227 of the 2012 CPL stipulates five circumstances for quashing, remanding, and retrying a case in China’s criminal procedure: (1) the provisions of this law regarding open trial are violated; (2) the system of withdrawal is violated; (3) a party is deprived of statutory procedural rights, or such rights of a party are restricted, which may affect a fair trial; (4) the composition of the panel is illegal; or (5) other statutory procedures are violated that may affect a fair trial (PKU Law, 2012). With regard to the procedure of

²Under such procedure, it is also necessary to provide legal assistance to the third parties including victims. For detailed discussions, see Chen & Li (2015) and Deng (2015).

confiscating illegal gains in a criminal case, the author supports the practice of quashing, remanding, and retrying the case if it has a substantive effect on a fair trial, while the court may use its discretion to decide if it will remand the case if the circumstance of illegal act is not so serious.

The System of Declaring the Legal Action Null and Void

During trials involving confiscation of illegal income, it may be discovered that there have been severe violations of procedural requirements, such as an illegal act or an act with procedural defects, when the police or prosecution have taken take coercive measures *in rem* during the investigation process, but the decision of applying the exclusionary rule of the illegally obtained evidence or revocation of the original sentence is sometimes insufficient to deprive the procedural violators of the illegitimate benefits. According to the common practice of civil law countries, the court can directly declare the illegal act null and void. Among the procedural sanction models, the exclusionary rule of illegal evidence and the system of reversing the original sentence has been commonly stipulated in the common law and civil law systems. However, slightly different from the common law, the civil law countries have a unique procedural sanctions system – the system of declaring the legal action null and void, which refers to the system that the court announces those acts of severe violation of procedural requirements or those with the procedural defects nullified. Such system is mostly in the legislation, and even in some the criminal procedure codes (e.g. see Articles 56, 57, and 59 of the *Criminal Procedure Code of the Republic of France*) (Hatchard, 1996; Stefani, et al., 1999).

The key to the system of nullified legal action is that the court announces the nullity of the act with procedural defect. For example, Article 802 of the Criminal Procedure Code of the Republic of France stipulates that “in the event of a violation of formalities prescribed by law under penalty of nullity or in the event of a non-observance of substantial formalities, any court, the Court of cassation included, which is seized of an application for annulment, or which raises such an irregularity on its own motion, may pronounce the nullity only where this has had the effect of damaging the interests of the party concerned” (Stefani *et al.*, 1999). Once a legal action is declared null and void, it may lead to the result that such a proceeding will return to the litigation and/or trial stage. That is to say that the criminal proceedings will have to be dealt with after the decision of the nullified legal action. Compared with the exclusionary rules and the system of reversing the original sentence, the system of declaring the legal action null and void may play a severer role in procedural sanctions against illegal act in the criminal process. Given that the confiscation procedure without a conviction is a prosecution with the absence of the criminal suspect/defendant, the procedural sanctions can better protect the parties’ interests in case the prosecution takes such measures as the search and seizure without a defendant during the investigation. Therefore, the author suggests that China consider such a system in the special procedure of confiscating the illegal gains in a crime.

Conclusion

The basic principle of procedural sanction is to compel the parties to abide by the procedural law to deprive them of illegal interests from the litigation. Such deprivation is conducted by announcing the nullity of the action, the evidence, and even the verdict. In this way, the parties, especially the police and the prosecution, will find that the procedural illegal act will lead to adverse consequences in the lawsuit and losing the case as the worse result. Although the exclusion of the illegally obtained evidence does not necessarily lead to an adverse verdict of the accuser, it will weaken the basis of the prosecution, at least. The sanction measures

can effectively inform the police, the procurator, and even the judge of the negative result for improper actions in the criminal procedure, who will comply with the legal proceedings or suffer the adverse but substantive consequences in a criminal case. In the context of promoting the rule of law in China, all the stakeholders and even the scholars need to pay attention to the due process requirement and protection of the accused at all times while striking down the crimes, especially in the cases of corruption and terrorism.

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Comparison and Analysis of the Legislation on Cyber Security between China and the US

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[Abstract] Acts are significant form of expression of the national official discourse, critical approaches to promote the country's political philosophy, to form the direction of the public voice, to construct the people's psychology, and, also, the practical foundation of dialogue between countries. By comparing the acts on cyber security in the two countries of China and the United States, the writers found that there are some similarities in the intention behind the difference in the perception on this issue. From political, legal, and cultural perspectives, the paper analysed the causes of the differences between the two countries and pointed out that currently there are some foundations for bilateral cooperation that take the path of the cooperation in cyber security between the two countries; this path is developing from "basic level politics" to "high level politics"; the most important issue at present is to achieve strategic mutual trust.

[Keywords] cyber security; acts; comparison; international relations

Introduction

In recent years, cyber security has become an issue of public safety in the whole world, and China and the US have shown their great concern about it; they have adjusted their respective national security strategies accordingly. On February 27th, 2014, Chinese Central Leading Group of Cyberspace Affairs was officially inaugurated, and Chinese President Xi Jinping acts as the head of it (Creemers, 2014). Thus, the cyber security issue has been officially upgraded to the high level of national strategy. The United States, also, acknowledged that the cyber threat has become the most critical threat to national security. At the same time, the trend of networking of security issues in the fields of traditional politics, economy, diplomacy, and defense, has posed an impact on the development of the relationship between the two countries. The friction between the two parties in the field of cyber security has impelled them to envisage their difference in the field, and several dialogues have been conducted. These dialogues are committed to reducing the misunderstanding in the field of cyber security between the two countries, and promoting the expansion of bilateral relations to the field of cyber security. So far, the Chinese government states it intends to work with the "international community to promote the building of a peaceful, secure, open, and cooperative cyberspace". Similarly, the U.S. government policy is to "work internationally to promote an open, interoperable, secure, and reliable" cyberspace. While this semantic overlap in officially stated goals suggests strong similarities between China and the United States in their viewpoints on international law and norms in cyberspace, they are more different than similar (Hsu & Murray, 2014). However, the two countries have no cooperation experience in the field, and China has no template that can be compared with the Homeland Security Act of 2002 and the Cyber Security Information Sharing Act of 2015 for the dialogue, making the dialogue superficial all the time. Until June 2015, when the Cyber Security Law (Draft) was drafted (passed in November 2016) and July 2015, when the National Security Law was adopted (hereinafter referred to as the "two new laws"), there has there

been substantive basis for the dialogue between China and the United States. The two new laws also provide a direction for bilateral cooperation in the field of cyber security (Shu, & Hongmei, 2017).

Comparison of Definition of Cyber Security

The nature of the issue of cyber security is the networking of practical security; that is to say, it is the necessary consequence of the fast development of the cyber threat and its permeation into practical security issues. The main causes of cyber security are the ever increasing financial value of cyber security, the mutual reliance of global economic and social development, and cyberspace, and the need for protection for the integrated security of the cyberspace. Due to the difference in perspectives, there are some differences in the definition of cyber security. The term cyber security was first used in the National Security Strategy of 1999 of the US but was not specifically defined by any other National Security Strategies or policy documents afterwards. Basically, the George W. Bush Jr. administration regarded the cyber security issue as part of homeland security; neither of the two national strategies of 2002 and 2006 mentioned the issue of cyber security, but the two homeland security strategies of 2002 and 2007 and the National Strategy to Secure Cyberspace of 2003 elaborated its cyber security policies. The national security strategy in 2010 of the Obama administration took cyber security into the scope of national security, and the International Strategy for Cyberspace of 2010 comprehensively elaborated the domestic and international policies on cyberspace. *The Dictionary of Military and Associated Terms of the Department of Defence*, as amended in January 2011, didn't include the entry of cyber security (Xiaofeng, 2013). What can be found in legislations is a definition of a similar term: information security. The Federal Information Security Management Act of 2002 stipulates that

1. the term "information security" means protecting information and information systems from unauthorized use, disclosure, disruption, modification, or destruction in order to provide
 - a) integrity, which means guarding against improper information modification or destruction, and includes ensuring information, nonrepudiation, and authenticity;
 - b) confidentiality, which means preserving an appropriate level of information secrecy; and
 - c) availability, which means ensuring timely and reliable access to and use of information.

This kind of obscurity in the definition is somewhat common internationally, and the purpose is to select a favourable interpretation when some specific policies are being developed in the future. According to the definition by the International Electrotechnical Commission (2012), the term of "cyberspace" is the complex environment resulting from the interaction of people, software, and services on the internet by means of technology devices and networks connected to it, which does not exist in any physical form. The term "cyber security" is the preservation of confidentiality, integrity, and availability of information in cyberspace. According to the definition by Wikipedia (2016), cybersecurity refers to network security consisting of the policies adopted to prevent and monitor unauthorized access, misuse, modification, or denial of a computer network and network-accessible resources. In Washington, cybersecurity is fundamentally about preventing unauthorized access to digital systems and, notwithstanding massive foreign hacking of US government databases, mainly focuses on protecting private-sector data, as well as critical infrastructure (Goldman, & Cohen, 2016). While the recently released draft of Cyber Security Law of China demonstrated its intension in the first chapter, [join sentences] this law is formulated to protect cyber security, safeguard the sovereignty of cyberspace, and national security, social public interests, protect the legitimate rights and interests of citizens, legal

persons and other organizations, and promote the healthy development of the informationalization of economic and social activities.

Xi Jinping has always stressed that without cybersecurity, there is no national security; without informatization, there is no modernization (Bandurski, 2014). This sentence has been quoted on many occasions by many people and shows that the Chinese government believes that cyber security is subordinate to national security to prevent domestic and foreign forces from using the network to threaten state power; what it seeks is the security and stability of national cyberspace sovereignty. This means that the government's control over the internet is the overall control over the infrastructure and various data. From this perspective, there is some difference in the priority of understanding of the cyber security between China and the US. The US mainly emphasizes the security of privately operated networks, while China focuses on the security of the national public network.

The Expansion of Government's Law Enforcement Powers

The difference in the priorities does not mean that the related legislations of the two countries are basically different. Both countries expanded the law enforcement powers in the name of protecting national and social security. In the US, after the 9/11 attack, the Patriot Act (expired) (Diamond, 2015), the Homeland Security Act of 2002 (Edgar, 2002), the Cybersecurity Information Sharing Act of 2015 (CISA) (Greene, 2015), as passed by the Congress, all violate personal privacy in the name of safeguarding national security. Especially, the CISA brought about more serious risk to privacy than the Chinese Cyber Security Law (draft). Then, the CISA has been incorporated into the 2016 Final Omnibus Spending Package (Boyd, 2015). The final cybersecurity bill merged parts of the Senate-passed CISA, and the two bills that passed the House last year, relying mostly on language from the National Cybersecurity Protection Advancement Act crafted by the House Committee on Homeland Security. The bill codifies an information-sharing framework by which the government and private industry can share data about known cyber threats in real time (or near-real time), bolstering the security posture for both sectors. In other words, it endows the government with powers of massive surveillance and allows government sectors and companies to share hacking information. That's why advocates of privacy are against it all the time. Opponents of the bill, such as Apple Inc., Twitter, and Dropbox are all against it, but failed to stop it from passing, which they did four years ago.

Currently, it seems that there is no better solution to the game between security and privacy. It's evidently difficult to introduce an act of good balance between security and privacy. In recent years, the high-profile cyber attacks against government agencies and enterprises, such as SONY pictures, United Airlines, and the Ashley Madison extramarital dating website have contributed to the passing of the bill by the Senate; however, this does not mean that that the CISA has natural justice. The CISA allows companies to directly share information, including personally identifiable information of text messages, emails, and APP data with the criminal justice authorities and the intelligence agencies. The enterprise should delete the identification information after processing the data, but there are always some enterprises which do not perform their obligation of confidentiality for their respective reasons. The Cybersecurity Information Sharing Act (CISA) grants broad latitude to tech companies, data brokers, and anyone with a web-based data collection to mine user information and then share it with "appropriate Federal entities," which have permission to share it throughout the government. At the U.S. Chamber of Commerce 4th Annual Cybersecurity Summit, it was also said that "...therein lies another critical component of the legislative language, whether we share that information in real time or whether we

share it in near real time. And the reason why we, believe profoundly that that term ‘near real time’ is so critical because it allows us to scrub in automated form personally identifiable information and other information that carries with it significant privacy interests that do not necessarily serve the discrete interests of the enforcement or investigative communities” (Mayorkas, 2015). It was said the bill could sweep away “important privacy protections,” to which Deputy Secretary of the Department of Homeland Security (DHS), Alejandro Mayorkas, responded that some provisions of the bill “could sweep away important privacy protections” and that the proposed legislation “raises privacy and civil liberties concerns” (Thielman, 2015). Generally speaking, in the present context of the increasingly serious threat to the cyber security, security is the overwhelming choice that the government is forced to take, instead of privacy, although the government understands that the significance of privacy is not less than that of safety.

Similar to the US, the two new laws have been criticized for the existence of the same problems. It is also the case that the obscurity in the definition of security and the protective measures in the new laws endows relevant authorities in China with tremendous law enforcement powers. For instance, Article 75 of the State Security Law empowers “the state security authorities, public security authorities, relevant military authorities to conduct special acts to protect state security, and they can take necessary means and measures in accordance with the law, relevant authorities and local governments should provide support and cooperation with the scope of their responsibilities” (National People's Congress of China, 2015). There are similar articles in the Cyber Security Law, and the concept, which takes state security as its core, overwhelms the privacy right of citizens. Article 50 of the law empowers the government to take interim restrictive measures to control the internet communication at specific junctures to maintain state security and good public order. However, the draft law also postures for protecting personal privacy. For example, Article 36 stipulates that internet service providers must keep the personal information of citizens that they have collected completely confidential, and they should not disclose, modify, or damage such information. They must not sell it to or provide it illegally with others (National People's Congress of China, 2015). In short, the Cyber Security Law represents a security-centered state security concept, so in special times, the government can temporarily and "legitimately" violate the privacy of citizens in the name of state security but forbid any other organizations or individuals from violating the privacy of public for any reason.

Consensus on Cooperation with Difference in Legislative Philosophies

Even though the inner logic of legislation is similar, there are some differences between the two countries' legislative philosophies. The legislations of the US are made from the perspective of ensuring public information security. Take the CISA as an example. It was “designed to protect internet users’ personal information while enabling new ways for companies and federal agencies to coordinate responses to cyber-attacks” (Greenberg, 2015), while the Chinese statements are more partial to the public interests. In addition, the differences in the context of the two countries reflects the fundamental differences between the two different cultures and mindsets: in an act, those articles about public interests are conventionally lined above those about the interests of the state, whereas the Chinese practice is the inverse, although the supreme legislative objectives of the two countries are that the state security interests are paramount. This certainly does not mean that the US government stresses more the protection of the public interests than China. The legislations of the United States do so because they have to rely on those civil infrastructures for the transmission of most critical data. Nevertheless, one

obvious effect of the different statements is that, on media and in the public opinion, the US seems to lay more emphasis on the protection of intellectual property rights and the combat of commercial crimes than China, and it seems that the US has been standing on the highest peak of morality in the protection of the privacy of the public and human rights, though the actual practice is not necessarily the case. In such a context, it's not difficult to understand why the two countries sometimes point their fingers at each other on the basis of the national strategic need and of tactical need in the conversations. However, even so, the leaders of the two countries are still pragmatic. On September 25, 2015, during President Xi Jinping's visit to the US, the two countries achieved agreement on the response to malicious cyber activities, identification and promotion of appropriate norms of state behavior in cyberspace, etc., and reached consensus for the increase of strategic mutual trust:

The US and China agreed that timely responses should be provided to requests for information and assistance concerning malicious cyber activities. Both sides agree to cooperate, in a manner consistent with their respective national laws and relevant international obligations, with requests to investigate cybercrimes, collect electronic evidence, and mitigate malicious cyber activity emanating from their territory. Both sides also agree to provide updates on the status and results of those investigations to the other side, as appropriate. Both countries agreed that neither country's government will conduct or knowingly support cyber-enabled theft of intellectual property, including trade secrets or other confidential business information, with the intent of providing competitive advantages to companies or commercial sectors. The US and China said they are both committed to work to further identify and promote appropriate norms of state behaviour in cyberspace within the international community.

The US and China agreed "to establish a high-level joint dialogue mechanism on fighting cybercrime and related issues". As part of this mechanism, both sides agree to establish a hotline for the escalation of issues that may arise in the course of responding to such requests (The White House, Office of the Press Secretary, 2015).

On the basis of the agreement, the first high-level joint dialogue between the two countries on fighting cybercrime and related issues was held on December 1, 2015. It could be observed that the foothold of the consensus reached by the two countries was finally placed on the joint crack-down of cybercrime, leaving alone the origin of the dialogue between them – the development of international cyberspace rules, or we can say that the two countries restricts their cooperation to the field of "low level politics" at last, as they hope to build up gradually the mutual trust mechanism in the field of cyber security through practical cooperation, before push it toward the fields of high level politics. Basically, this is a convention of the development of major countries politics. But this process will be very difficult, as the core issues of the field of high level politics are the cyberspace sovereignty and international cyberspace rules. The protection of cyberspace sovereignty has always been the stance of the Chinese Government; it has become incontrovertible after the occurrence of the Edward Snowden incident. At the same time, China also called on the international community to establish international cyberspace rules to safeguard the fundamental interests of all countries. The US is not interested in the field of high-level politics, it seldom talks about cyberspace sovereignty publicly, and it tries to avoid most of the issues related to international cyberspace rules. Therefore, the dialogue between the two countries is more like the limited cooperation under the premise of promoting their respective assertions on cyber security, and this is determined by the differences between the two countries in two aspects.

First of all, under the influence of economic liberalism, most internet infrastructures are owned and run by private sectors in the US, while most commercial, political and military information has been transmitted by the private-run networks, so the protection of the security of private-run networks is of national strategic significance, and the legislations on cyber security in the US tend to protect private-run networks. For the US, to combat the unauthorized access to a computer network and network-accessible resources committed by any individual or group is, actually, to protect its national security. This also can be used to explain why the US has always been accusing China of invading the private-run networks in the US and has been determined to sue Chinese military personnel for the theft of commercial data; , under most circumstances, the sued persons did not appear the court, knowing that it could alienate China. In contrast, in China, cyber security is generally considered an extension of the functions of the government, and cyber security is defined as the good order in cyberspace under the guidance of the government. Internet infrastructures are basically monopolized by the state-run enterprises, so the interests of the government, the public, and the enterprises have been completely tied together. As a result, the legislation on cyber security in China has indiscriminately cracked down all the actions against cyber security.

The second aspect is the line between the domestic surveillance and cyber security mentioned above. In the US, the legislation on cyber surveillance has been, mainly, to justify some computer intrusion and to broaden the border of law enforcement; legislation on cyber security is committed to preventing those actions of illegal intrusion into computer systems of others and stealing information. The former is a central controversy on the media and is a so-called legal action of intrusion authorized by the government, though it must be done for the purpose of public safety and order and under effective supervision of competent authorities. The latter is mainly to ensure the information security of citizens and private-run enterprises. Though the two somewhat overlap each other, they are laws of two different systems. However, in China, maybe due to the lack of legislative experience or legislative convention, the new law and the draft have not strictly distinguished the boundaries between domestic surveillance and cyber security but, in a way, have intentionally blurred the boundary between them. The advantage of doing so is to use the protection of national and public information security to moderate the pressure from the media for the violation against the privacy of the public so that the laws can be adopted and implemented. This is somewhat similar to the merger of the CISA into the “2016 omnibus spending bill” in the US, although the latter practice is more concealed.

Actually, the differences in the legislation on cyber security between China and the US has proved the differences in cultures and mindsets in the field between the two countries and corroborates the difference in the fields of international politics and economy as an extension of those in cyber security. At the same time, the negative elements in the field of sovereignty between China and the US have nudged China into firmer determination on the maintenance of cyberspace sovereignty. Especially after the revealing of the PRISM project, a series of violations against the sovereignty of other countries by the US [for instance, the intrusion into the network of nuclear facilities in Iran through Worm Stuxnet Sanger, 2012)] made China aware of the significance of cyberspace sovereignty, and Edward Snowden (2013) also revealed that the US has always been high profile about publicizing Chinese cyber espionage, even without any direct evidence; meanwhile, the US has always been invading the network systems in China. This has forced China to strengthen and improve legislation on cyber security. All in all, in the field of cyber security, it is not possible that for China and the US to cooperate with each other like they have

been doing in the economy, let alone the tendency of sovereignty alienation in the cyberspace in Europe. In contrast, the PRISM project actually unveiled the worries of the US of their domestic cyber security. Since the 9/11 attack, the concerns of the US about homeland security and information security have accelerated the improvement and enhancement of cyber security awareness and legislation. In other words, there is no distinctive difference in both concepts and intentions of legislation on cyber security, which demonstrates the options in the dilemma of domestic cyber security and the privacy of the public. However, the kind of superficial difference in the legislative concept and the internal value identification is obviously clear and also indicates that the cooperation on the basis of common interests of the two countries is extremely difficult; however, they can achieve such consensus and cooperation in the field of low politics, as in the China-US Strategic and Economic Dialogue and the China-US High-level Consultation on People-to-People and Cultural Exchanges.

Looking at the direction of the cooperation of high-level politics, the high-level joint dialogue between China and the US on fighting cybercrime and related issues is more like an extension of the cooperation of low-level politics in the field of cyber security. In the writers' view, this is actually a compromise made by the two countries for which both sides have given up something, and China has given up more than the US. As we know, although what the domestic legislation of the two countries pursues is domestic supervision and information security, and, fundamentally, cyberspace sovereignty, but the format of Chinese legislation and its statements on cyberspace sovereignty on international occasions has formed a sharp contrast with that of the US. For China, after Edward Snowden's revelations, China has become fully aware of the strong capabilities of the US in the field of cyber security and the potential threat to the state security of China. For that purpose, China emphasizes more the cyberspace sovereignty and risks violating privacy of the public to safeguard state security. Behind the helplessness is the oppression from the field of high-level politics between the two countries.

First of all, mutual distrust seriously restrains the development of the cyber security act and national strategies. The emergence of China at the global level aggravates the frequency and depth of the frictions with the US, making the "China Threat" a critical consideration in the development of strategies and legislations, while part of Chinese officials and scholars think that the strategies of returning to the Asia-Pacific, establishment of the TPP and TTIP, are all strategic measures to restrain China from rising (Fangyin, 2012). Accordingly, though China has disassociated again and again, many Chinese strategic steps (for example, the belt and road strategy, Asian Infrastructure Investment Bank, Silk Road Fund, etc.) have been taken as steps to squeeze out the US. At present, this kind of distrust has spread to the field of cyber security, especially with the occurrence of the Edward Snowden incident, which profoundly damaged the foundation of mutual trust, making China firm about the absurdity of the concept that there is no border in the cyberspace; this triggered the introduction of a new law and the draft of another law with a strong sense of cyberspace sovereignty in China.

Second, the technological capabilities of China and the US are not commensurate with their respective positions in the development of rules. As a latecomer in the development of the internet, and the field of cyber security, China has fallen far behind the US in the accumulation of technologies, talents, and experience and has been lacking in discourse power in the development of international order in cyberspace, which is significantly not commensurate with its status as a big economic power, and the fact that its cyber economy has increasingly infiltrated into or even has exceeded the traditional economy. For fear that it be left behind in the new development of international order in cyberspace, China has to reach

some kind of cooperation with the US so that it can ensure the healthy development of its economy in the next ten years. The US also hopes to develop some kind of cooperation with China. Keith Brian Alexander, the former Director of the National Security Agency, first Commander of the United States Cyber Command, clearly stated that the US hopes to develop cooperation with China and to associate with the influence of China to weaken the global impact of the Edward Snowden incident.

Conclusion

The release of China's new law and the draft provides the foundation for the analysis of the concepts and practices of cyber security. Behind the difference in the legislations on cyber security is the difference in the cultures, mindsets, and interests of the two countries. The concepts of legislation on cyber security will impact the national strategies of the two countries in the end. The limited consensus reached by them indicates that there is room for dialogues in the fields of low-level politics between them, and it may extend to the fields of high-level politics. The US needs support from China to weaken the doubts and criticism on its cyber security strategies in the international community caused by the occurrence of the Edward Snowden incident. The Chinese acceptance of the proposals on the protection of intellectual property rights and fighting cyber-crimes from the US is of strategic foresight, and it's a necessary path to build its image in the international cyberspace, to gain support from the US for the building of the order in international cyberspace. To that end, China and the US have promised to jointly make further efforts to develop and promote the appropriate code of conducts by countries in international cyberspace, which must be regarded as a cooperative model explored by the two countries, or even a model for similar cooperation between China and other countries. Definitely, for the smooth facilitation of the cooperation mechanism, it's necessary that the two countries take more measures to enhance their mutual trust. For instance, first, the two countries should restrain themselves from stealing personal data and commercial data from each other, stop those irrational attacks by the media between them, and pursue cooperation in the legislation aspects in the framework of the international law. Second, China and the US should follow the well-developed dialogue mechanism on economic and political issues, accelerate the pace of official exchange on cyber security, and facilitate regular and informal non-official dialogues. Additionally, in order to better supervise the irrational conducts that may happen between them, it's necessary to pursue establishment of an international cyberspace order involving multi countries. To summarize, the two countries should rationally face their respective differences in the cognition of the scope of security, conquer their respective distrust and fear between them through long-term, stable dialogue, and cooperation to find an approach of interaction in the cyberspace, which is good for the citizens and interests of both countries, and to promote the further development of bilateral diplomatic relations.

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A Study on the Reform of UN Peacekeeping Police English Training

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[Abstract] In recent years, Chinese peacekeeping police officers have participated in UN peacekeeping operations. That is not only a reflection of our country actively participating in the world peace affairs, but also a symbol of a great country's duty. Teaching peacekeeping police English is a guarantee to deploy peacekeeping police officers to mission areas, as well as the basis for normal work and life in mission areas. Peacekeeping police English training has unique characteristics. Meanwhile, there are some constraints and challenges in the training. Analyzing the problem and researching the reform of peacekeeping police English training is of great significance.

[Keywords] peacekeeping police English; training; reform

Introduction

In recent years, UN experts and scholars have studied peacekeeping operations and peacekeeping training from different perspectives. However, there are few researches about peacekeeping police English training. Peacekeeping police English plays a very important role in peacekeeping police training. Practical language competence is an urgent, strategic need in global times. When peacekeeping police officers conduct their tasks in non-mother-tongue missions, English is the foundation of their work and life. This essay consists of four parts. First, it introduces the importance of peacekeeping police English. Second, it summarizes the particularity of United Nations peacekeeping police English training. Third, it analyzes the challenges faced by UN peacekeeping police English training. Fourth, it studies the countermeasure to UN peacekeeping police English training reform. Finally, it concludes that the reform of peacekeeping police English is necessary. It is not only good for practical peacekeeping work, but it also is a reply to the call of the times. Only the peacekeeping police English training can catch up with the times; the peacekeeping operations can go with the tide of world political situation and achieve success.

The Importance of Peacekeeping Police English

Most of the UN Missions Use English as an Official Language

In UN missions, people cannot live or work without English. English is the basic guarantee of successful work and convenient life. Even if the host country is not an English-speaking one, all the peacekeepers may be from different countries and work together using English as the work language. Although not all the peacekeepers are native speakers, they use English as a bridge to communicate with each other. So, mastery of English not only matters as a quality of peacekeeping police officers, but it also matters for work.

English is an Important Standard of Peacekeeping Police Selection

Before deployment, the candidates for peacekeeping police have to pass a selection by UN. The selection test contains some subjects, such as language, policing skills, shooting, and driving. Among these, English takes the most important role. The language test consists of three parts: reading, writing, and interview. In the reading part, candidates have to read some material about a case and answer ten questions in 20 minutes.

In the writing part, candidates have to write a police report of the former case after reading and listening to the follow-up materials. Every candidate has to undergo an interview of at least 20 minutes. Not limited to the English, the candidates have to state their professional background and communicate with the judge about mission and peacekeeping knowledge during the interview. So, the selection test has a very high requirement for English. It is required that the peacekeeping police officers master English and be able to use English freely in policing work (Qu, Z., 2006). This is also the spirit of police English – combining English and policing together.

Police English is an Essential Condition of Acknowledging the UN's Policy

Most of the UN policies are in an English version, as are UN mission-related documents. If the peacekeeping police officers want to acknowledge the UN's policies, the peacekeeping operations and the updates of the missions, police English is essential. In UN mission, whether making a call, attending a meeting, or communicating by e-mail, English is more useful. Especially when writing e-mail and even when drafting a report, peacekeeping police officers have to pay attention to English. Although everyone has different accents, they can communicate with few problems. However, in writing, English really reflects the quality of a police officer. So, mastery of police English is a shortcut to getting into gear quickly.

The Particularity of United Nations' Peacekeeping Police English Training

Gradually Improved Training Contents

The Chinese peacekeeping police training began in 2000 without any experience to follow, so the trainers gradually explored police English training models. From the beginning of basic training to the later United Nations general training module, to get the UN certification, to become the first in Asia, the seventh peacekeeping police training center, which has the only UN training certification in the world, the Chinese peacekeeping police English training has been improved. At the beginning of the training center set up, to acknowledge that English is an important part of the UN selection test, English training focused on examination techniques early. To be deployed to a mission successfully, candidates had 2 to 3 months' training delivered by the peacekeeping police training center to help them master basic English and pass the UN selection test. The UN selection test's content changes, requirements and the contents of peacekeeping police training are different (Wang, X., 2010). According to the requirements of the test, course designers have gradually put the UN general training module, the United Nations rules, and regulations of relevant policies and regulations in the training content. As the teaching material is in an English version, all the training is delivered in English. Finally, in 2011, the training course got the United Nations official certification. At the same time, the police English training also added other contents, such as police exchanges, simulation on duty, and so on. The training not only helps candidates pass selection tests, but also helps them use English to carry out their work and life smoothly.

Diversity of Training Objects

The training objects of the Chinese peacekeeping police training center are individual peacekeeping police, FPU (formed police unit), and the peacekeeping police from other countries, etc. English has been the main content of peacekeeping police training. Different training objects assume the different responsibilities in the peacekeeping mission area, so the content and focus of the English training of different objects are different. Peacekeeping individual police focus on police English to communicate and guide local police. FPU focuses on police English to contact other peacekeeping forces and the police. According to their work

focus, respectively, the trainers make different training plans and training content. However, one thing is unchangeable: combining English knowledge and police skills. Having English as the medium and based on the knowledge of police skills, police English shows the best quality and elegant appearance of Chinese peacekeeping police.

Diversity of Trainers

When the training center was established, all the trainers were selected from English teaching and research sections of the academy. The training content and form also followed the traditional domestic classroom teaching pattern. Along with the development of the training, the training center gradually employed interdisciplinary talents as faculty members. More and more postgraduates become trainers, and their major were different, including the international policing, international relations, international law, and police skills. All the new-age trainers all have a bachelors degree in English. It also shows police English is a kind of professional English. English is the foundation, while the core is policing (Qu, 2008). At the same time, the center also actively introduced peacekeeping police with rich experiences with police and peacekeeping experiences as part-time instructors, which made peacekeeping police with English training and practice together.

Challenges Faced by UN Peacekeeping Police English Training

Essentiality: Language is More than a Tool

In the past, the domestic peacekeeping police mainly focused on the police English itself, and the study of the theory of basic common sense and the UN framework. The primary purpose of the training was to pass the UN selection test, and it took most time and energy. As a result, somehow the former training ignored the most basic police skills training, the learning of police agency, and the functional aspects of UN mission. It limited the peacekeeping police English to a basic element of the UN selection test. In fact, police English is not only a tool, but also an essential part of our lives. Language is the basis of the work and the life of the peacekeeping police. It should attach importance to the study of police English and put it in a higher position. At the same time, we should pay attention to methods, turn what we have learned into ability, and, finally, show our comprehensive competency. Language is not only a way to express, but it is also a precondition for making a speech. In the international official environment, what you say is as important as what you do. Expressing clearly can truly reflect the ability and quality of Chinese peacekeeping police. If we want to have the right to say something, we must first be able to express it clearly.. Therefore, police English cannot be regarded as merely a tool; it is also an embodiment of the comprehensive competency of the peacekeeping police to carry out the task, fulfill the work, embody the great powers, and strive for the right of discourse.

Continuity: The Training Mechanism is Not Coherent Enough

To measure whether a mechanism has actual operational significance or worth is to see whether it has sustainable development. Language learning is a continuous process. Peacekeeping police training lacks continuity in the training mechanism. At least, it didn't work in police English for the standing peacekeeping police, nor strengthen self-training. After receiving regular training or completing the peacekeeping mission, all the peacekeepers returned to their original units. In this period of vacuum, due to personal reasons, such as the job, life, and not being in the training center and peacekeeping missions, not in the corresponding learning environment and the language environment, peacekeeping police have less relevant

information channels. It is hard to know about the latest developments in peacekeeping and learning materials, and their police consciousness and skills in English may gradually fade out during this period or even disappear completely (Wang Honghai, 2011). When reassembling for the UN selection test, training will be redone, resulting in wasted manpower, material resources, and time.

Strategy: Lack of International Vision

The Chinese peacekeeping police have always simplified English. They think that police English is just a subject of simple language with related vocabulary that adds professional police skills. They think that should make one invincible. However, language learning must be learned from the culture and should have a corresponding international vision. The peacekeeping police should know the world situation and know the local society needs; then they can learn and use the language much better. The peacekeeping police should take their advantage of language to study more foreign literature and research materials, which can grasp the frontier policy and theory. At the same time, when considering the problems and dealing with their work, the peacekeeping police should acquire an international vision and perspective to reflect the power of a big country.

The Countermeasure to the UN Peacekeeping Police English Training Reform

Equal Attention to Examination and Application

Examination. The United Nations selection test is the foundation and the key. Passing the exam is necessary to carry out a task in the UN peacekeeping mission area. Learning a language requires a lot of hard work and patience. People have to spend a lot of energy to remember and a lot of accumulation to make a qualitative leap.

Application. The use of police English and skills to complete peacekeeping missions is the goal, the guarantee, and the body armor. It is, also, a sufficient condition for the work in the UN peacekeeping mission. Language is the surface, ability is the core, and quality is the foundation. Learning a language means to communicate more with others. In ordinary work and life, we can find opportunities to practice and combine learning with the real context to test and improve learning in use.

The training of peacekeeping police English should combine the examination with the application. We try our best to support all the candidates to pass the United Nations selection test, to attain a prominent role that police English plays in the peacekeeping mission area, and to complete tasks successfully and smoothly. For quality, we try to develop highly qualified peacekeeping police, not only good in speaking police English, but also being skillful and of political quality. They have good psychological qualities and good interpersonal relationships. The Chinese peacekeeping police have the ability to fulfill tasks or be competent in important positions, to ask recognition for a larger sense of national interests and increased power for China.

Equal Attention to Theory and Practice

Theory refers to the training module of the United Nations, improving the consciousness and professional knowledge of the peacekeeping police, cultivating the quality and the embodiment of professionalism. Only when we know the rules can we win the game. We need not only to understand, but also to express. We should strive for the national interest and the interests of the police force, strive for the right of discourse, protect our rights and interests, properly avoid risks and mistakes, and carry out the important basis of law enforcement according to law.

Practice refers to the actual application and practice of peacekeeping police English. Policing skills need to be practiced, and so does policing English. We need to do this so as to not only understand, but also to hear and speak clearly. In the mission area, the peacekeepers need not only to communicate with international peacekeepers, but also to train and guide local police officers, which requires the police English training to not only pay attention to the writing, but also to pay more attention to practical application.

The training of peacekeeping police English should combine theory with actual practice and use it to play the real role of police English. The training of police English cannot meet the needs of the task completely in the content of the course because the actual situation of the mission area is partially disjointed, and there are some defects in the training. Combining the training content and the reality of mission areas and strengthening basic skills training will greatly shorten the adjustment in mission areas, which can enhance the competitiveness of Chinese peacekeeping police.

Equal Attention to Content and Form

Content. Besides the language part of the United Nations selection test, the peacekeeping police English training has different content according to the category of peacekeeping police (individual peacekeeping police and peacekeeping police units) and the different positions in the contingent. Special knowledge includes launching interoperability, training, leadership development, understanding of national strategic goals and interests clearly, the custom of the host country or the local language and basic idioms, negotiation and communication skills, relationship with the media, the rules of engagement, community policing, and other UN documents and regulations and related content.

Form. The training method of peacekeeping police English is varied, which is also the biggest characteristic and an advantage of peacekeeping police English. The training form includes lectures, group discussions about former peacekeeping missions and experiences, individual presentation, group tasks, police exchanges, drills, role playing, simulation on duty, “one day in mission” and so on.

In the English training of peacekeeping police, the main purpose is to learn and practice. So, simulation is the essential part, which can improve peacekeeping police abilities to deal with some emergencies, such as on-site accidents and emergencies. The combination of theory and practice, combining the actual situation of the mission area into the ordinary training, is the fundamental way to improve the quality of the police. In the game or tasks as method, from graphics to understanding, thinking more than by rote memorization, the right choice is greater than brute force, to cultivate students to not only master police English, but be able to think in English so that the English thinking mode is established.

Equal Attention to Short-Term and Continuous Training

Short-term training: Pre-deployment focused training. The main training measures for peacekeeping police, including the individual peacekeeping police and the peacekeeping formed police unit, is concentrated training before deployment, which typically lasts for a few months of short-term training. The main task is to pass the United Nations selection test, followed by the actual work of the commission to overcome the lack of what to learn and what to do. The advantage produces obvious results in a short time, and will produce the satisfactory results (passing the UN selection test and the smooth deployment).

Continuous training. This includes pre-training, re-training, post-mission-training, workshops on a regular basis, the international seminar, and master’s degree education. The continuous training cultivates

professional talents who can be trainers engaged in scientific research or be the mission area that takes office, etc.

Peacekeeping training, especially peacekeeping police English training, should not be a one-time task; passing the United Nations selection test and successfully deploying is not the end of the training, but merely one small part (Qi, L., 2007). The training of peacekeeping police English should be the long term goal, and it should establish a long-term sustainable development training mode. It is not only the training of the peacekeepers before the selection, but also the pre-training after the domestic selection, which means the training of basic English and police knowledge. During the period of passing the United Nations selection test and waiting for deployment (from passing the examination to deployment needs a process, different time, the maximum possible number of years), we should actively organize personnel for re-training to maintain and restore language skills and learning. When the peacekeepers return to their homeland after completing their task in mission, we should organize them to summarize the police English experience, including the problems of training and the challenges they faced, and to discuss the experience.

Conclusion

The Chinese peacekeeping police not only work conscientiously, but also contribute a lot to world peace with the advantage of their police English. They learn by personal experience and draw lessons from the advanced international concepts of police and the United Nations police training mode so as to widen their vision and improve their own quality and abilities. After years of exploration and practice on peacekeeping police English training, a considerable amount of experience has been accumulated, and problems have also been found. The experts, scholars, and experienced peacekeeping police officers can summarize historical experience and lessons. With the practice of peacekeeping work, they try to improve the peacekeeping police English training methods and the comprehensive quality of peacekeeping police. The training will support them by enabling them to better adapt to the needs of the United Nations, completing the mission, and improving China's voice in the UN peacekeeping work policy.

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Research on the Legislation of Chinese Network Information Supervision

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[Abstract] From public sources of information, the author found that the Chinese government is building some “firewalls” in order to realize the supervision of the network information. To supervise the massive and complex network information, the most common method is to legislate to regulate the network information service and take the specific means of administrative management. Organic combination of the two constitutes China's current approach to network information government regulation. So, government regulation of network information should be implemented in a certain way.

[Keywords] internet information; legislation; supervision

Introduction

At present, China's network information security faces severe challenges. In the field of network information safety, China lags far behind developed countries (Li, 2016). From the perspective of legislation, organization, and system operation, this paper compares the advanced experience of foreign information network security supervision and probes into the status quo and development of the rule of law construction of the Chinese government information network (Zheng, & Liu, 2016). Network information supervision is a worldwide problem, and the path to legalization is the inevitable choice of China's network information supervision. Foreign good practice is the sample that we learn from, and the most important thing is that we should stick to the actual situation, take into account the social situation and the public opinion and find the path that is suitable for our own online information supervision legislation (Zhang, 2016). The general secretary attaches great importance to the work of public opinion. It will require a lot of effort from legislation, law enforcement, oversight, and so on, to coordinate a steady advance, and we need governments, corporations, and people to work together (Wang, & Chen, 2015). Based on the analysis of the basic theory of government supervision in the network public domain, the principle of network supervision is put forward -- the principle of moderation, the principle of neutrality, the principle of transparency, and the principle of elasticity (Wang, & Peng, 2015).

On August 19, 2013, in a keynote speech at the National Conference on Ideological Work, Xi stressed that “the Internet is a top priority” (*China Daily*, 2013). On August 18, 2014, at the 4th meeting of the central committee for comprehensively deepening reform, Xi Jinping made an important speech on the integration of traditional media and emerging media (retrieved from web site, February 20, 2016). Besides that, when Xi Jinping was conducting a visit to the People's Liberation Army newspaper (retrieved from web site, February 22, 2016), in the opening ceremony of the Second World Assembly on the Internet (*People's Daily*, 2015), during the Central Leading Group for Network Security and Information Conference (retrieved from web site, September 7, 2016), and other occasions, Xi stressed the news and public opinion related topics in his speech. On February 19, 2016, Xi Jinping, on-the-spot investigation and study of the *People's Daily*, Xinhua News Agency, and CCTV, three central news media, put forward the press job mission in 48 words, pointed out the direction of work for the news media, and provided the fundamental principles (retrieved from web site, February 25, 2016).

The Necessity of Network Information Supervision

The development of a market economy tells people that the market has dual attributes: one is the market is the means of resource allocation; its unique advantage lies in the resource allocation and in the high efficiency of economic operation. The unique functions of the market are embodied in the following: (1) the market can effectively allocate economic resources; (2) the market can effectively motivate production operators; (3) the market can effectively adjust the total supply and demand and promote the equilibrium of the market; (4) the market has an evaluation function. Therefore, the market is irreplaceable and the country cannot replace it. The second is market failure. Markets can efficiently allocate resources based on strict conditions on the assumption of its being a completely competitive market; there are many producers and consumers of the market, the products of the enterprise is homogeneous, there is no difference, all the resources have full liquidity, and the market information is complete. However, in the real economy practice, it is difficult to fully compete with all the preconditions of a perfect competition market. Therefore, it is difficult to show the perfect competition market in real economy practice. This imperfect competition may directly lead to misallocation of resources, namely “market failure”; when the market fails, there is a reason for regulation and intervention in the market.

Deficiency of Legislation of the Existing Network Information Supervision

Administrative Legislation

China’s current system of network information supervision and regulation is still in the process of development and perfection. There is no systematic, complete, and independent legal text for the legal standard of the application stage of network information supervision, and the daily work of law enforcement depends on many laws and regulations, as follows: “The People’s Republic of China telecommunications regulations,” “Measures for the administration of Internet information service,” “Information network transmission right protection ordinance,” “Measures for the administration of Internet information service”, and “Interim provisions on Internet management of computer information network of the People’s Republic of China”, etc. These laws and regulations are more or less inclusive of the provisions of the normative constraint network information application. They are basically administrative legislation. The existence of network information administrative legislation is justified, and we have already begun the practice of network information administrative legislation. However, the existing problems in the administrative legislation of network information are the lack of administrative legislation. The legislative body is diverse, and the legislative level is not high. There is a lack of provision for the relief of the illegal regulation of the government.

Administrative Licensing

The administrative licensing system is the product of the development of a commodity economy. The product economy must be connected by an executive order; only in the market economy condition, in order to control and regulate the competition, is the licensing system needed. The legitimacy of the administrative licensing system is “market failure”. A market economy is essentially a free economy, and licensing is a restriction on the nature of its behavior. For any activity that is subject to approval or approval by an administrative organ, it is prohibited to do so without prior approval.

Supervision and Inspection

Supervision and inspection are based on an administrative authority of administrative subject in order to ensure the corresponding laws, regulations, rules, and relevant administrative commands, such as administrative punishment decisions, are observed and executed in accordance with the law of citizens, legal persons, or other organizations to obey the law and statutory obligations of inspection, understanding, and supervision of an external specific administrative act.

Countermeasures for the Construction of Network Information Supervision

A Change in Supervision Philosophy

The emergence of the Internet not only provides a more advanced communication and communication tool, but also for the difference between the Internet and traditional media. Compared with the traditional media, the fundamental advantage of the Internet is that it provides the possibility for the emergence of an ideal communication situation in the public domain, which creates the premise for the construction of the ideal public domain (Li, 2016). However, the construction and cultivation of the public domain are related to the promotion of social cohesion, which is related to the political operation mechanism of the country, and the perfection of a democratic system. If we are able to think at such an angle and think highly of the regulatory problems in the public domain of the Internet, our network information supervision situation will be different.

Blocking to Channel

At present, relevant departments still see the Internet as a medium of transmission, still follow traditional media regulation, emphasize management and control, and adopt the “wall” to avoid network bad behavior. If the Internet is viewed as a platform for public opinion and public discussion to form public opinion, then existing regulation is out of place. For the network that is scattered, mixed, and disorderly, a biased point of view, and even “blocking”, can make them temporarily moved by the opinions of the public communication platform to those opinions hidden inside, to really make different opinions by compromise and consensus, they must be “channel” (Zhang, 2016). This requires the government to change from regulation thinking, reverse regulation thinking of strict control and strict management, to the Internet as a powerful tool to promote social progress in the process of fostering and promoting its development, for the existing problems and deviations to be corrected, and with guidance.

Positive Government Guidance

Internet development in China is still in the initial stages, which needs the government to actively support and guide the stage carefully because a lot of problems exist alone to strictly control the network. It may cause the deformation of Internet development even to nipping the development of the Internet in the bud. Therefore, an effective market supervision orientation should be a strengthened market operation mechanism. The key to perfecting the market regulation by ideas from the past "command and control" regulation transformation to the "market incentives" regulation is for the government to just be the referee of rules, rather than a market participant or market leaders (Wang, & Chen, 2015). Government administrative regulation should be limited to the protection of rights, pay attention to regulating the direction of the power of the government, make network can free to play their own advantage, by rational public opinion can be formed an ideal platform.

Respect for Spontaneous “Customary Law” in Cyberspace

Outside the enacted law, cyberspace in the years of development has spontaneously formed a relatively independent standards and norms, such as communication autonomy, transfer rules, posting rules, the network language, etc. Therefore, we should also fully consider and respect the tradition of network "self-government" when exploring government regulation in the Internet public domain. The legislator should fully recognize the existing “customary law” to discard the dregs, extract the essence, and extract the beneficial parts to guide and utilize as an auxiliary means of government supervision. Because virtual behavior in the network society is formed in the practice of Internet users in the long-term network, it has a certain representation and typicality, which, if ignored or denied, is likely to be rejected by netizens, the effect of other regulatory means. On the contrary, if we can make reasonable use of it, we can not only cater to the psychology of netizens, but also reduce the regulatory resistance and achieve better regulation effect.

Improvement of the Legal System and the Internet Supervision

The network information regulatory environment is based on the voice of freedom and equality, and the government should focus on the governance of network information supervision. However, for some extreme statements and anti-social messages, the government should make special laws to restrain it. At present, there are large gaps in Internet legislation in China, and some laws have not been able to adapt to the needs of online social development. Does “handclap” action constitute infringement? Who should bear the responsibility of the negative impact of "human flesh search" to the parties? Illegal and criminal behavior and the infringement on the network emerge endlessly in addition to the personal and property safety of any immediate harm of others in the network by violence or fraud, with the spread of bad information, fabrication of false news, such as behavior, our country law does not have clear legal constraints. The government should set up special regulations to regulate the behavior of the Internet. Law enforcement departments should also step up their efforts to crack down on cybercrimes and conduct direct control of online information supervision. Meanwhile, the publicity of the law should be intensified to prevent negative public opinion from the source.

Improvement of the Legal Control and the Regulation, and Policy Construction

In the new era, in the face of the new media environment, in order to guide and supervise network information more effectively and promote the orderly and harmonious development of social health, the government, as the management department of the press propaganda, has the social control function to exercise the macro-control of public opinion (Wang, & Peng, 2015). We must constantly improve the policies and regulations, management system, and implementation means of news communication and network information guidance so as to provide institutional and rule guarantee for the construction of new patterns of network information supervision.

The government should establish and improve the supervision and guidance of network information laws and regulations. It is necessary to introduce and establish the law of the press and copyright law and other relevant legal systems as soon as possible. At the same time, it is necessary to improve the “information disclosure system”, “social supervision regulations”, and other relevant regulations, which are closely related to network information supervision. Also, the government should by making laws, regulations, and policies related to the method ensure the media practitioners and the public’s normal exercise of the rights of network information regulation. It should make known to the public the network

information supervision and guidance, the purpose, scope, and principles, and undertake the obligations and responsibilities.

In response to the rapid development of new media, many relevant laws and regulations are not sound, so it is necessary to establish and improve relevant policies and regulations. In view of the network information flood, false, vulgar, public opinion is extreme; with Internet pornography and other problems, the government must carry out effective control and management, establish the network news law (“the network information dissemination regulations”) and other relevant laws and regulations, and the government should perfect the “network news checks”, “network public opinion monitoring”, and other related management system actions. By the relevant laws and regulations, it should improve the quality of the network information and standardize the order of network to build a harmonious and orderly network environment; the government should affect public opinion supervision and regulation of network information to provide a good network environment.

Conclusion

It is necessary to solve the problem of existing new media network the country, the government, media, and even of the common efforts of every audience. The new media can create healthy development and construct a harmonious society. Based on the current situation and the existing problems of the network media management, network new media management should respect the law of development, draw lessons from foreign successful experience in network management, actively explore the modes and mechanisms of the network of social management in our country, engineer the network of the new media to run at a faster speed, improve the development trend, and make greater contributions to society.

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Minorities and Pluralism in the Political Representative Bodies: Aspects of Comparative Public Law

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[Abstract] The paper is aimed at showing the normative means that are devoted to promote or guarantee the representation of linguistic and ethnic minorities in political organs. The focus is based on the idea that linguistic, racial, and ethnic pluralism doesn't lead to a negative freedom but rather to a positive obligation of the state, which consists in safeguarding, keeping, and promoting the linguistic difference to guarantee the pacific coexistence of minorities in modern states.

[Keywords] protection of minorities; political representation; principle of equality

Introduction

The purpose of this paper is to document some mechanisms that can promote or guarantee the representation of groups identified on the basis of race, language, religion, and ethnic origin within elected assemblies. The perspective taken here outlines a framework in which pluralism does not make up a negative freedom, but rather an obligation of the state to safeguard, to maintain, and to promote cultural differences. Indeed, there is no lack, especially in the most recent Constitutions, of provisions that consider identity pluralism a wealth to be safeguarded and to protect the right to cultural identity. The second perspective taken here outlines a framework in which pluralism does not make up a negative freedom, but rather an obligation of the state to safeguard, to maintain, and to promote cultural differences. It is doubtless that constitutional provisions and subsequent the implementation of legislation carry out a selective operation in determining the claims that can legitimately become a qualified guarantee. From examining comparative law, two elective criteria seem to emerge: acknowledgement of the *status* of founding peoples and the historical settlement of ethnic communities in the country. This approach also contributes to setting out the differences of quality as regards the cultural claims because not all those present within a given territory can be automatically protected. Indeed, not every cultural difference can hold the same legal position, but each jurisdiction must be acknowledged as having a selective right. In other words, the constitutional principle of protecting pluralism is not applicable in an undifferentiated manner, as the right to differentiate the position of the various social groups comes within the competence of each legal system.

Apart from determining the subjects, the discretion of public powers also includes the manner of giving value to minorities' claims. Once again, in this case, comparative law may be of help, and we have a range of options about the instruments that would foster the protection of identity claims. As already mentioned, in this paper we will deal with the possibility of integrating the central state authorities with its own representatives, which is also an option put forward by the framework convention on minorities, as it envisages the possibility of giving the minorities the opportunity of participating in public affairs (art. 15). This degree of protection assumes a qualified political choice, which is set out in the constitutional text, insofar as the connected measures introduce laws derogating the general ones (Pizzorusso, 1966, p. 40), which can be legitimized only with the approval of the highest sources in the legal system.

The article will analyze the main techniques used in constitutional law to promote the representation of these groups, concluding with a series of critical considerations that underline how the theme of the rights of culturally (in the broad sense) identified groups dispose of a subversive potential for the founding principles of constitutionalism.

Guaranteed and Protected Representation

Obviously, the choice of the legal systems envisaging mechanisms of participation in the supreme powers of the state has two sides: on the one hand, the option is established by the express will to acknowledge the pluralism existing in their own society and is considered as a *quid pluris* to be enhanced; on the other, it manifests a logic of inclusion rather than separation of the groups. This acknowledgement is based on the principle according to which the members of the identity groups must participate in defining the general will of the state through their incorporation in the bodies that exercise legislative power (Casonato, 1998, p. 3).

The objective of integration within the legislative bodies may be achieved through three solutions: a) reserving seats; b) mechanisms aimed at indirectly favoring the election of the culturally identified representatives; c) strengthening the weight of the representatives of the minorities in the procedure of passing the laws.

Reserved Seats

The first solution is, apparently, the most rigid one and puts the principle of equal voting under significant strain; however, it has found a certain number of applications in comparative law. Since 1867, New Zealand has legitimized the *ex officio* presence of representatives of the Maori population; with the reform of 1993, the number of seats varies according to the numerical consistency of the native community. A similar solution has been adopted in Colombia, where Article 171 of the Constitution envisages the election of two senators belonging to the native communities, by establishing a special indigenous constituency in which eligible candidates must have served in traditional offices within the society or have been in charge of organizations protecting the native peoples' rights. Furthermore, Article 176 provides for the House of Representatives to create a special constituency for the representatives of the native populations and of political minorities.

However, turning to the idea of instruments of special guarantee for some identified minorities, we can include Article 64, paragraph 3 of the Slovenian Constitution, which requires the presence of representatives of the Italian and Hungarian communities in the local assemblies and in the national one and, notably, Article 80, paragraph 3, specifies that the Italian and Hungarian communities are entitled to a member each. Implementing the constitutional provisions, Article 23, last paragraph of the National Assembly Elections Act (Law September 10, 1992, amended on September 20, 1996) stipulates the assignment of a special constituency for each of the communities. Furthermore, citizens registered as belonging to minority communities are given two votes: one for choosing the party and the other for electing the ethnic-linguistically determined candidate. The technique of the dual vote was also the subject of a judgement by the Slovenian Constitutional Court, which, in its sentence U-I-283/94, dated February 12, 1998, ruled the constitutional conformity of the favorable legislative provisions, inasmuch as it was made in execution of bilateral international treaties.

However, uncertainty remains over this way of implementing the principle of protecting minorities. This is due to the fact that there seems to be conflict with the equal voting rights and at least two elements bear witness to this.

The first concerns Slovenia itself, which was criticised by the OSCE High Commissioner on national minorities, who reiterated in his report that bilateral treaties are not suitable to “undercut the fundamental principles laid down in multilateral instruments. In addition, States should be careful not to create such privileges for particular groups which could have disintegrative effects in the States where they live” (“Statement on Sovereignty, Responsibility and National Minorities”, 26 October 2001, <http://www.osce.org/hcnm/53936>).

The second element, on the other hand, comes from another legal system, the Croatian one, in which the dual vote was brought to the attention of the Constitutional Court (Sentence July 29, 2011, U-I-3597/2010, U-I3847/2010 U-I692/2011, U-I898/2011, U-I 994/2011). The dispute arises from Article 19 of the organic law on the rights of national minorities, which envisaged the attribution of at least three parliamentary seats for groups with a consistency exceeding 1.5%, whereas for the minority communities numerically lower than this threshold, the seats would have been five, assigned through special constituencies and on the basis of a dual vote. In this way, the electors, who had declared they belonged to recognized minorities but were few in number, could have had two votes: one expressed nationally and the other for the constituency reserved to the minorities, after registration. The provision, according to the claimant Serbian organisations (representing the only minority in Croatia exceeding the threshold of 1.5%) represented an unreasonable discrimination. The body of constitutional review, in dismissing the provisions relating to the additional vote, highlighted two levels of the problem. The first regarded the question of the binding mandate, whereas the second concerned infringing upon the principle of equal votes.

In relation to the first *topos*, the judges hold that duplicating the vote also supposes two functions of the elected people: those selected by means of the ordinary procedure would represent the nation and are, thus, without constraint of a mandate, whereas, those elected by means of the additional vote and elected by a clearly identifiable group would be bound to the imperative mandate. However, this reconstruction, in the opinion delivered by the Constitutional Court, was inconsistent with Article 74 of the Constitution of Croatia, which generally establishes that the imperative mandate is forbidden, and any introduction would only be legitimate if there is an amending procedure of the constitutional charter and not through the organic law on electoral procedures.

However, the motivations presented to declare the inconsistency of the dual vote are more appropriate to our reasoning. This would come about first for violating the ruling of equal voting rights in the Constitution, but especially international acts. The latter are mentioned both as regards to Article 4 of the framework convention for the protection of national minorities of the Council of Europe, which obliges the public powers to treat citizens equally and not to discriminate, but, above all, for the references to the principles expressed by the Venice Commission, whose advisory opinions cannot, however, be assimilated to the sources of law and, thus, be binding.

An example of seat reservation is also envisaged in Italy, although it is limited to a single Region. The reference is to the subject of the representation of the Ladin community in South Tyrol, which has offered the opportunity for some rulings of the Italian Constitutional Court. Indeed, Article 62 of the Statute of Trentino-Alto Adige envisages that a representative of the Ladin linguistic community should take a seat in the South Tyrol Provincial Council. If the ordinary division between votes and seats has not elected a member of the linguistic minority, he/she will be chosen from those who have obtained the highest individual figure, replacing the last elected person belonging to the same list. This provision, thus, exploits the ethnic-linguistic cleavage to the detriment of the political orientation of the individual elector

and, furthermore, conflicts with the rule for which the candidate with the highest number of votes is elected.

Promotion Instruments for Plural Representation

There is also another way aimed at promoting the presence of elected members coming from minority groups, and it regards legislative interventions that can favor a representation of a certain kind by operating on electoral legislation, avoiding the excessive rigidity of attributing the seats *ex officio*. As suggested in the reports of the Venice Commission, a desired solution concerns the configuration of the constituencies in such a way as to promote a representation of the groups (*gerrymandering*).

Also, an international treaty provides the legitimizing source: Act on the Autonomy of the Åland Islands, August 16, 1991, for assigning a seat to a representative of the Åland Islands (a linguistically Swedish territory) in the Finnish parliament by foreseeing a single Swedish language electoral district provided for by the law on the independence of the islands.

To a certain extent, even Article 48, paragraph 3, of the Statute of Trentino-Alto Adige constitutes a manifestation of affirmative gerrymandering by imposing that a seat in the Council of the Province of Trento is assigned the territory coinciding with that of the towns where the Ladin-Dolomitic linguistic group of Fassa is present.

In Denmark, the law of May 13, 1987, amended on April 10, 1991, indicates a sharing of two seats for the inhabitants of the Norwegian culture of the Faroe Islands and of Greenland, attributing a higher specific weight to these electors than for the continental ones.

In the proportional systems, on the other hand, the affirmative electoral actions are concentrated on the electoral thresholds that are very often present to reduce the excessive proliferation of the parties, but which have particularly penalizing effects for those political groupings, which represent minority groups.

One provision that excludes the parties representing national minorities from exceeding the electoral threshold of 5% (and of the alternative clause that envisages obtaining seats in the single member constituencies) is envisaged by Article 6 of the German Federal electoral law of July 23, 1993, (and subsequent modifications) for the elections of the *Bundestag*. A solution of compromise that maintains the principal of representing the minorities but does not change the weighting of votes is provided by Article 62 of the Constitution of Romania, which indicates that the national minorities recognized by the law must have at least one seat in the House. If the electoral outcomes have not produced this result, the electoral law attributes the seat to the candidate of the political formation reaching a national level of at least 10% of the votes that are normally necessary for a candidate to be elected (Protsyk, 2010).

Guarantees in the Voting Procedures

We cannot hide the fact that the legislative bodies structure their decision-making activity through the principle of majority and, thus, *in re ipsa*, the minorities (or the cultural diversities) are always in a position of subordination. The symbolic function still remains satisfied but forms a concrete and pragmatic viewpoint; there is a true risk that their action may be of a modest entity, if not even in vain (Lijpart, 2004). An element that may make this conclusion less forceful may be subsumed in all those cases in which the approval procedure of the laws is not subjected to the rigid guillotine of accounting numbers but refers to a logical group criterion rather than an individual one. Therefore, the deliberative body is broken down into “subdivisions” joined by a common shared cultural heritage based on language, race, religion, and traditions, rather than into individuals, which grant the precedence and prevalence to a commonality of ethical-political values, resulting from a continuous and constantly re-modulated

compromise, which is capable of creating a single political community. It almost appears that the emersion of the minority claims can contribute to reviving a class-based, corporative dimension that seems to have been dispersed by the disruptive charge of the French revolution with its call for voting “by head”.

For instance, there is a true right of veto to the representatives of the Italian and Hungarian communities in Slovenia because the last paragraph of Article 64 of the Constitution expressly sets out that no law or regulation concerning the *status* of these minorities can be approved without the consent of their representatives, thus attributing a specific significant weight to these elected people.

The qualified involvement of the representatives of the minorities is also established by the Macedonian constitution, which, at Article 49 (reformed by the X amendment), imposes the positive vote of the representatives of the minorities if a bill regarding their condition is under approval. However, a veto can be overruled if there are disputes on using the procedure. The same device was borrowed by the Kosovo Constitution (Article 81), which, for special laws, requires the consent of the representatives who have obtained ad hoc seats (Bieber & Keil, 2009). Belgium, which is made up of linguistic communities founding the system (French, Dutch, bilingual in the capital Brussels, and German), affords particular protection in Article 4 of its Fundamental Charter. Indeed, it makes the approval of legislative deliberations on sensitive topics for the linguistic groups dependant on achieving a majority inside each linguistic group in each House if the majority of representatives of each one is present. To this effect, we can also mention Articles 56 and 84 of the Statute of the Region Trentino-Alto Adige. The former has a general scope and envisages that, in the event of bills that affect the equal rights of citizens belonging to different linguistic groups or the ethnic and cultural characteristics of the groups, it can be requested that the vote be made by linguistic group. If the request for separate vote is not approved or the bill is approved in spite of 2/3 of the members of the linguistic group voting against it, action can be brought against the law before the Constitutional Court. Article 84, on the other hand, restricts the implementation of voting by linguistic group to the budget law, but excludes action before the constitutional justice body.

A “special” type of participation in the legislative procedure is pursued in Article 35 of the Canadian *Constitution Act*, that, as regards the procedure of constitutional amendments, obliges calling a conference composed of the representatives of the *First Nations*, if the object of the proposal concerns provisions regarding the aboriginal population (Article 25 of the Charter of rights and freedoms, Article 91.24 of the *British North America Act*, Article 35 of the *Constitution Act*). When enacting the amendment process, the government has the duty to consult the Aboriginal Peoples but has no duty to accommodate them; it would, therefore, be possible to enact an amending process without the consent of the First Nations. One thing for sure is that while this hypothesis is possible from a literal viewpoint, it is politically very slippery, considering the fact that the Supreme Court, in its Reference to the secession of Quebec (1998 2 S.C.R. 217), actually held that the supreme principles of the Constitutional system should include protecting the minorities, whose respect would be difficult to configure in the presence of a precise and compact rejection of the indigenous people of the proposed bill.

Implications and Conclusion

The attempt to map out the representation mechanisms of identity pluralism present in the distinct legal systems gives us an array from which we can make some general considerations. First of all, it is self-evident how the issue has prominently permeated from the international and supranational system, from which the internal legal systems obtain significant inspiration. The internal legal systems have stopped

being impervious to heteronymous influences and have accepted that the body of laws applicable on their own territory may be the result of a process of osmosis between domestic and international legal systems (Toniatti, 2010)

Second, it must not be forgotten how the so-called affirmative actions applied to the elective procedures, which are sometimes expressly legitimized by the constitutional texts, affect the principle of the equal vote in the sense of the weighting of the vote, which inevitably acquires a *quid pluris* when these measures are applied. Basically, some groups may find themselves with benefits or disadvantages with respect to their numerical consistency, infringing upon the one-person-one-vote principle and reducing the links with the liberal political representation. Indeed, the democratic legitimacy of power must include the provision of electoral mechanisms that attribute to each elector an equal share of influence in assigning the seats and regulatory intervention should never be so incisive as to pre-establish the result or coerce the voter's freedom.

Furthermore, remaining in the wake of critical remarks in the field of representation, moving the focus of attention from the single elector to the group they belong to would affect Edmund Burke's theory, imagining the representative as a subject at the service of general good and not of fractions of the social body who had elected him. The criterion of the indivisibility and the uniqueness of the people grant space to fractions, parties, categories, and corporations in which each elector is ideally identified. Ethnic separatism (to use a synthetic expression) has the advantage of shedding light on the diversities making up a certain legislation. However, it runs the risk of failing to comply with its very reason to exist, that is to favor the peaceful coexistence of the various components while exaggerating the conflictive logics fed by barriers erected *iure sanguinis*, which cannot be overcome even by express will. This is, therefore, also a delicate element worthy of further study and that is, in some way, deflated following at least three rulings of the Court of Strasbourg: *Sejdić and Finci v. Bosnia-Herzegovina* (Grand Chamber, *Case of Sejdić et Finci v. Bosnia and Herzegovina*, Applications no. 27996/06, 22nd December 2009), *Zornić v. Bosnia-Herzegovina* (July 15, 2014) and *Pilav v. Bosnia-Herzegovina* (Appl. No. 41939/07). The disputes concern the legal provisions of the electoral law no. 21 of 2001 of the country that, in compliance with the constitutional laws which determine three founding peoples (Bosnians, Croats, and Serbs), establish a criterion combining ethnic origin and residence in order to exercise the right to active and passive voting. Each elector disposes of active and passive electorate only prior to registration in the electoral rolls reserved to their own ethnic origin and may exercise their right only if they reside in the territorial area where their reference group is the majority. It is obvious that this system excludes the possibility of voting for both those who do not identify themselves in any of the recognised communities and those who live in an entity in which the ethnic group to which they belong is not the majority.

In conclusion, the grievances and the *caveats* surrounding the matter related to the representation of the identity groups in elective bodies have been thoroughly presented and are mostly acceptable; however, leaving the theoretical and critical level and considering the more empirical and pragmatic one, some elements cannot be ignored. The first concerns their system efficacy and that is the capacity of these mechanisms to maintain a peaceful coexistence in societies that have not only been deeply divided but lacerated by bloody conflicts in the recent or not-so-recent past and which have endangered the territorial and political unity of the state. Even where the public order does not seem to have been compromised, the emersion on a representative level of identified groups seems to be the essential condition thanks to which the legal systems remain balanced and this could be the case of Belgium; without forgetting that divided,

democratically solid societies have recalled the necessity for recognizing their “speciality,” unless there is a desire to loosen the unitary constraints, like the case of Quebec in Canada (Norris, 2008, p. 6).

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Question of Dominance: The Portuguese Language in Two Contexts, while Dominant and Non-Dominant Language

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[Abstract] In two different, but similar, contexts of migration and of language contact, the Portuguese language finds its position as dominant or non-dominant. This paper aims to explore the perceptions of local speakers within the two studied contexts and about their language and individuals' process of integration into the new society. Education is a one of the main tools to assess migrants' integration, but it is also important while promoting a Heritage language in a new context of communication.

[Keywords] Portuguese language; power; minority languages; education; integration

Introduction

Education is one of the main tools of governing entities such as a state, a region or even a municipality in order to deal with the migration process and the integration of new citizens and their descendants. Questions of power are important between languages that find their position in a ranking where each language gains new positions of power and prestige.

In the two cases under study here, it will be possible to observe the position of the Portuguese language within two different systems – one which has a dominant position in Portugal and the second one, which has a non-dominant position within the Portuguese community in Montreal, Quebec.

In the first case, a Portuguese is the main reference for the Cape Verdean Creole speakers still suffering past colonial dominion and classified as a sublanguage, depending on the European Portuguese (EP) norm. In the second case, Portuguese is as an amalgam of different varieties, finding in EP (continental) its “norm of prestige” and fighting for power in a complex context in which two languages are dominant: French and English.

Language and Power in a Context of Migration

Portugal and New Processes of Integration

There are currently about 4% of foreigners among the total population in Portugal (Oliveira, 2016); about 46% of them are from African countries where Portuguese is the official language (PALOP), and whereas those of Cape Verdean background represent a major group.

This community has been studied since the 1980s in terms of difficulties related to education and insertion, alongside with the arousal of studies in descendants of immigrants in other European countries. However, the main previous databases with variables allowing identification of pupils with immigrant backgrounds come from 1990's data (*Entre Culturas* Secretariat's database, Portuguese Ministry of Education); however, policy concerns with these students' language issues date considerably later with the discipline: Portuguese, as a Non-Mother Tongue Report (PLNM), was introduced at school in elementary to upper secondary education (2006, 2007). The Portuguese Ministry of Education financed and directed many studies on a national schedule in order to plan this discipline's implementation and, later, to evaluate its first impacts (DEB, 2003; Dionízio, et al., 2005; DGIDC, 2009; Madeira, et al., 2014), along with a

sensitivity to urban areas where problems of education and insertion were more significant, such as in the Lisbon Metropolitan Area (AML) (Mateus, et al., 2008); the latter was accomplished with public and private funding.

These studies sum up a complex situation in Portugal in which 70-80 different nationalities or immigrant backgrounds can be identified at school (Mateus, et al., 2008). Questions of language learning are of major interest, considering the social insertion of these students within the new society. All of these studies agree on the fact that Cape Verdean Creole presence in Portuguese schools is ahead of other languages (estimating about 3000 speakers and compared to less than 2000 thousand speakers for those of Guinea Bissau Creole, and less 300 speakers for speakers of any of the other languages (Mateus, et al., 2008) that are considered a major language spoken by pupils (beside Portuguese).

Montreal, a Round-About between Quebec and Canada

In Quebec, more precisely in Montreal, the situation is different. The complexity of this context relates to the presence of two dominant languages; French and English have, for ages, played a major role in terms of integration for new migrants. Anglophone schools were preferred before the 1970s by immigrants in Montreal. In fact, starting with Bill 101 (1977), it was declared that all new migrants within the Francophone province of Quebec had to be integrated into the Francophone school system and should learn French. This was a main action of *Parti Québécois* government of René Lévesque (premier 1976-1985).

The Portuguese community in Montreal dates from the early 1950s, and had to deal with all processes of linguistic integration and having two main groups among those with a Portuguese immigrant background, one more integrated into the Anglophone system (arrived before the implementation of Bill 101) and one in the Francophone system (before Bill 101).

However, since the Multilingualism Act (1988), the government of Pierre Elliot Trudeau focused its action not only on bilingual Canada, but also for a more open society in which allophones' languages (mainly spoken by immigrants) could be taught. Many communitarian schools were then created within the urban area of Montreal (Scetti, 2015). Those schools were integrated in the 1990s into the *Conseil des Écoles de Langues et Cultures d'Origine* (C.E.L.C.O.). MSC's activity is integrated into the educational system of the Province of Quebec. Students accumulate credits that will be important for their future (Scetti, 2016c).

Missão Santa Cruz (MSC), located in the center of the Portuguese district of the city, is an example of a communitarian school. Portuguese is the main language spoken within this institution, being simultaneously a school and, also, a church and an association. Here, Portuguese and their descendants find their "corner."

Multilingual Education as a Step for Integration

Bilingual Education in the Metropolitan Area of Lisbon (Portuguese/Cape Verdean)

The first research refers to a post-doctoral research project on sociology (funded by Science and Technology Foundation, FCT), with a study named *Konta bu storia: Patterns of linguistic acculturation among descendants of African immigrants in Vale da Amoreira*, wherein the impact of institutional and family language policies on individuals' biographies and attitudes are the main focus of analysis.

The fact that students with immigrant backgrounds from Cape Verde have systematically shown weaker school achievement compared to pupils of non-immigrant origin or those of other immigrant origins; there are questions about the efficiency of linguistic and educational policies, especially when there's a seeming

proximity between European Portuguese and minority languages like Cape Verdean creole. Aiming to develop linguistic education as a tool to improve school success in socioeconomically deprived neighborhoods and focusing on children with a Cape Verdean family background, the project, “Bilingual Class,” and the subsequent project, “Multilingual School,” were implemented in two schools of the 1st and 2nd cycle of basic education (2008-2013, ILTEC), with the coordination of a linguistic expert in Creole studies and sociolinguistic studies, Dulce Pereira. These projects were financed by the Calouste Gulbenkian Foundation (FCG) and were part of a larger project of linguistic education; the latter was the main concept, too, for fighting against education failure at earlier ages and in socially deprived territories. These schools were pioneers in the Portuguese system, involving students of Portuguese and immigrant backgrounds, mainly Cape Verdean but also Guinean, Angolan, and Moroccan. The intervention was made directly with children through daily classes and indirectly with the broader school community: parents, grandparents, and school staff. These projects’ first focus was on early bilingual education in 1st to 4th grade during elementary school (“Bilingual Classes”). Because methodological approaches are different from language teaching, in addition to the teaching of (and in) Cape Verdean Creole and Portuguese, focus was given to the development of the students’ implicit and explicit linguistic conscience and positive linguistic attitudes. In the 5th and 6th grades (“the Multilingual Classes”), Cape Verdean was introduced, together with other languages, within the disciplines of Portuguese and English teaching.

The aim was for children to acquire biliteracy skills at an earlier stage of their educational experience, meaning first alphabetization in Portuguese and through immersion classes with Cape Verdean Creole writing. More important was developing linguistic awareness by allowing them to adapt to different contexts, producing autonomously their own linguistic analysis and reflection on languages and their uses: words, structures, meanings, and language functions. Thus, working (socio)linguistic attitudes and behaviors was the strategy, hoping that these children would accept the value of each language, be active agents of linguistic cooperation, enjoy of language uses, develop listening skills, and be more prone to translate.

However, this “particular” group of children with Cape Verdean immigrant background, at the same time, have been since the 1980s one of the main targets of educational policies in dealing with school failure and earlier drop-outs, but not language policies. The current discipline of PLNM, introduced only very recently nation-wide (2006, 2007), was paired with the experimental and local “bilingual classes” experience. Differently, the first was mainly for children who were Eastern European and Asian immigrants and refugees from around the world, who started arriving in Portugal between the end of the 1990s, beginning in the 2000s. Despite this fact, recent reports and studies (2009, 2014; see above) pointed that its main attendance was among students from PALOP, followed by Eastern European countries, and descendants of Portuguese immigrants who returned. In addition, problems with this discipline PLNM (DGIDC, 2009) showed that retention in PLNM are more present among students from PALOP, particularly those of Cape Verdean background. These numbers have promoted few debates on the efficiency of this discipline, while more debates have arisen with a more recent study in 2014, highlighting that still 96% of PLNM teachers were not skilled on the subject. Thus, the efficiency of schools in evaluating students’ profiles and progress in Portuguese learning processes, as well as in other subjects, was questioned.

The Trilingual System in Montreal: Education in Portuguese on Saturdays

The second research project is based on a doctoral research entitled: “The Evolution of the Portuguese Language Spoken within the “Portuguese Community” of Montreal Considering Transmission Dynamics”

(Scetti, 2016a) – an ethnographic description of the Portuguese community in Montreal. The main focus of this research is the evolution of the Portuguese language spoken today within the group. Analysis showed some elements of attrition (Scaglione, 2000) in the Portuguese structure and uses from one generation to another. Oral practices analysis was combined with epilinguistic discourse analysis (Canut, 2000) (discourses on practices).

In Montreal, the Portuguese community, also called *comunidade*, was created in the 1950s due to the treaty of immigration signed between the two countries. The district is located in Saint-Louis and represents the center of the communitarian life, even if many members have moved to other suburbs of the metropolitan area (Da Rosa & Teixeira, 2000). The *Missão Santa Cruz* (MSC) church was then created among other associations and clubs. This church, together with the secondary school, *Lusitania*, takes charge of the education in Portuguese of young descendants of the community.

According to the head of the institution, the MSC school is today the promoter of the European Portuguese (EP) variety and gives to students the possibility to cultivate a passion for a language for their future. In fact, young speakers defend “*O Português é a 6a língua mais falada no mundo*” (Portuguese as the 6th most spoken language in the world – Jamie, 3rd generation) and promote its position of a leading commercial language for the future.

Discourses promoting the power of Portuguese circulate within the community and help the school every year, considering the non-continuous migration flux from Portugal to Canada nowadays. However, Portuguese maintains its vehicular position in the group and finds its “space of practice” on a social urban context. In Montreal, together with English and French, the fight for survival seems difficult but not impossible. The fact that the educational system supports allophone languages is a positive factor shows a continuation between Multilingualism Act (1988) and present policy of Justin Trudeau (Prime Minister). The MSC classes of Portuguese are given on Saturdays, and they complete the mandatory schedule of students enrolled in either the Anglophone or the Francophone systems.

To conclude, it is important to underline how important it is the context in order to maintain a heritage language within a group with an immigrant background. It is also very important to observe which discourses are created and how in a context where multilingual practices are not considered unusual. The question of the norm of reference, in this case EP, is relevant while promoting access to the Portuguese school system or in order to acquire Portuguese as a tool for the future, a language of power. The MSC school represents, then, the heart of the Portuguese community in Montreal. Since the decrease of Portuguese migration to Canada, the group’s members elaborate other strategies to keep alive their story and trajectories. Language is still a marker of the identity of the group, and members must speak their language, “*É primordial a língua Portuguesa*” (the Portuguese language is fundamental), added Vítor (1st generation).

Implications and Conclusion

Through the examination of these two contexts of studies, we see how education plays a major role in terms of integration of migrants into a new system. In both situations, languages are ranked in terms of power and find their place not only into the common social space, but also in speakers’ discourses. Portuguese defends its international position in Montreal where it is related to strong commercial opponents. In Lisbon, on the contrary, the “*marché aux langues*” (market of languages; Calvet, 2002) is different, and Portuguese owns its top position, whereas Cape Verdean is still fighting for a ranked position. The maintenance of its subordinated position, or its forced “deafening silence” position has (Pereira, 2016), on the other hand,

implied significant consequences in undermining the efficiency of Portuguese language policies and planning.

In Portugal, the fact that Cape Verdean was introduced into public education has been a main *manoeuvre* to improve school achievement in a specific socioeconomic deprived neighborhood in the AML of Lisbon. In Quebec, the Portuguese migration is older and not continuous today. The immigrants have had to deal with different issues, and the question of language related to identity has been more focused on one norm. However, the Canadian system has been favorable to allophone languages, which are defended and promoted as a heritage for the entire country.

We would like to summarize our paper by remembering that the relation through language and power has been shaped during the years, but it seems to fix on relevant ideologies on normative and standard forms that are considered as “proper.” Children, at school, are passive to parents’ decisions, and institutions’ changes in terms of educational and linguistic policies, but are, indeed, active agents for their own language learning processes, and can, thus, develop different tools to think and bridge the relation of power between their languages: their mother tongue(s) or language(s) spoken at home and the dominant language(s) of the society.

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National Language and Social Cohesion: Focus on Ukraine and Malaysia

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[Abstract] In this paper, we examine whether national unity can be achieved through the government policy of learning and using of national language. There is a strong belief in many countries with diverse people speaking different languages that homogenization of the population through the predominant use of a sole language helps to glue the nation together. This language ideology finds its way in the legislation. However, links between the use of the national language and social cohesion are anything but simple. We analyze factors that contradict the assumptions that the national language guarantees national unity.

[Keywords] monolingualism, language ideology, education, mass media, social cohesion

Introduction

In this paper we discuss the ideology that promotes a sole official language as a warrant of national unity. The language ideology can be defined as a set of beliefs about functions of language in the society (Blommaert, 1999). One of the most popular conceptions about the role of language in forging a strong nation can be presented through the motto “One nation—one language. Many people around the globe express the belief that the social cohesion can be achieved when the population, as a whole, uses the same language in official and private settings. Most often, this nation-wide language belongs to the ethnic group that gives the name for the land, i.e. the titular nation.

Some scholars warn the linguistic community and broad public that the idea of monolingual and homogeneous society is anutopia (Blommaert & Verschueren, 1992, p. 358; Shohamy, 2006; Pulinx & Van Avermaert, 2016, p. 342). Nevertheless, politicians are inclined to insist that the social cohesion is impossible without the use of an official language by all members of the society in all territories of the state (e.g. Yushchenko, 2010). Stringent actions to strengthen the status of the official language remain very popular worldwide.

We would like to look again at the evidence, which can undermine the wide-spread beliefs that the national language functions as a unifying force. We are going to look at some social practices in two different countries to explain by-products and controversies of the ideology stressing that the national language is a unifying force.

The two countries, Ukraine and Malaysia, have gone through different socio-political experiences. Ukraine became a sovereign country after the collapse of the Soviet Union in 1991. Malaysia is a post-colonial country that gained independence from the British government in 1957; at that time, it was called Malaya. Both countries recognize the language of the titular nation as the sole national language. Article 10 of the “Constitution of Ukraine, 1996,” claims that Ukrainian is the sole state language in the country and Articles 3 and 152 of the Malaysian Federal constitution define Malaysia as Islamic and Bahasa Malaysia (the Malay language) as the official language for government and public office .

Our juxtaposition of the sociolinguistic landscapes and language policies relies on the comparative model of Maurais (1991), which he used to compare language legislation in five Soviet Republics and Quebec. We also take into account a further adaptation of this model by A'Beckett and Du Plessis (in press), which was applied for evaluating South African bills and legislations and a framework for comparison of the South African and Ukrainian language law. The discussions of domains of use of language in Turi (1994) and of sociolinguistic factors relevant for comparison of the language policy in Italy and Malaysia (Coluzzi, 2016) guided us in our selection of typological features for the analysis.

The application of the contrastive model begins with the comparison of constitutional provisions, i.e. how the state constitution defines normative language requirements. We also look at the real situation of distribution of languages among the population. Then, we characterize habitual ways of communication between residents of different regions and ethnicities. Finally, we evaluate the dominant language ideology, i.e. the wide-spread beliefs about the role of languages in the two countries.

Furthermore, we analyze the processes that contravene the national language policy or result in outcomes that are in direct opposition to expectations. We discuss these processes within the public domains of education and mass media. The paper concludes with a summary of problems in implementation of the policy “One country—one language.”

Basic Comparison of Sociolinguistic Landscape

Ukraine

The complicated ethnolinguistic situation of Ukraine can be explained by the fact, that the Ukrainian territory was divided between several mega-states, among which Russia was the most influential player. Other nations looked down on Ukrainians, calling them “a stateless nation” (Wilson 2002; Blommaert & Verschueren, 1992, p.359). The partitioning of the Ukrainian territory came to an end with the creation of the Ukrainian Soviet Socialist Republic in the Soviet Union. To be precise, the Ukrainian Soviet Socialist Republic re-established the Ukrainian borders after the Treaty of Non-aggression between Germany and the Union of Soviet Socialist Republics of 1939, otherwise known as the Treaty of Ribbentrop and Molotov.

In the Soviet Union, which included fifteen Republics, the knowledge of the Russian language was required in official and academic settings, whereas the Ukrainian language played a regional role. There were incentives encouraging studies and proficiency in Russian among different ethnic groups. In 1989, several years before the collapse of the Soviet Union, Ukraine, along with many other former republics (Maurais, 1991), proclaimed Ukrainian as its sole state language, even though formulations of this legislation also acknowledged a special status for Russian.

In 1991 the Soviet Union was dissolved, and Ukraine gained its chance to become a new country on the global map. The people of Ukraine faced the necessity of building their modern nation, which was impossible without liberation from Russian political and cultural dominance (Strikha, 2006). The gradual removal of the Russian language from Ukrainian public domains was a component in this vision (Pavlenko, 2008a, b).

The Ukrainian Constitution was adopted in 1996, and it recognized Ukrainian as the sole state language. Russian was demoted to a language of national minorities. The Ukrainian language became the focus of linguistic and sociocultural efforts directed to the revival and restoration of all its functional domains (Bilaniuk, 2005; Pavlenko, 2008a, b; Bilaniuk, & Melnyk, 2008). Ukrainian policy makers and nationally-conscious citizens became preoccupied with the meaning of national identity. Many nationally-conscious Ukrainians perceived the national language to be a crucial element in cementing the nation and preserving

its cultural and linguistic heritage. For instance, former President Yushchenko (2010), who was in office from 2004 to 2010, was keen to elaborate the idea: “The language is the glue of the nation. Only the sole state language, the sole history and the common church can guarantee the independence and prosperity of the country.”

The common perception of the ideal language practice is that Ukrainian becomes the sole national language and plays the role of the major channel for interethnic and business communication in the state. However, after 25 years of Ukrainian independence, Russian has retained its role as the language of interethnic communication. In the Eastern and Southern parts of the country, Russian prevails in day-to-day communication and professional exchange. The western regions of Ukraine have almost abandoned the practice of using Russian in their interactions. Still, many Ukrainians need Russian to communicate with other nations of the former Soviet Union. They often participate in online discussions, watch and listen to Russian TV and radio channels, and use Russian internet products.

The choice of language in the day-to-day communication for the western and south-eastern regions of Ukraine is different, as it is also different for rural and urban communities. According to the State Statistics Committee of Ukraine (2001), 67.5% of Ukrainian citizens declared Ukrainian as their native language, and 29.6% declared Russian. Around 3 % of the Ukrainian population speak languages other than Russian or Ukrainian. Different sociological agencies have conducted the most recent surveys on the use of languages, but they do not represent an officially endorsed public census.

The residents of the right and left bank of the Dnieper River, which divides Ukrainian lands geographically, have not lived together long enough. The western regions of Ukraine experienced Austro-Hungarian, Polish, Romanian, and Czechoslovakian influence as the territories used to belong to different states over the centuries or in a short period between WW I and WW II (Hull, & Koscharsky, 2014, p. 9). The process of “unification” of Russia and Ukraine began with the adoption of the Pereyaslav Treaty signed in 1654. The political division of the Ukrainian territory had also a significant impact on the language choices of the population and on the formation of Ukrainian dialects.

In the post-Soviet world, a controversial public perception was formed regarding the legitimacy of incorporation of some of the southern lands within Ukraine because of their non-Slavic ethnic makeup, a long history of alliance with the Ottomans, and a later submission to Russian tsars. The complex history of the region led to the formation of an identity that lacks a distinct ethnic character. After the Socialist Revolution, the identity of people residing in these territories was defined through references to an amorphous group of “Soviet people,” which in other parts of the world, was often associated with Russia and Russians (Blommaert & Verschueren, 1992, p. 360).

Hence, there is a duality of beliefs attributed to the use of the Russian language. On the one hand, Russian is the lingua franca in the post-Soviet space. It provides a medium for reviving common memories among those who lived in different republics of the Soviet Union. Oral and written communication in Russian has become an entrenched habit among some groups of the diverse Soviet population. The availability of public information in Russian and channels for its transmission, as well, as a large number of Russian speakers in the Post-Soviet world strengthened the power of Russian in the capacity of a lingua franca.

Two main reasons can be given to explain the intolerance of nationally conscious Ukrainians of Russian, which could be otherwise perceived as a language of outstanding and multiethnic heritage in culture and science. The Russian language is often associated with the soft power through which Russia tries to re-establish its influence on its former satellites. For instance, the foundation “Russian world” was

created as a government-funded organization by the decree of Vladimir Putin in 2007, whose purpose was to promote the Russian language and establish the Russian world globally (“Russkiymir” Foundation, n/d; Laurelle, 2015). Such attempts can be viewed as an enactment of revanchist plans by the Russian political elite. Russian speakers in many post-Soviet countries, such as Moldova, Latvia, and, most recently, Ukraine, stirred social unrest and often carried out irredentist and separatist plans. Hence, the governments of many post-Soviet states look upon the Russophone population as a ticking time bomb or volcano, which can erupt at any time. In countries like Ukraine, one can find political forces in national parliaments that lobby interests of the Russophone population and advocate political alliances with Russia.

During Yanukovich’s presidency (2010- 2014) ,the Communist Party of Ukraine and the party of Regions formed a majority in the Parliament, which allowed them to push through Parliament the bill *On the principles of the state language policy (PSLP), 2012*. The bill introduced “regional languages” to the public spheres of the Ukrainian society. PSLP introduced regional or minority languages, including Belarusian, Bulgarian, Armenian, Gagauz, Yiddish, Crimean Tatar, Moldovan, German, Greek, Polish, Romani, Romanian, Slovak, Hungarian, Rusyn, Karaim, and Krymchak alongside the Russian language. At least 11 of these regional languages enjoy privileges in their respective states. The adoption of this legislation was a neat strategy to officialize the status of Russian and to please the Russophone voters (A’Beckett, 2013).The legislation made Russian a regional language in 13 out of Ukraine’s 27 regions. It followed the initiative of many regional authorities in the south and east of Ukraine, which issued decrees giving Russian the status of a regional language to offset Yushchenko's policy of Ukrainization (A’Beckett, 2012, p. 166).

The adoption of this legislation evoked strong criticism from nationally conscious Ukrainians, as well as from European Union officials (European Commission for Democracy through Law, 2011). The major concern with the adoption of this particular legislation, as well as with any other attempts to equalize the status of Russian and Ukrainian stemmed from the belief that the second state language in Ukraine leads to the division of the Ukrainian territory into two parts in accordance with the language preference.

When former President Yanukovich fled the country and his own party denounced his legacy, a Parliamentary proposal to repeal the law served as a pretext for the Russian government and the so-called “volunteer” militants to defend the Russophone population in South and Eastern Ukraine. It can be argued that the perception that there are “oppressed minorities” in Ukraine and that they needed to be protected by Russia played an important role in the ignition of the “hybrid war.”

Malaysia

The Ethnologue.com lists 137 languages for Malaysia. It is a multiethnic, multilingual, multicultural, multi-religious and multicultural country. Malaysia is made up of Peninsular Malaya and the states of Sarawak and Sabah. While Peninsular Malaya is known as West Malaysia, Sarawak and Sabah are referred to as East Malaysia. Peninsular Malaya (or West Malaysia) gained its independence in 1957 and the states of Sarawak and Sabah joined them to form Malaysia much later.

While the Malays who form the majority of the population are for the large part indigenous, the non-Malays (i.e. the Chinese and the Indians) are considered to be immigrant communities, since many of their ancestors were encouraged by the British colonial government to come to work in Malaya.

While the Malays, Chinese, and Indians form the majority communities in Peninsular Malaya, there are many more communities and languages in Sarawak and Sabah. In Sarawak, the Iban form the largest group, followed by the Chinese, Malay, and Bidayuh. There are smaller groups, like the Kayan, Kenyah,

Lun Bawang, Kelabit, Penan (collectively known as the Orang Ulu) and the Melanau (120,000) and there are even smaller groups like the Berawan, Bisayah, Kedayan, Kajang, Baketan, Sian, Ukit and Punan. Sabahans comprise of Kadazandusuns who form the largest group, followed by the Chinese, Bajau, Malay, Murut, Ilanun, Lotud, Rungus, Tambunuo, Dumpas, Margang, Paitan, Idahan, Minokok, Ramanau, Sulu, Orang Sungai, Brunei, Kedayan, Bisaya, and Tidong, etc.

The Department of Statistics reported in 2015 that about 67 % were Malays and other bumiputras (sons of the soil), 25 % Chinese, and 6.8% Indian. Malaysia is, therefore, an ethnically pluralist society (David & Manan, 2015), and education has been seen as an important policy domain to pursue national integration. While the 1957 constitution declared Malay the national language, English remained the main medium of government and education for the first decade of independence. In the 1970s, Malay was gradually phased into primary, secondary, and, eventually, tertiary education. What is interesting to note is the change, over time, in nomenclature of the national language from Bahasa Malaysia (the Malaysian Language) to Bahasa Melayu (the Malay Language) and then back to Bahasa Malaysia.

The summary of sociolinguistic features in Ukraine and Malaysia is presented in the next subsection.

Comparative Model of Sociolinguistic Landscape in Ukraine and Malaysia

We can pinpoint the following particularities of the Ukrainian and Malaysian sociolinguistic landscape.

- In terms of **Constitutional language dispensation**, both Ukraine and Malaysia are monolingual in official settings. Article 10 of the Ukrainian Constitution (1996) presents Ukrainian as the sole state language. Articles 3 and 152 of the Malaysian Federal Constitution (1957) define Malay as the official language of Malaysia.
- **The linguistic make-up** of Ukraine and Malaysia can be defined as drastically different. According to the Ukrainian Bureau of Statistics, around 69 per cents of Ukrainians declared Ukrainian as their mother tongue, around 29 percent declared Russian, and more than 2 percent speaking 17 other languages, which are presented in PSLP. In Malaysia, around 137 languages form the country's linguistic make-up. The most spoken languages are Bahasa Malaysia (official), around 60-70 percent of the population, English (some sources present English as the second most popular language, while others claim that a variety of Chinese dialects are the second largest linguistic group in Malaysia (over 20 per-cent of the population). This is followed by Tamil (around 7 percent), and speakers of indigenous languages, around 11 percent of the population. Iban and Kadazan are the most popular indigenous languages.
- **The dominant linguistic practice** in Ukraine can be defined as non-accommodating bilingualism. That is, speakers of Russian and Ukrainian understand each other well but choose the most comfortable medium when they need to express themselves. Bahasa Malay and English are used as the lingua franca when it comes to communication between different ethnic groups in Malaysian official settings. Many indigenous groups remain monolingual, while most Malaysians are bilingual. At the same time, many other major ethnic groups in Malaysia are often multilingual.
- **Legislative provisions for the use of languages** are also different in Ukraine and Malaysia. The unpopular PSLP, which is currently disputed at the Constitutional Court and is being gradually annulled through adoption of new laws concerning mass media and education, prescribes the use of Ukrainian on par with other 18 regional languages in official and educational settings in the regions when the status of regional languages was ascertained. However, the recently adopted

laws on quotation in mass media and education restrict the use of minority languages in these public spheres. At the same time, the use of languages by regional administrators is difficult to control. The state language was institutionalized, i.e. prescribed for public use. In Malaysia, even though the official language is Bahasa Malay, English is widely used, especially in the urban areas. In Sarawak, English has been widely used on many occasions, including official purposes.

- Finally, **the dominant language ideology** is also different in the two countries. The most popular beliefs in Ukraine regarding functions of languages can be defined as follows. Only one language, i.e. the language of the titular ethnic group, should be used as the state language nation-wide. The official status of the titular language is a warrant of preservation of the cultural legacy of the nation. The sole state language is also a warrant of the national sovereignty. In Malaysia, policy makers assert different facets of ethnolinguistic dominance of the Malays.

Controversial Public Domains

Education in Ukraine

The titular language has not yet become the main channel of instruction in educational institutions in Ukraine. This is despite the lawsuits brought by students against tertiary institutions that continue using Russian as the language of instructions (Bilaniuk & Melnyk, 2008, p. 306). The main obstacles for shifting the language of instructions are the public demand for Russophone language products, a lack of specialized scientific literature in Ukrainian, the unsettled scientific terminology, the admission policy, which favors demands of the majority of students and particularly those who pay for their education, and the wide practice of receiving education outside of Ukraine.

The new education legislation was passed by the Parliament and signed into law by the President. This law makes Ukrainian the required language of study in state schools from the fifth grade on. The Council of Europe adopted a resolution that “the new legislation does not appear to strike an appropriate balance between the official language and the languages of national minorities” (Council of Europe, 2017).

Several concerns can be expressed regarding the implementation of this policy. First of all, the stringent language policy endangers Ukrainian relations with neighboring countries and impedes its succession to EU and NATO. Second, the inequality between the rich who can provide for education of their children in any language and the poor, who often do not have access to the quality schooling, is also a concern. Finally, the problem of insufficient scientific terminology is relevant not exclusively for nations that recently gained independence. For instance, in France, researchers obtained a court ruling allowing them to publish in languages other than French (Butler, 2000). Therefore, bottom-up processes of linguistic convenience and social mobility often challenge top-down policies.

Even though some scholars interpret signs of the language shift in Ukraine very optimistically (Kulyk, 2017), the attempts to restrict languages other than Ukrainian evoke concerns (Adams, 2017; Council of Europe, 2017). A more balanced approach is required.

Education Policy in Malaysia

National cohesion has been a meta-goal of Malaysian education policy since independence. Education is regarded as an important policy domain to pursue national integration. The idea of using a standard curriculum and mandating the study of the national language after independence was recognized as occupying an important role in establishing fundamental attitudes and images of national identity among the younger generation.

While English medium government schools (a legacy of the British colonial government) were eliminated over time, Mandarin and Tamil medium primary schools were provided for the Chinese and Indian population (David & Govindasamy, 2005; David, 2004, for details of the language policy and effects on the education system). The fit of the vernacular school system attempts to enable the aims of national integration. However, some sociolinguists argue that the concession for teaching Chinese and Tamil in national-type primary schools was made to secure political support from these sizable communities rather than to open-mindedness and multiculturalism of the government (Coluzzi, 2016; 2017)

Malay is the medium of instruction both in primary and secondary government or public schools. Children graduating from primary vernacular schools moved on to secondary government schools where Malay is the medium of instruction. To obtain proficiency in the Malay language, these children had to undergo an extra year of Malay language schooling in what came to be known as Remove classes. The policy of bringing Malay into the educational domain was reinforced by requiring high schools leaving qualifications in the language for anyone seeking government employment. These and other affirmative policies of the government tended to favor one ethnic group. Therefore, the affirmative language policy of the government tended to officially discriminate by race and, consequently, education alone cannot be blamed for lack of national unity.

It should be emphasized that English has always been seen as the second most important language and is taught as a subject. There have been oscillations in Malaysian language policy on English. With globalization in 2002, a decision was made to teach mathematics and science in English at school level. Some Malays in urban areas welcomed the change, while many in rural areas opposed it. In 2009, the government initiated the process of returning to the teaching of math and science in Malay.

The Education Act of 1995 allowed the establishment of private universities with English as the medium of instruction. What has resulted is that there is now further division in choice of language for Malaysians. Ninety-five percent of Malaysian Chinese and 55% of Malaysian Indians attend vernacular primary schools (David, & Coluzzi, 2009, p.160). Then, if their parents can afford it, they attend private secondary schools where English is mainly used; they then move on to private universities where English is the medium of instruction. It has been reported that ethnic polarization has increased, and this could partly be due to early segregation while in primary schools. In the mid 80s, the government tried to adopt an integrated school project to bring together some Malay Chinese and Indian schools under the same building. During 1995-2000, another government initiative, the Vision School Programme, was attempted. Both of these programs were not very effective and were not accepted, mainly by the Chinese community, which perceived it as a threat to Chinese language education.

Instead of strengthening the national identity and unity of various ethnic groups, the education and language policies may have, in fact, weakened such identity and unity. It should, however, be pointed out that there has been a provision for Pupils Own Language, or POL. This is made possible if a group of 15 students request to be taught their own language as a subject. This requirement has often not been found to be realistically possible.

Situation in the Ukrainian Mass Media

The languages featuring the Ukrainian mass media represent another controversial case that undermines the state effort to promote the language of the titular nation. The state channels broadcast in Ukrainian, though they incorporate many Russian programs, invite Russian actors and artists, hold interviews with Russian speakers, etc. Russian famous TV presenters, e.g. Savik Shuster, Evgeny Kiselyov, and Matvei

Ganapolsky, as well as a Belarus journalist, the late Pavel Sheremet, were invited to Ukraine to conduct their shows in Russian, while their guests and audience were free to use either language.

There were several government attempts to impose ratio on broadcasting. In 2006, there was a law on broadcasting that required that at least 50 percent of the total amount of broadcasting should consist of domestic audiovisual product (Verkhovnoirady, 2006). Then, another attempt was made when the resolution of the National Council for Television and Radio was issued on 26th March, 2008 (Kot, 2012). In addition, there was also a requirement to provide subtitles for Russian films (Interfax Ukraine, 2006). The measures were very unpopular and were cancelled and overruled by the new language legislation (Verkhovnoirady, 2012).

However, despite the previous negative experience with the ratio of acceptable languages in broadcasting, a new legislation on the quota for broadcasting was introduced in May 2017 and was signed into the law by President Poroshenko. According to the new law, an obligatory share of Ukrainian-language content on television should be in the amount of 75% of the total volume. The share of Ukrainian music should be progressively increased each year (Interfax Ukraine, 2017).

The law evoked a lot of criticism (Vakarchuk, 2016). Musicians and media persons argued that the government did not do anything to facilitate the production of Ukrainian music and songs. The number of Ukrainian recording studios is insufficient for the facilitation of the growth of quality soundtracks and footages. The cost of recordings eliminates young musicians from the competitive market. Therefore, many artists prefer to make their carrier outside of Ukraine and produce their recordings in languages other than Ukrainian.

In relation to the guidelines of the policy on broadcasting in the state language, there should be several considerations taken into account. With the advent of new technologies, it is ultimately impossible to prevent a stream of information from other countries to Ukraine. The laws of supply and demand often prevail over decisions of administrative bodies. The promotion of national culture has to take into account the cost of producing quality artefacts. Young artists experience difficulties in withstanding the market pressure, which is exerted not exclusively by the international market. The ratio on broadcasting of the national music can create a monopoly of the reputable actors and musicians at the expense of beginners, who do not have the resources to create quality musical recordings and video copies. The broadcasting policy is often determined by Ukrainian oligarchs owning media holdings and TV channels (Chervonenko, 2015). The imposition of the ratio of languages used for broadcasting does not protect the nation from irredentist and separatist activities, as TV channels often openly promote the business interests of their owners, who do not necessarily act as national guardians.

Mass Media in Malaysia

There are numerous newspapers published in Malay, English, Chinese, Tamil, and other local languages. The most prominent newspapers include *The Star*, *New Straits Times*, *The Sun*, (all in English) *BeritaHarian*, *UtusanMelayu* (in Malay) and *Sin Chew Daily* and *Oriental Daily News* (in Chinese), *Tamil Nesan* and *Malaysia Nanban* (in Tamil), *Utusan Borneo* (Malay-Iban for the Sarawak edition and *Malay Kadazan-Dusun* for the Sabah edition). *The Catholic News* in Kuching occasionally has news reports written in Bidayuh dialects, and *Utusan Sarawak*, a local Malay daily, allocates one section for news in the Iban language.

As for television, there are also many languages used. These do not only include languages but also dialects. For instance, there are several Chinese dialect programs in Malaysia. Cantonese drama series are

shown on TV2, Astro channels, NTV7 and Channel 8 often. According to Coluzzi (2016, p. 36) the multiethnic audience, however, prefer Anglophone programs, as they are the ones that show interactions between different groups of people.

Mass media in Malaysia is one of the important sources for revitalizing minority languages. A Chinese radio station in Malaysia – 988 started with a five-minute Hokkien program in which two to three Hokkien words are taught daily through simple conversation. The DJs repeat the new vocabulary several times so that the listeners learn how to pronounce the words correctly. Malaysia Radio and Television's (RTM) Chinese Station also has five minutes of news announcement in four different Chinese dialects (Hakka, Cantonese, Hokkien, and Teochew) in the evening. Radio Malaysia Sabah (RMS) airs several ethnic languages, namely Bajau, Kadazan, Dusun, and Murut. Based on the feedback and response of the ethnic broadcasters of both the Kadazan and Dusun slots, the interviews display the roles of this medium in maintaining the Kadazandusun language. RTM Sarawak Bidayuh service broadcasts news items in Biatah, Bau-jagoi, and Bukar-sadong dialects. In short, the media (newspapers, radio, and television) takes into account many of the languages of Malaysians and caters to their interests.

Conclusions

Even though the two countries were inspired by the same vision of a nation unified through the use of the sole state language, they had to address different sets of linguistic and social factors in the pursuit of their goal of linguistic homogenization. The difference in their sociolinguistic landscapes prompted dissimilar challenges to the policy “one nation-one language.” The major setback for asserting the supreme status of Ukrainian in the Ukrainian society has been the dominance of Russian as a regional lingua franca and the language of the hegemonic neighbor state. English did not play an important role in the distribution of power positions among languages in Ukraine. The competition was exclusively between Russian and Ukrainian, and the balance of power has gradually shifted toward the language of the titular nation.

In Malaysia, the national language has had to compete with English and other local languages that are used as the language of intra and interethnic communication and between diverse ethnic groups. The choice of English as a lingua franca appears to offer more benefits, as it is the language of the commercial sector. English is also a global lingua franca and does not strengthen the power of any local ethnicity. The affirmative action strengthening the status of Bahasa Malaysia, to some extent, is being entwined with attempts to revive indigenous languages.

At independence, there was the feeling that English was the language of the colonial power and that as a free and independent nation, Malaysians should have their own national language – Malay. However, English has remained an important language and survived in a kind of bilingual existence.

Judging from the tendencies observed in Ukraine and Malaysia, the nation is empowered when people can communicate in many languages rather than a sole state language. Multiculturalism provides opportunities to enrich cultural experiences and world views. Nationhood is based on the willingness of the people to live together rather than on commonalities of languages they speak (Renan, 1990; p. 16; Dipika & David, 2011). Testing the endurance of this willingness by radical changes in any sphere of public life can weaken the nation. The attempts to remove other languages and dialects or reduce their domains of use do not draw much sympathy from those who use these languages and dialects. If the disadvantaged language group is large, it can call any affirmative action of the state “discrimination” and organize public protests leading to conflicts. Drastic changes can evoke self-destructive forces in society rather than lead to national unity.

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Conjecture on the Chinese Phrases of “Economic Law”

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[Abstract] Since the 19th CPC Central Committee, the emphasis on the supply-side reform theory that links institutional supply with enterprises and markets has further strengthened the importance of economic law. Since the 1970s, economic law has always been in close contact with both the policy and the market. It has combined market regulation with macro-control and made outstanding contributions to the socialist legal system and economic construction. The paper has divided the words of “economic law” into three parts. Using the language source “economic law” to reveal the import role of economic law. In the light of retrospective, it summarizes the development of economic law in China for more than thirty years. Finally, it discusses the relationship between economic law and civil and commercial law through the way of literal exegesis.

[Key Words] phrase of “Economic Law”; economic and law; language

Introduction

At the 19th NPC, General Secretary Xi Jinping emphasized “the concept of unswervingly deepening the supply-side structural reform and promoting the sustained and healthy economic and social development” (2007). How should economic development from policy orientation be promoted? Coase argues that the existence of firms is to save transaction costs of the market by replacing more expensive market transactions with cheaper intra-firm transactions; the size of the firm is determined by the marginal cost of trading within the firm that equals the marginal cost of the market transaction or equals to the marginal costs of other internal transactions; whether the successive stages of production or between the successive industries has long-term contracts or vertical integration depends on the higher or lower of the two forms of transaction costs (Coase, 1937). The development of enterprises on the market is extremely limited, and it is very difficult for the voluntary transaction to solve the problem of negative externalities to reach the market; it can only resort to judicial procedures or government control, and these are the exact problems that exist. The legal rights definition, a moderately systematic supply, will certainly have an impact on the overall efficiency of economic operations, while, the adjustment of rights will have more output than other adjustments. Many scholars believe that since 1978, the large number of economic theories we have introduced has been too pale before China’s reality (Ye, 2006). Therefore, many advanced economic theory reforms are often overwhelmed by a large number of contradictions. It is obvious that economic theory in Western countries is generally farther from China than it is from the West. In a country that has always driven its national economy with policy orientation, the three parties that emphasize enterprises, markets, and laws must have the more important meanings. Because of this, the supply-side reform theory, oriented by the localization needs, will get a more universal and effective application in China than in the West. However, economic law, which takes the market regulation and the macro-control legal system as the main body, will play a decisive role in promoting supply-side reform. In this way, it is necessary to re-sort the connotation of economic law from words and phrases.

The Language Source “Economic Law”

The current literature shows that the etymology of the “economic law” can be traced back to the *Nature Code* published in 1755. The French scholar, Morelly (1720 -1780), first used the term “economic law” in

the fourth chapter of the *Natural Code*: “The Laws Manifestations of Natural Intentions”. From the section of *Natural Code*, especially related explanation of “distribution law or economic law”, at least Morelly gives the following meanings to “Economic Law”: (1) Economic law is essentially a distribution law, the legal regulation about “natural product or the artifacts allocation” (Zhang, 1986). (2) The purpose of economic law is to “fundamentally eliminate social abuse and evil” so as to promote the realization of an ideal society (Wang, 1983). (3) The economic law has the sublime status that is just lower than the constitution, being the “the basic and sacred law” (Wang, 1983). In 1842, a French scholar T. Dezamy (1803-1850), developed Morelly’s theory to propose that economic law is used to realize the ideal of dividing society according to the principle of proportionality and building the future society, an important distribution system of the construction of product statistics and distribution of the political economy (Ge, 2000). It is noticeable that since 1979, there have been many relevant writings that believed that the use of Proudhon or Wright is the first legal use and neither Morelly nor Dezamy. This view may hold that Morelly’s use is political, not “purely” legal. The question is “When can law break apart from politics and society, especially in economic law countries that emphasizes more the country (or government) function?”

Radbruch believes that economic law, a third kind of law that can escape from public law and private law, examines economic relations from the standpoint of the national economic productivity. During the capitalist period, people pursued the absolute freedom of private law and the sacred inviolability of property. The economic relationship among people was nothing more than the relationship between two private persons based on equality, and the “public” was excluded from the relationship circle. However, the view has a fatal abuse because God cannot really exist, and the negative impact brought by free competition and advocated by the equality requirement gradually appears, bringing with the innate ills of the market economy. Directing economic development with purely private law cannot keep up with the trend of the times. Economic law stems from the great changes in economic relations and ideological trends. When there is a problem with the free competition mechanism, people can no longer balance their private interests in common utilization. When the economic activities of individuals are constantly colliding in a relatively small economic space, the economic law comes into being. In the new circle of economic relations, in order to balance the interest of a new interest body, the interest of public, legislators are no longer satisfied with considering and handling economic relations in the perspectives of the fair mediation of economic and human disputes. Instead, interest from the perspective of economic and economic relations is strengthened. When the economic adjustment is from the perspective of economic relations, the level of economic productivity in the measurement of the merits of a country’s economic legislation is particularly important. Radbruch believes that when the economic law stems from the time when the state no longer allows purely private laws to protect free competition and seeks to regulate its free competition through legal norms and its sociological laws that legal norms themselves may be effective in interventions in sports in sociology facts. Then, according to Bradbrook’s theory, it is the general trend of economic development when states intervene in the freefall of economy by its own unique means. The law must regulate this new economic relationship, so, economic law was born. The birth of economic law also means that private property and contractual freedom are never glorified in sacred natural law.

Different from the civil law system, Anglo-American jurisdictions have no legal branch of economic law. However, as a kind of legal thought, the spirit of economic law is applicable in all fields. In the Roosevelt administration of the United States, the state introduced of a series of policies and regulations to save the collapse of the U.S. economy through macro-economic control, allowing it to quickly survive from the economic crisis 1992 to 1993 (Wikipedia, 2017). Subsequently, in the capitalist countries, it has become

a trend for the government to guide the sound development of the economy through the economy regulation of the state. A variety of laws and regulations related to this have also played a pivotal role in the Western legal system. In the opinion of private individual, Chinese jurisprudence advocates economic law as a new legal field, but the West does not classify it, which is, to a large extent, the difference between Chinese and Western cultures and historical backgrounds. Since ancient times, the Chinese people have emphasized their dedication and obligations, believing that the collective interests and national interests are above their personal interests, while Western countries emphasize freedom, equality, and the pursuit of individuality. The difference between cultures makes both parties differ in the way and extent of how they accept the term “economic law”. Also, the legislative traditions of the mainland countries and the socialist conditions in our country, we certainly can give our position in the legal branch of economic law without any hesitation.

The Development of “Economic Law” in China

The development of economic law in country can be proximately divided into two stages. The late 1970s to the mid-1990s is the period of the birth of economic law. During this period, the concept of economic law was in a period of various self-talk, with a wider concept of expression that was not uniform. The object of legal regulation as the symbol of the uniqueness of economic law has also been in a state of volatility; from the general economic relations to the vertical and horizontal economic relations, again to vertical and partial horizontal relations (Gan, 2015). The main problem during this period was the contradiction and conflict between economic law and the object of civil law regulation; that is to say, economic law scholars are launching a defensive war on the independence of economic law. Especially after the issue of the *General Rules of Civil Law*, some scholars changed their attitudes towards economic law adjustment objects. In a very long period of time, the definition of the concept of economic law was in a closed situation, individual research and individual argument, with no complete, unified system. The study of implemented economic legislation and economic systems is only a defense, with no relation to the legal system itself.

At this period, the greatest contribution to the study of economic law lies in the understanding of the “economic” of economic law, which is different from the general economic economy; it is not the legal property relationship but it refers to the national economy. The starting and the conclusion points of the theoretical study of economic law rest in the general standpoint of the national economy instead of economic legal adjustment from the standpoint of the local economic relations.

The conceptualization of economic law is the premise of the theorization of economic law, but if it stays on the concept, it can only produce the concept of jurisprudence. The reasoning of the concept of economic law, it formed the theoretical knowledge (Liu, & He, 1998). As people believe that all laws are guided by a common goal and a rational principle, it is logical that various conflicts will eventually be resolved (Berman, 1993). With the further understanding of economic discipline and the improvement of legislative techniques, the theoretical basis of economic law has gradually been improved. Just as the American jurist Posner proposed in *Jurisprudence*, the law is not so much a solution to the normal problems of a civilized system as it is that it decides what a civilized system is. The deepening and development of the theory of economic law has precisely solved its role as a new legal department adapted to social development, which cannot be replaced by other laws. When economic globalization becomes the irreversible trend in the economic law exhibition, it is no longer possible for the Chinese alone to adapt to the trend of the entire global economy. Under the domination of Adam Smith’s laissez-faire ideology, the countries cannot adapt to the needs of the new economic form, nor can they have the sustained economic growth by relying solely on planned economies, and the state authority must combine with the market-

driven incentives. The state's full attention to the complicated economic is a prerequisite for deepening the theory of economic law. The sign of the deepening of economic law theory is the initial formation of the framework of the knowledge system in the field.

The second period of economic law development is from the mid-1990s until now. During this period, profound changes have taken place in the study of economic law (Gan, 2015). The study of the theory of economic law is also in full swing nationwide and forms a complete logical body of economic law example and dialectical structure. The subject, object, and content of economic law of the theory have become an important theoretical support for the subject of economic law to be the science. In fact, knowledge growth and theoretical change in China's economic jurisprudence rely largely on the transplantation or introduction of knowledge, theories and methods of other disciplines, and the ones that really belong to the original law are few. Looking at the entire field of humanities and social sciences, many new discourses, new ideas, and new methods that have emerged in the area of jurisprudence are not new but are mostly from other disciplines, such as philosophy, economics, politics, sociology, psychology, and others. In a sense, law has actually become the output and experimental field of other humanities, social sciences, and even natural science discourses, theories, and methods (Huang, 2007).

The Moderate Conjecture on the Chinese Phrases of “Economic Law”

In the ancient characters, “Jing” belongs to the shaped sound, of which the original meaning is the fabric used for vertical lines. In the Word and Explanation, there is “Jing, means weaving”. Later, the extended meaning is “governance” and another is righteous. “Ji” originally meant to be the name of a place. In the Word and Explanation, “Ji, means Jishui”. Later, the extended meaning is “save, relief, (useful to things) good” and other meanings. The combination of “Jingji” means the “contributions to the country and the goodness to the people”, and “the help to the country and the people”. In many Western languages, “economy” comes from *oconomia* in Latin and *oikonomia* in Greek. The word “economy” in English may be traced back to the *oikonomos* of Greek (“the housekeeper”), which, in turn, originated from the evolution of *oikos* (“the house”) and *nemein* (“management”). *Oeconomicus* created by the philosopher and economist Xenophon elaborated on the meaning of the term “economy”. Aristotle also considered the economy as a livelihood and a necessity for life. *Oikonomos* is derived from *oikonomia*, which means not only “family management”, but also the meaning of “instruction”, “administration”, and “arrangement”. Economy, first seen in a work published around 1440, means the “management of economic affairs” in the monastery”; in the 19th century or the 20th century, it derived from the “economic system of a country or an area” and other meanings. These analyses show that from its original purpose, “economy”, whether in Greek or in ancient Chinese, focuses on the country's economic operation and management, not on the microscopic exchange of commodities, and is far from the “property”.

In word structure, “Contributions to the country and the goodness to the people” and “the help to the country and the people” can be collocated phrases or biased phrases. In the case of the parallel relationship, both the country (state) and the world (people) are important, and both serve the same purpose; if it is a biased relationship, the former is an adverbial and the latter is a verb (the subdivision is a moving object); then the former is means, and the latter is the purpose. Whether collocated or biased, “economy” aims at “governance” of the national economy and “enhancement” of the well-being of the people. Mencius's thought of “taking the people as the most important, the second one being the country, and the king as the least”, “economy” should be a biased phrase of the motile structure. Therefore, the central gravity of “economy” is very clear from this: the focus of the process and the method is in the “Jing”, the state's

economic governance; the purpose and aim of the central gravity is “Ji”, the improvement of people’s well-being. Then applying this interpretation in the “economic law”, the reality source of the “Economic Law” is in the activities or processes of the “state (economic) governance“, and the adjusted economic relations of economic law should be located in the country, national economy, and the national economy operating level. The relationship with the “people“ is mainly in its purpose and aim, not in the means and process. That is, economic law achieves the goal of improving people’s well-being by adjusting the economic relations that occur during the “governance“ of the national economy rather than directly adjusting the economic relations among the people. The function of the law is to adjust social relations, and the relationship that arises from the behavior, while, the behavior and means are inseparable and reflected in the process. Therefore, the economic law is more connected with the “people“ in the supreme purpose and ultimate goal, not with the in the process of economic relations. Furthermore, “people“ in “civil law“ refers to citizens and civilians in civil society as “individuals” in the civil relationship of equal subjects, that is, “people,” which contains the concept of equality, rather than “people” in the symmetric context of “state” and “people.” At this point, the process of economic relations and the adjustment of economic law does not occur with the “people” process and means of contact (only the purpose and tenet), then the difference and correlation between economic law and civil law will be clear (Xiao, 2002).

Conclusion

Although there are decades of history of economic law, people’s understanding of economic law is not deep enough, not deep in the essence of economic law, and it does not go deeply into the revelation of the inherent stipulation of economic law. In economic law, the phenomena of a shallow, absent-minded place can be seen everywhere. In particular, issues of economic law are still indifferent to their own reason, and the scarcity of rational light is not scrutinized by reason, and some cannot withstand the test of rationality, with many fallacies and deficiencies in economic law. The purpose of the deep reflection and development of the economic law of China from the perspective of language is to find the brilliance of economic law itself, raising the study of economic law to the height of thought, giving thought and enlightenment to people. It is worth pointing out that the applicability of economic law should not have become its theoretical superficial evasion, and the practicality of economic law should not be an excuse for its theoretical fragmentation. The interpretation of legal norms by economic law does not simply explain the legal implication of norms but reveals the legal spirit behind the norms (Chen, 2003). Only in this way can we make the explanation of economic law a kind of academic narration and exert its theoretical guidance on legislation and judicature. This is exactly the only way for the development of economic law. Therefore, the attention should be paid to the research of basic theory of economic law to deeply analyze the basic category, principle and technology of law itself, and try to elevate the meaning of economic law, departmental law to economic jurisprudence, and to provide more law for the economic construction of China’s new era of support for the socialism system.

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Disparities and Similarities in Contract Clauses in Chinese, English and Polish Legal Languages

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[Abstract] In this paper, the main clauses used in civil law contracts from China, USA and Poland have been juxtaposed and analyzed. The aim of this research was to find clauses crucial for civil law contracts and recognize the major differences and similarities, as well as propose a translation in the event of lack of equivalence. To provide the research material, representative sample contracts of sale from each of the three countries were chosen.

[Keywords] contract of sale; legal Polish; legal Chinese; legal English; legal language; language of contracts

Introduction

The aim of this research was to compare selected contract clauses from Polish, English and Chinese contracts and then analyze them in terms of their disparities and similarities. In recent times, more and more civil and commercial law contracts are concluded between entrepreneurs from China and Poland. In further perspective, the trade between these countries can develop even more due to current plans of the New Silk Road expansion. Nevertheless, business transactions between subjects from China and Poland are undertaken just now.

In such cases, the English language is quite often the language of negotiation, as well as the language of contracts, allowing both parties to understand each other without choosing their own languages (which could make their negotiation uneven in some way). However, sometimes the copy of a contract in Polish or Chinese is also perceived as binding, and therefore, it is crucial for the translators to do the translation precisely and carefully, neither omitting any essential information, nor changing the meaning, since such a situation would lead to the creation of two conflicting versions of one contract. That is the reason why continuous improvement of knowledge of legal translation is required to provide high quality legal translations and, consequently, the safety of international trade.

In this paper, by the term “English language”, the American English is understood; by “Chinese language”, only the Chinese Mandarin variety is meant; and “Polish language” refers to standard Polish.

Research Material

The research was based on the analysis of Chinese, English and Polish contracts of sale¹. Regarding the fact that the freedom of contracts principle allows conclusion of unlimited types of contracts, and due to briefness of this paper, a representative type of contract was examined, that is the contract of sale (CN: 买卖合同 *mǎimài hétóng*, PL: *umowa sprzedaży*). This kind of agreement evolved in Europe from the Roman contract *emptio-venditio* (‘purchase and sale’) (Radwański & Panowicz-Lipska, 2012, p. 16). Ancient China also knew such contracts, and though they were not originally regulated in any written law, their existence can be traced back in customs and tradition (Zhang Mo, 2006, p. 27). In order to focus on contract clauses in general, sample contracts of sale have been studied, as they are models for any potential contract

¹As the contracts conveying land ownership involve numerous additional regulations, in this paper only the contracts of sale regarding movables were analysed.

of sale and are not influenced or modified by any actual object of sale. The sources of the samples were publications on contract law for practitioners, published both in print and on dedicated websites. In other words, the sample contracts of sale were investigated.

Research Method

The applied research methods included the analysis of comparable texts (formerly named parallel texts). This method requires examining at least two (in this paper it was three) texts originally written in each of the examined languages, having originally the same function and touching the same subject (Kubacki, 2013, p. 146). Therefore, in this case it was contracts of sale written respectively in Polish, English and Chinese. The application of this method allowed observation of typical contract clauses used originally in the proper context and exact wording. In this study, contracts of sale were juxtaposed and compared, which allowed determination of translational equivalents. The author also analyzed structures.

Contract of Sale in the Context of American, Polish and Chinese Law

Laws in America, Poland and China have specific characteristics, which have a crucial impact on *lingua leges* used in these countries. The United States belong to the common law family, which means that all issued judgments bind judges in their decisions. The country has state-level legislation too, which binds all states of the federation. On the contrary, Poland has a regular civil law system, which is based only on laws issued by the Parliament, whereas the Chinese system is often described as a “mixed system” for the sake of the fact that it includes both features of a common law system and a civil law system, and additionally has its own specific elements related to Chinese culture and history. The differences between the legal systems are substantial factors hindering legal translation (Matulewska, 2010, p. 59).

The contract of sale, being one of the most commonly concluded types of agreements, can be found in almost every legal system. Since, both in Polish and Chinese laws, this type of contract is regulated in the first place, and in many common law countries it is included in statutory law, it is probably perceived one of the most important kinds of contracts.

In the United States of America, apart from local legislation and common law in general, the contract of sale is regulated by Article 2 of the Uniform Commercial Code (UCC) of 1978, as amended. The article covers all essential legal aspects of sale: “§ 2-301. General Obligations of Parties. The obligation of the seller is to transfer and deliver and that of the buyer is to accept and pay in accordance with the contract”. Clearly, the contract of sale includes obligations of both parties; the seller is obliged to give the sold thing to the buyer, whereas the buyer is bound to pay the price.

Polish provisions on *umowa sprzedaży* ‘contract of sale’ are included in the Polish *Kodeks cywilny* (Civil code, KC), promulgated in 1964. The contract of sale is the first nominate contract regulated in the section on law of obligation: “Article 535. By the contract of sale the seller undertakes to transfer the ownership of a thing to the buyer and to release the thing to him and the buyer undertakes to collect the thing and to pay the price to the seller”². As it can be seen, the Polish contract of sale also creates obligations both for the seller and for the buyer – the former is obliged to transfer the ownership of a thing and deliver it to the buyer; the latter is obliged to pay the price. In some circumstances, Polish contracts of sale can bring not only the obliging effect, but also an effect of disposition (and then the ownership is transferred

²Art. 535. Przez umowę sprzedaży sprzedawca zobowiązuje się przenieść na kupującego własność rzeczy i wydać mu rzecz, a kupujący zobowiązuje się rzecz odebrać i zapłacić sprzedawcy cenę (Source of translation: Bil, Broniek, Cincio, & Kielbasa, 2011).

immediately after the conclusion of a contract, even without the delivery) (Radwański & Panowicz-Lipska, 2012, p. 20).

Chinese regulation on 买卖合同 *mǎimài hétóng* can be found in 中华人民共和国合同法 *Zhōnghuá Rénmín Gònghéguó Hétóng Fǎ* (Contract Law of the People's Republic of China, CL) and similarly to the Polish regulation, this is the first type of contract regulated: “Article 130. A sales contract is a contract whereby the seller shall transfer the ownership of a subject matter to the buyer, and the buyer shall pay the price for it”³. The Chinese contract of sale is an agreement which creates an obligation for the seller and the buyer (Yang Lixin 杨立新, 2013, p. 405), so on this general level the Chinese approach can be perceived similar to the American and Polish ones. Nevertheless, it should be noted that the actual performance of sale, as well as specific provisions in these countries may vary a lot. However, a thorough legal analysis is not the subject of this paper, and thus, the particular legal aspects of sale in these countries shall not be considered.

Contract Clauses Compared

Thus, the contracts of sale in Polish, Chinese and US laws basically seem to be quite similar. Notwithstanding, some differences are clear at first view and some can be found through thorough examination.

Commencement (Premises)

In the beginning of a contract, it is required to establish both parties, as well as signify the type of a contract. However, all of the analyzed contracts are based on a definitely universal principles reveal disparities. All three analyzed examples begin with the title (heading) of the contract, which is shown in Table 1.

Table 1. Headings of the Contracts

Polish	English	Chinese
Umowa sprzedaży	Contract of Sale	货物买卖合同 Huòwù mǎimài hétóng

Although the Chinese contract has additionally settled the specific object of the contract, that is the sale of 货物 *huòwù* ‘goods’, all headings are constructed analogically: indicating that the following text is:

- English: contract
- Polish: umowa ‘contract, agreement’
- Chinese: 合同 *hétóng* ‘contract, agreement’

and that it is a contract:

- English: of sale
- Polish: sprzedaży ‘of sale’
- Chinese: 买卖 *mǎimài* ‘buyment and sale’.

Another parallel structure can be observed in establishing abbreviated forms for a seller and a buyer – see Table 2.

³第一百三十条 【定义】买卖合同是出卖人转移标的物的所有权于买受人，买受人支付价款的合同。Source of translation: <http://www.lawinfochina.com/display.aspx?id=6145&lib=law&SearchKeyword=contract%20law&SearchCKeyword=> [access: 2017/01/04].

Table 2. Abbreviated Forms for a Seller and a Buyer in Contracts

Polish	English	Chinese
..., zwanym dalej Sprzedawcą	(hereinafter referred to as “Seller”)	卖方: __ (下称乙方) mǎifāng: __ (xiàchēngyǐfāng) 出卖人 (甲方) chūmàirén (jiǎfāng)
..., zwanym dalej Kupującym	(hereinafter referred to as “Buyer”)	买方: __ (下称甲方) mǎifāng: __ (xiàchēngjiǎfāng) 买受人 (乙方) mǎishòurén (yǐfāng)

In Polish and English contracts, the particular parties, while referred to in the further parts of the contracts, are called respectively *Buyer* (Polish: *Kupujący*) and *Seller* (Polish: *Sprzedawca*, however it is a term that originated from the language of the legislative and in contracts, often another term can be met: *Sprzedający*, which is constructed analogically to the term *Kupujący*). On the contrary, in Chinese contracts different pairs of terms are used:

- 卖方 *mǎifāng* ‘selling party’ and 买方 *mǎifāng* ‘buying party’
- 出卖人 *chūmàirén* ‘seller’ and 买受人 *mǎishòurén* ‘buyer’, which are the terms used in CL.⁴

What is more, these terms are mentioned only in the beginning of the contract (in Example 3 to introduce the names of the parties), and in the following parts of the contracts they are called 乙方 *yǐfāng* and 甲方 *jiǎfāng* (which can be translated as ‘Party B’ and ‘Party A’). Such way of identifying parties is quite common in Asian contracts, but not applied in Western agreements.

Eventually, in all of the three languages mutual equivalents of the phrase hereinafter referred to as can be found:

- English: hereinafter referred to as
- Polish: zwanym dalej ‘further called’
- Chinese: 下称 *xiàchēng* ‘below called’

Interesting is the fact that in English and Polish contracts, this phrase is used to define a certain person as the buyer and another – the seller. In Chinese contracts though, this phrase identifies the buyer as Party A and the seller as Party B. Thus, in the entire contract, neither the term for the seller nor the buyer are mentioned, only at the beginning and at the end, along with their names.

The Polish paragraph is brief and does not include a lot of details. The whole clause is gathered in one sentence, identifying the parties and giving limited information about them. The English paragraph on the other hand, not only distinguishes terms for respective parties, but also explicates that parties are to be called jointly “parties”. A synonymous string is used to describe the act of concluding the contract – where in Polish a single word term is used:

- English: made and entered into
- Polish: zawarta ‘concluded’
- Chinese: -

In the Chinese contract, no such term can be found, due to its briefness and focusing only on the subject matter of the contract. However, a corresponding term can be found in CL, and it is 订立 *dìnglì* ‘establish’, ‘conclude’⁵, which could be used in such a context.

⁴See e.g. Art. 130 CL.

⁵See e.g. Art. 9 CL.

Parcels

The clause regarding the object of a contract can be found in every contract of sale, for the transfer of the object's ownership is one of the requirements constituting such a contract. Nonetheless, the approaches to construction of this clause differ in the analyzed contracts:

In the Polish and English contracts, the first paragraph includes essential information on obligations of the parties, such as presented in Table 3:

Table 3. Contractual Obligations of the Parties

Polish	English	Chinese
Sprzedawca zobowiązuje się przenieść na Kupującego własność	Seller shall transfer and deliver to Buyer	-
Kupujący zobowiązuje się zapłacić cenę	Buyer shall (...) take delivery and accept	-

whereas in the Chinese contract, such basic statement is omitted as if assumed implicit. Instead, the whole paragraph focuses on the object of sale, and gives detailed information about it.

In the presented examples, some equivalents can be noticed, however, since the Chinese paragraph only gives information on the object, without entailing duties of the parties, there is no term for the transfer of ownership or transfer of the object:

- English: transfer and deliver
- Polish: przenieść (...) [własność] ‘transfer [ownership]’
- Chinese: -

Searching for the appropriate equivalent it is possible to refer to the CL, where a term 交付 *jiāofù* ‘to deliver’, ‘delivery’ and 转移 *zhuǎnyí* ‘to transfer’ is used⁶.

Payment

Clauses on time and method of payment also can be found in every contract of sale, due to its *essentialia negotii*, which is the payment of the price for the sold goods. As shown in the examples, the clauses on payment are rather different at first sight. The studied examples visibly show different attitudes in formulating contract clauses in the analyzed languages. The Polish paragraph seems to be quite synthetic and omits numerous details; otherwise the English paragraph, which carries a lot of information, is similar to the Chinese one. However, while the English paragraph consists of complex sentences, the Chinese paragraph is quite concise, containing only the essential data.

Some disparities can be observed directly in the clauses on price and time of payment (see Table 4).

Table 4. Disparities in Contractual Clauses on Price and Time of Payment

Polish	English	Chinese
Zapłata ceny nastąpi (...) w terminie (Ex. 5) Kupujący zobowiązuje się zapłacić cenę	Buyer shall pay Seller	单价: __; 总价: __ Dānjià: __; zǒngjià: __
Zapłata następuje w dniu	Payment shall be within	货款的支付时间: __; Huòkuǎn de zhīfùshíjiān: __;

In the Polish clauses it is zapłata ‘payment’, which is the subject of the sentence; therefore, the fact that it is the Buyer who pays is interpreted on the basis of the previous paragraphs of the contract. On the contrary, in the English clause, it is indicated for the first time in the contract that the Buyer is to pay the

⁶See e.g. Art. 133 CL.

price to the Seller. In the following sentence, similar to the Polish example, *payment* is the subject of the sentence. The Chinese clause is again clearly laconic and is not even constructed with sentences, but rather short syntagmas (e.g. 货款的支付时间 *huòkuǎn de zhīfùshíjiān* ‘time of the payment’) or mere single terms (e.g. 单价 *dānjià* ‘price per unit’). Therefore, it is possible to determine mutual equivalents of particular terms in English and Polish, but in Chinese it is not achievable in all of the cases:

- English: *payment*
- Polish: *zapłata* ‘payment’
- Chinese: 货款的支付 *huòkuǎn de zhīfù* ‘payment’

- English: shall be within
- Polish: *nastąpi w terminie* ‘shall be within’
- Chinese: 时间 *shíjiān* ‘time’

- English: Buyer shall pay
- Polish: *Kupujący zobowiązuje się zapłacić* ‘Buyer binds himself to pay’
- Chinese: -

Again, the Chinese contract omits statements on the parties' duties, which suggest that the identification of the type of the contract implies these obligations and it is unnecessary to repeat them in the contract provisions. The equivalent phrase is though used in CL: 买受人支付 *mǎishòurén zhīfù* ‘buyer pays’.

Conclusion

The analyzed clauses basically carry the same information, e.g. identifying parties, establishing time and method of payment, or number and legal validity of contract copies. In several cases, functional 1:1 equivalents could be ascertained, such as:

- seller / sprzedawca / 出卖人 *chūmàirén*
- buyer / kupujący / 买受人 *mǎishòurén*
- payment / zapłata / 货款的支付 *huòkuǎnde zhīfù*

In several situations however, only near equivalents were found, or there were no equivalents at all – in such situations the translator should either search for suitable terms in corresponding laws, e.g.

- made and entered into / zawarta/ [term used in statute law]: 订立 *dìnglì*
- transfer and deliver / przenieść / [terms used in statute law]: 交付 *jiāofù* or 转移 *zhuǎnyí*

or use the techniques of providing equivalents for non-equivalent terms (cf. Matulewska, 2014).

Some vital dissimilarities could be noticed regarding the construction of paragraphs. Polish paragraphs are quite concise and short, though consisting of full sentences. Some provisions, which are included in English and Chinese contracts, are not present in the Polish one, which is understandable with an assumption that all matters not covered by the contract are defined in KC. Nevertheless, a few key clauses have to be incorporated, otherwise it would not be recognized as the specific type of contract. More details can be observed in English contracts, which are far more periphrastic and seem to cover all possible events, as well as describe any situation which may occur during the execution of a contract. Paragraphs are very long and built with complex sentences. The entirely opposite approach is shown in the Chinese paragraphs, which resemble more of a kind of form, and hardly any clause indicating duties of the parties is included in there, since these duties are just assumed on the basis of the type of a contract. Regarding the presupposition that all duties and rights of the parties are included in the statute laws, if the type of the contract is specified, it is then unnecessary to repeat these provisions. Such a reliance probably stems from the Chinese culture,

which praises trustworthiness and bases on *guanxi*⁷. However, the contract constructed with such an assumption could be perceived invalid in other countries, which have more strict regulations. Since literal translation may seem unnatural, unintelligible or just non-binding, it is necessary to uncover the counterparts of respective clauses in the target language. Problems may arise if a clause equivalent is not used originally in the target language, which can make finding equivalents for clauses in a given language quite difficult.

In conclusion, although the English, Polish and Chinese languages of contracts preserve some similar features, several vital disparities can be found, which result from the different attitudes towards contracts' construction. Moreover, since the laws evolve, along with them must evolve legal languages. It is then necessary to do constant and extensive research in this area to provide more appropriate translation and determine exact equivalents both for particular terms, as well as whole clauses.

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⁷关系 *guānxi* 'relations', 'relationship', 'influence'; term specific for Chinese culture.

The Essence of Legal Language from the Perspective of Justice

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[Abstract] There is a long history of exploring the essential features of legal language. At present, there is no widely-accepted conclusion. Based on the ambiguity of legal language, some scholars have advanced a rigorous monistic interpretation. Not all of these views are proper. In addition to the superficial features of legal language, the essential features lie in the value of its independence. The inherent demand of the legal language for justice is embodied in the legislative language and the language of the legislative texts in our country. By adopting the method of extracting public factors, we learn that the value in the ambiguity, accuracy and rigor of legal language is manifested in the service of justice. After analyzing specific legal texts, it can be demonstrated that the essential feature of legal language is justice.

[Keywords] legal language; justice, accuracy, ambiguity, rigor

Introduction

In early human society, people formulated a code of conduct into law by means of language. This code of conduct was derived through consultation among community members or by orders from community leaders, either verbal or written. Therefore, this code of conduct has been language-based since its birth (He, 2009). Since the 1980s, anthropologists have referred to the study of the impact of this code of conduct on society as “Legal Studies”. The legal systems of today’s world represent a remarkable achievement and the laws continue to become more mature and fair. However, legal language as the carrier of law continues to present many non-standard problems in its application. These outlying problems need to be discussed from the perspective of the essence of the legal language. Since legal texts are expressed in the language of “legal language”, inquiry into the nature of legal language has never ceased (Li, & Pan, 2017). The study of legal language has important practical significance for legislation, justice and law enforcement. Standing on the shoulders of previous studies, we can initially explore scholars’ view of the nature of the legal language. In general, the essence of the legal language is revealed in the following criticisms: Is legal language accurate? Is it ambiguous? Is it rigorous? There are some scholars who believe that legal language is a comprehensive language system related to law. In this article, the essence of legal language will be discussed in depth.

The Essence of Legal Language Criticism of “Accuracy”

The Accuracy of Legal Language

There is no single, agreed upon academic definition of “legal language” among domestic scholars (Song, 2006). The essential feature of a legal language lies in the legislative language which balances accuracy and ambiguity (Luo, 2011). In the view of legal formalism and conceptual jurisprudence, the notion of the rule of law requires that legal language must be deterministic and complete, however, within the complexity of legal practice, ambiguity is unavoidable (Lu, 2010). The accuracy of legal language primarily means that every word and sentence must be precise and rigorous, and all must conform to the scientific content of the law and the logic of thinking (Pan, 2004). Therefore, we must first seek

clarification of the content itself and then seek clarity of the expression of that content. Literally, the accuracy of the legal language means that the meaning expressed by the legal language strictly conforms to the standard of the situation. The quantitative expression of the legal language should be “refined”, and from the qualitative perspective, the expression should be “accurate”. There is no doubt that the legal language, to the extent that it is based on the needs of the legal function, is accurate, but the essence of the legal language is accurate and is an open question.

Arguments about Legal Language

It has been pointed out that every word and phrase used in legal language is precisely appropriate and this is the most fundamental feature of the legal language (Jia, 2010). Those who hold similar views also believe that legal activities and jurisprudence put more stringent requirements on the accuracy of legal language than all other areas of language use (Yang, 2010). Word accuracy is an essential feature of the legal language, so we can say that accuracy is the lifeline of the legal language. The mainstream view of the academic community is that accuracy is the essential feature of legal language.

Questions about the Use of “Accuracy” in Legal Language

The understanding of “accuracy” has the following problems:

- Based on scholar’s discourse. Celebrity discourse is not a valid argument. Celebrity discourse has authority in some fields, but there is doubt as to whether the argument of celebrity speech (especially beyond its professional discourse) can be used as scientific research argument.
- Based on certain specific legal provisions. The cited examples are not representative. Scholars holding such views also cite some concrete examples in argumentation, but these illustrations are basically words or phrases in the field of criminal law. As we all know, criminal law is only one of the many departmental laws and does not have full representation and typicality.
- Demonstrates the accuracy of legal language from the perspectives of word meaning, special terminology and sentence meaning. Demonstrative logic is not enough. As mentioned above, some scholars use the provisions of “proper defense” in our criminal law to prove accuracy. It is questionable whether the words “on going”, “wrongful”, “necessary” and “not existent” are used to conclude that the linguistic feature of this provision is “accuracy”. Words such as “other”, “discretion”, and “or” are vague characteristics. Some scholars use vague language to prove that the legal language is more contradictory.
- Not a feature’s “feature”. For a person or situation to claim to be “special”, there should be a reasonable explanation. A simple claim of being strong or gifted within legal language is not accurate. For example, in the fields of mathematics and engineering sciences (industry), it easy to see the accuracy or precision of terms. The terms used in legal language, however, are not comparable to the accuracy or precision of terms used in the language of these other disciplines.

From the above, we see that the inaccuracy of legal language makes it difficult to carry out legal tasks. The conflict between the law and the application of law is reflected in the inconsistencies and contradictions found within legal language.

The Critique of “Ambiguity” from the Perspective of the Essence of Legal Language

What is the Ambiguity in Legal Language?

The ambiguity of the legal language means that certain legal provisions or expressions cannot be semantically defined and are generally used in cases where the nature, scope, degree and quantity of legal facts are not clear. Furthermore, legal language includes the use of vague words such as “about”, “within” and so on (Gao, 2010), as well as the use of fuzzy terms such as “can”, “bad”, “general” and other ambiguous expressions. An understanding of the ambiguity embedded in legal language is inferred from reading “between the lines”. There is not always a direct and clear expression.

The “Ambiguity” Argument of Legal Language

American legal linguist Mellinkeoff summarized the expression of legal language in four points: cumbersome, vague, exaggerated and stereotyped. Some scholars have also pointed out that the inaccuracy of language (fuzziness) is one of the essential attributes of language (Wu, 2002). Other scholars have pointed out that legal language is a variant of natural language, without exception, and the characteristic of natural language is an inherent characteristic of legal language. Therefore, it is not improper to say fuzziness is one of the attributes of the legal language. However, many Chinese scholars call the distinctive attributes (characteristic) of the legal language “vague” which I feel is not appropriate.

Questions about “Ambiguity”

The ambiguity of language’s natural existence does not mean that the essential feature of legal language has “ambiguity”. Since the human language itself cannot express many things in its own right, leading to inherent flaws in the language and the fuzziness of the attributes, this is not enough to allow us to attribute this inherent attribute of the human language expression to the linguistic peculiarities of the language (Wang, 2006). Discussing the essential characteristics of the legal language must presumably refer to the different proprietary attributes of this language when compared to other languages. Fuzziness is not the exclusive property of the legal language; we cannot say that fuzziness is a characteristic of the legal language.

Individual examples of vague legal language are not representative of legal language as a whole. Some scholars use legal language such as “a number of”, “appropriate”, “if necessary”, “can be extremely serious”, “the plot is lighter”, “larger”, “below” and other words to demonstrate the ambiguous characteristic of legal language, but in fact, these examples are not representative and do not have universal meaning. Thus, suggesting that these terms are representative of the entirety of the language cannot prove that the unique attribute of legal language is ambiguous.

The notion that legal concepts are used to justify the ambiguity of legal language is also not appropriate. Any concept is an abstraction and generalization of the essence of a thing reflecting the most fundamental feature, not the highest feature. However, legal concepts extract the greatest common divisor of the general characteristics. The primary issue to be resolved by law is the issue of conscientiousness. Therefore, it is an unrealistic conclusion to think that the legal language is ambiguous.

The linguistic features of literary languages, especially lyric essays, cannot be compared with the ambiguity of legal languages. Literary language often gives a sense of dimness and sometimes users of literary languages try to give the impression that vagueness and obscurity are one of the pursuits of that language. On the contrary, legal language cannot and should not pursue obscurity. In the end, pursuing obscurity will prove to be impossible; for example, during the Spring and Autumn Period, the Chinese

“law” of taking a prisoner for a righteous cause led to an extreme social condition. Regarding “loopholes” in the law, these cannot be explained as ambiguity in the legal language. Loopholes are reasoned. There is a reason for a so-called loophole. The phenomenon of loopholes will be discussed shortly.

Judging from the above questions, legal language has fuzzy attributes, but ambiguity is not the main attribute of legal language. The view that the characteristic of legal language is ambiguous is primarily a linguistically driven error in logic.

In terms of accuracy, legal language appears to be inferior to engineering language but is obviously superior to literary language. It is hard to reconcile both engineering and literary language as including the essential features of legal language. Sometimes it is semantically accurate, sometimes obscure or general. Accuracy and ambiguity are properties that all languages have. We cannot conclude the essential characteristics of legal language is accuracy or ambiguity.

The most typical manifestation of legal language is the basic form of law. On the other hand, the law also reflects the essential characteristics of the legal language. Even though people prefer laws to be deterministic and predictable, imperfection is an inevitable feature of legal norms.

An Example of an “Ambiguous” Law Policy

The ambiguity of the legal language is not indefinable. For legislative purposes and supporting litigation procedures, the legislature sometimes vaguely intends to blur the purpose of legislation. This is also the difficulty of legislative techniques When dealing with various functional departments. The responsibilities of competent authorities need to be clearly defined. However, the responsibilities of departments (agencies) need not be clarified. At this time, it is necessary to use fuzzy legislation to express them and replace them with “other” relevant departments (agencies). The term “other” is highly ambiguous under the context of a high degree of legal certainty and is often expressed as: XX department (organization) supervisor (responsible for) the national XX work, and another relevant Department (agency) is responsible for XX work. For example, the Social Security Administration of the State Council is responsible for the administration of social insurance throughout the country. Other relevant departments of the State Council are responsible for the relevant social insurance work within their respective responsibilities. (First paragraph of Article VII of the Social Security Act).

Criticism of the Character of “Rigor” Discussed in the Essence of Legal Language

The “Rigor” of the Legal Language

“Rigorous” is interpreted in the *Modern Chinese Dictionary* as “serious and cautious” and “(structured)”, such as “rigorously spoken” and “rigorous article”. In addition, rigorous also contains the meanings of solemn and strict, and well-intentioned. At present, no scholars make a direct and definite definition of the rigor of legal language. Rigor in legal language means that the legal language is more thorough and cautious than other languages (Maley, 1994), and this tendency is reflected in the meaning expression of legal provisions (the “law”), which is also an aspect of legal language.

Legal Language cannot be Entirely Rigorous

The law itself determines that legal language cannot be entirely rigorous. The law is formulated and approved by the state and implemented by law-enforcement personnel. The essence of the law is class-oriented in nature and society-oriented in implementation. The law cannot be formulated without considering the will of the ruling class. The judiciary represents the will of the ruling class and judicial

authorities need certain judicial discretion. If the legal language is too strict, it is bound to force the judiciary to lack flexibility when balancing social justice against the intent of the law. The basic principle involved in the creation of laws is that of flexibility. Social relations are complicated; therefore, it is unrealistic to cover each specific social relationship with a strict legal language. From the perspective of the whole operation of the society and the country, the law cannot be completely rigorous.

Limitation of “Rigorous” Legal Language

The relationship between legal phenomena and social phenomena represents one area where we find a limitation in implementing rigorous legal language. Social phenomena include the various relationships between individuals and their things. Legal phenomena include the ability to solve social disputes in order to stabilize and maintain the social order. Therefore, it is important to note that legal texts originate from legal phenomena and not the other way around. Language phenomena are also subordinate to social phenomena. Laws are expressed in words. Legal language completes the social function of expressing legal phenomena. Even though (legal) language is an intermediary instrument does not mean that all legal disputes can be solved. This is due to the fact that legal language is first and foremost subject to the inherent “flaws” or “loopholes” of the language itself. There are some legal situations that cannot be resolved, and this is a function of the language itself.

Reflections on the Essential Features of Legal Language

Dante evaluated legal language very highly and even raises legal language to the altar height of being the ideal language. The essence of legal language is that it is accurate and weighted. French lawyer and political philosopher Montesquieu also highly praised legal provisions, saying that “the meaning of legal provisions is unclear, and the conviction is not clear enough to degenerate a government into despotism” (Sun, & Zhou, 1997). The assertion of these authoritative people compels legal language to bear a very important responsibility. The inheritance of the branches of human civilization cannot be separated from its roots in the law, and the law’s development is inseparable from the legal language in which it serves as an important carrier; accuracy, vagueness and rigor of legal language are merely representations of legal language. Together, these reveal characteristic of legal language from different perspectives. However, all these characteristics serve a common goal, which is, legal language is the voice of justice. The essential inquiry into legal language also needs the common force of accuracy, ambiguity and strictness of legal language to highlight legal justice.

Implications and Conclusion

Through the analysis of the essential features of legal language, we can arrive at the conclusion that legal language has a significant relationship with legislation, justice and law enforcement. Legal language always functions in coordination with law. Legal language can not be explained from a single perspective. Analyzing legal language is a discipline with a wide range of applications and successive generations of scholars have explored and amended the language resulting in a gradual improvement. This article has reviewed legal language mainly in the following areas:

1. The essence of the legal language is the combination of accuracy, ambiguity and rigor:
2. Legal language cannot be measured solely by grammatical knowledge.
3. The essential characteristics of legal language determine that it cannot be completely “rigorous”, meaning that it cannot have “pure accuracy”.

4. Legal language needs practical operability.

We would like to summarize our paper by saying that the essence of legal language refers to a comprehensive feature of accuracy, ambiguity, and rigor. The primary appearance of legal language is that it guarantees that the law is validly implemented. The essential feature of the legal language is the fusion of accuracy, ambiguity and rigor, which makes it practical.

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Discourse and Translation Analysis of Nominalization in Legal Text: A Corpus-Based Study

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[Abstract] *English language is characterized by a high density of nouns. The nominalization phenomenon is even more prevalent in legal text, which to some extent, accounts for its precise, solemn and highly formal style. This paper is designed to illustrate the nominalization phenomenon in different genres and the reason for its preponderance in English legal text, as well as the existing problems in its translation into Chinese. Also suggested are relevant strategies to overcome these obstacles and facilitate the translation of English nominalization structure.*

[Keywords] *nominalization; legal English; corpus; translation analysis*

Introduction

Nominalization is a prevalent linguistic phenomenon in English, especially in written English. The study of nominalization has aroused many scholars' interests, both at home and abroad. Numerous studies have been conducted on nominalization in English for science and technology presenting the trend of high frequencies of nominalization in such genre, but similar research which reveals the instances of nominalization in legal English are rare. It is even less frequent to conduct empirical studies on nominalization in legal English. Thus, it is worthwhile and necessary to conduct empirical study on nominalization phenomenon in legal English. A corpus-based study will present us with a more scientific and reliable account of characteristic of nominalization in legal English. This study aims for a corpus-based investigation into the distributional characteristics of nominalization in legal discourses, analyzing their functions and providing a qualitative analysis of the translation of nominalizations. The paper first reviews the conceptualization of nominalization, as well as the corpus-based study on legal English. In addition, it addresses the research methodology of the present study in terms of instruments and data collection. Finally, it provides a detailed discussion on the nominalization and its most frequent structure in legal English.

Literature Review

There are varied views towards the definition of nominalization. Halliday (2000) provided the definition of nominalization in his book *An Introduction to Functional Grammar*, "Nominalization refers to any element or group of elements which can function as a noun or a noun group in a clause including clauses, nominalized adjectives or verbs, etc." Nominalization can be divided into two types according to its functions in a clause: clausal nominalization and lexical nominalization. Different suffixes of nominalizations are illustrated by two categories of the most frequently used suffixes of nominalizations, *-tion/-sion, -ment, -ure, -ity, -ness, -ance/-ancy, -ence/-ency, -th* (their plural forms included) and gerundive nominalizations *-ing* (It has the properties of a noun or a noun phrase).

In *A Comprehensive Grammar of the English Language*, noun suffixes are divided into denominal noun suffixes, including *-age, -ship, -ism, -hood, -dom, -er*; deverbal noun suffixes, such as *-ant, -ment, -ee, -ing, -ation*; and de-adjectival noun suffixes like *-ity, -ness* (Quirk, & Randolph, 1985). In this study,

the noun suffixes including *-tion*, *-sion*, *-ment*, *-ity* and *-ness* (including their plural forms) were chosen to analyze in detail. We took a narrow sense of definition, focusing on the lexical/morphological level, and studied the nominalized word or word group which was derived from verbs and adjectives.

Several studies have elaborated on nominalization and grammatical metaphor. Emerging from a larger, corpus-assisted analysis of the Chinese Longitudinal Learner Corpus (CLLC), Liardét (2016) proposed a nuanced framework that characterizes the deployment of nominalizations in academic discourse, both qualitatively and quantitatively. Barrata's study investigated how students developed their use of nominalizations by analyzing the academic writing of six undergraduate students throughout each year of their degree course. It suggested that the students demonstrated proficiency with regard to their nominalization development (Barrata, 2010).

L. Heyvaert (2003) took a cognitive functional approach to examine nominalization in English. This approach elaborated on the internal functional organization of nominal and clausal structure. By examining the way that critical discourse is written, Michael Bilig (2008) warned of the danger of nominalization, calling for more power to verbs and held that critical analysis requires clear thinking and clear writing.

Wang Jinjun (2003) proved that the more formal the text, the more frequently nominalization occurs by analyzing the proportion that nominalization accounts for in different genres. Zhu Yongsheng (2006) discussed nominalization and verbalization from the perspective of Halliday's Grammatical Metaphor. On the basis of a self-built (Corpus of Taiwan's Environmental Protection Law) and using the tool *Paraconc*, Zhu Qinghua found out nominalization is prevalent in the corpus (2012).

Previous research on nominalization in English for science and technology suggests that such genre demonstrates an inclination towards nominalization. The style of legal language is characterized by sobriety, preciseness and conciseness. However, the same research revealed the instances of nominalization in legal English are rare. It is even rarer to conduct empirical studies on nominalization in legal English and explain the structural relationship within nominalizations.

Research Method

PKU Law, English for Science and Technology in Shanghai Jiao Tong University (JDEST), and British National Corpus (BNC) were chosen as the source of corpora to conduct a comparative study with the nominalization feature in legal discourses highlighted in the study. A brief introduction to the three corpora is given below.

PKU Law is bilingual and was established by Peking University Law School in 1985. The translated texts amount to more than 150 thousand and every week it will upload 20 translated texts in average and new translation works could be available in 3 to 7 days after the introduction of a new law. The translated versions of laws from PKU Law were randomly chosen.

The corpus of JDEST is considered as representative of English for science and technology. It consists of 5 million tokens and collects scientific articles covering subject areas including Computers, Mechanics, Physics, Physical Engineering, etc. In this study, the size of JDEST is only 3.6 million. BNC is considered as a representative of general English. It covers both spoken and written language from a wide range of genres so it can provide authoritative support for the study. The result of self-built corpus is compared to Song Yan's study for reference (2012).

Antconc 3.2.1w served as the research instrument in this study. *Antconc 3.2.1w* is equipped with the functions of *Word List*, *Cluster*, *Concordance*, *File View*, and *N-gram*. They were all used to compile poly-words, collocations, institutionalized expressions, sentence flames and heads in the corpus text. By *Word*

List, we may find words arranged from the high frequency to the low frequency. Cluster can list the neighboring word cluster of the retrieved word. With Concordance applied, all sentences containing the retrieved word will be clearly shown. With File Review, we can have a clear look at sentences and context where the retrieved word is located.

Retrieved by Antconc 3.2.1w, the type, token, type/token ratio of the nominal in each corpus are listed as follows:

Table 1. Type, Token, and Type/Token Ratio

Corpus	PKU (self-built)	JDEST	BNC
type	6961	80306	379216
token	199944	359484	99149736
type/token	0.035	0.0223	0.0038

Data Collection

It has been discussed that suffixation is the principal advice to realize nominalizations. As there are so many suffixes that can realize nominalizations, we only focused on the most frequently used suffixes: *-tion*, *-sion*, *-ment*, *-ity*, *-ness*. We first searched out all the nominalizations ending with *-tion*, *-sion*, *-ment*, *-ity*, *-ness* (including their plural forms) and then contrasted the overall frequencies of different nominalization endings in different corpora and analyzed the characteristics of nominalization in legal English. Then we got a raw result of the proportion of suffixes in each corpus, which is shown in the following table.

Table 2. Raw Proportion of Suffixes in Each Corpus

	PKU		JDESTJD		BNC	
-tion	8490	79081	1060902	1.07%	2.20%	4.2%
-sion	1320	10424	198299	0.20%	0.29%	0.66%
-ment	4374	17973	436259	0.44%	0.50%	2.19%
-ity	3876	23005	356939	0.36%	0.64%	1.94%

Though the distributions of nominalizations ending with these suffixes can represent the distributions of the overall nominalizations in three corpora, the frequency of nominalization may not be very accurate since there are many nouns ending with the frequently used suffixes but not belonging to nominalization. We manually excluded the nouns with the frequently used suffixes but not belonging to nominalizations, such as “moment”, “element”, “environment”, “section”, “city”, and “session”. Finally, we obtained the precise results of proportion of suffixes in each corpus.

Table 3. Precise Proportion of Suffixes in Each Corpus

	PKU		JDEST		BNC	
-tion	7775	79081	1060902	0.86%	1.84%	3.80%
-sion	1262	10424	198299	0.14%	0.25%	0.62%
-ment	2885	17973	436259	0.33%	0.37%	1.41%
-ity	3455	23005	356939	0.27%	0.51%	1.68%

Results and Discussion

We can figure out from the table that *-tion*, *-ment*, *-ity* are the most productive suffixes in the three corpora, whereas the *-sion* and *-ness* are less productive. Furthermore, the suffixes, as the primary way to achieve nominalizations, are more frequently occurring in legal English than that in EST (English for Science and Technology) and general English. Once previously stated by Yang Fengning, the more formal an English

text, the more common nominalizations used in the text (1996). Then the conclusion can be drawn that legal English is more formal than English for Science and Technology. The frequent occurrence of nominalizations highly condenses and simplifies the language with an impersonal tone by deleting the agent, which embodies the regularity, accuracy and rigorousness of legal text, which renders the legal discourse more solemn, precise and authoritative (Zhao, 2006).

Among the existing forms of nominalization, the nominalization structure “*the+n+of*” is the most frequently used, which renders it worthwhile and significant for further analysis. The following table unveils the proportion of “*the+n+of*” in nominalizations.

Table 4. The Proportion of “The+N+Of” Structure in Nominalizations

	Frequency	Proportion
The implementation of	56	64%
Implementation	88	
The establishment of	44	71%
Establishment	62	
The ratification of	6	67%
Ratification	9	
The approval of	93	43%
Approval	216	

Looking into the inner structure, the nominal and the noun after “of” can either constitute subject-predicate relationship or predicate-object relationship. In the first example, “participate” and “the elderly” form the subject-predicate relationship. In the second example, “implementation” and “energy conservative plans” form the predicate-object relationship. The nominal “participation” and “implementation” are respectively derived from the verbs “participate” and “implement” and establishes a new subject-predicate relationship and predicate-object relationship. According to Smirnova (2015), the reason why the two nominals and the nouns after “of” constitute different grammatical relationships should be explained by the lexical semantic properties of the head nouns and she proposed that the mapping of arguments in nominal is akin to argument alternations in the verbal domain (Smirnova, 2015). The strength of deverbal nominal lies in its fewer morphological changes considering that verbs should correspond to subject, object, complement as well as adverbial. The more constraints the verb is subject to, the less flexible it is used (Zhou, 2003). In contrast, the nominalization structure is much freer since it can condense a sentence into a noun-centered nominal phrase, which increases the content density and embodies the formality of the text.

e.g. ensure the participation of the elderly in social, economic and cultural life. (from PKU Law)

确保老年人参与社会，经济和文化生活

e.g. and organize the implementation of energy conservation plans. (from PKU law)

组织实施节能计划。

The translated Chinese version “*the+n+of*” varied from the English version in parts of the speech. The form is nominalization structure in English, while the corresponding Chinese translations tend to be in verbal structure. The originally prepositional structure in English is translated into independent small sentences. This difference embodies the dissimilarities between the two languages in thought and culture.

e.g. The formulation and revision of the constitution of a stock exchange shall be subject to the approval of the securities regulatory authority under the State Council. (from PKU Law)

证券交易所章程的制定和修改，必须经国务院证券监督管理机构批准。

e.g. Chapter II Formulation and Implementation of Population Development Planning
第二章 人口发展规划的制定与实施

In the above two examples, nominalization structure is translated in different ways. In the first example, “The formulation and revision of” is also translated into noun form “章程的制定和修改” in Chinese. While in the second half of the sentence, the corresponding Chinese translation of “the approval of” appears in verbal structure “(管理机构) 批准”. The noun form “章程的制定和修改” is adopted for the purpose that the subject can be ignored. It is the act of formulating and revising rather than the subject that needs to be overstated. In the second example, the nominalized noun “formulation and implementation” is also in noun form “制定和实施” when translated into Chinese. As Chinese is a verbalized language, generally it is less common for strong verbs like “制定” and “实施” in Chinese to be used as nouns. The translation into noun form can be explained by its appearance as a title which calls for formality and objectiveness. Legal translation is different from the translation of common texts. Understanding the dissimilarities may guide us to find the suitable translation. As stated by Hu and Cheng, legal translators need to be alert to the influence of ordinary language, use reliable reference tools for legal language, improve their legal knowledge, enhance proficiency in the target language and source language, and mind the peculiar characteristics of legal language (2016).

Conclusion and Implications

The major findings of the study are that nominalizations are more prominent in legal English compared to English for science and technology and general English. The frequent occurrence of nominalizations in legal discourse demonstrates the conciseness, abstractness and objectivity of legal English, which renders the legal discourse more solemn and authoritative. “*the+n+of*” is the most commonly used structure in nominalizations. As proposed by Smirnova (2015), the mapping of arguments in nominal is akin to argument alternations in the verbal domain. In a sense, it explains the phenomenon that nominal and the nouns after form different grammatical relationships. However, limitation of the study also exists. Firstly, only suffixation is considered to generate nominalizations, conversion not considered. As for the suffixation, only five suffixes are under discussion, while gerunds are not investigated. Besides, the extractions from the corpora are limited, the study is based on the samples extracted randomly, and therefore the result cannot be applied to all different situations.

The implication of the results is that attention and research interests about nominalization can be shifted to legal text rather than the mere focus on English for science and technology or academic writing. As is revealed by the results, nominalizations are more prominent in legal text compared to other genres. Furthermore, the translation pattern of nominalization structure is also significant for further research.

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A Solution to the Problems in Large-Scale Corpus Construction for Police Translation

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[Abstract] *With transnational crime cases increasing yearly and the international policing cooperation becoming more regular, it is necessary to improve the rapid response ability of police translation. To cope with this challenge, the best way is to adopt the big data translation technology. The two milestones of this technology are the CAT and MT modes which are based on translation corpora. The bigger the corpora, the better their effects. But large-scale translation corpora are now in short supply. Therefore, we need to carry out research on the construction of large-scale translation corpora.*

[Keywords] *big data translation technology; corpora; corpus noise reduction; value engineering; performance-price ratio*

Introduction

In recent years, with the increasing rate of foreign-related cases and growing international police cooperation, rapid response ability is in great demand in terms of police translation. To tackle this challenge, it is desirable for the police departments to adopt big data translation technology instead of the traditional human translation mode. Towards this end, the optimum option is the use of “CAT + MT” translation mode. But this translation mode needs the support of corpora. The more corpora a CAT is equipped with, the higher its efficacy will be. Unfortunately, large-scale translation corpora are in short supply at present. Worse still, the police departments are facing an even more critical shortage of corpora due to the fact that, in many cases, it is not permitted for them to use the corpus resources on the public network platforms because their documents to be translated often require confidentiality. Therefore, in order to improve the rapid response ability of police translation, it is imperative to construct large-scale translation corpora in the police departments.

How to construct large-scale translation corpora? To make an extensive discussion on this issue, we must first have a clear picture of the corpora types and the type defined in this paper. As to the types of corpora, they can be categorized into monolingual corpus, bilingual corpus and multilingual corpus. The corpus discussed in this paper is a bilingual one, and to be specific, a bilingual parallel translation corpus used for CAT and MT. A bilingual parallel translation corpus can then be subdivided into passage corpus, sentence corpus and phrase corpus. The construction of a passage corpus is relatively easy. A passage unit, however, is too large to be used for searching specific sentences or phrases while translating, so it is of no use to CAT and MT. Therefore, this type of corpus is widely rejected by the CAT and MT communities. The corpora with a high value the sentence and phrase ones. A sentence corpus is usually called a sentence database or a TM (translation memory). Strictly speaking, a TM should include both a sentence database and a TB (termbase), but it is relatively easier to construct a TB than a sentence database, and there have been many successful examples of electronic dictionaries and TB constructions such as the 10 million TB. There is no sentence database in the SCAT software, and sentence databases are more badly needed than termbases. This is why a TM often means a sentence database in the CAT community. How to construct a

sentence database quickly and efficiently has become a problem which is more difficult and needs to be solved more urgently than a TB. It is for this reason that all the corpora hereinafter refer to sentence databases.

The Current Situation and Existing Problems of Corpus Construction in China

The first step of corpus construction is to determine the size of the corpus to be constructed, which, however, depends on its purpose. If the purpose aim is research or teaching, its goal is characterized by a specific directivity, and hence, the corpus to be constructed will also feature a specific directivity, and therefore will be limited in scale. Accordingly, the professional scope covered by the corpus, the representativeness, synchronicity/diachronicity and language type are also limited, and therefore, the corpus scale is small or medium-sized. In police departments, however, given the fact that the corpus discussed in this paper is used mainly for police translation, and that crimes may occur in any field and any profession, the technology used and the social phenomenon involved in criminal investigation may thus cover all fields and professions, the scope of material selection for police translation corpora is infinite in terms of professional fields and synchronicity/diachronicity, and therefore, the corpus scale should be large or even super-large-sized.

In that connection, in spite of some achievements we have made, the available corpora are far from enough to meet the demand for CAT and MT. One reason for this is that the task for a large-scale translation corpus construction is so formidable that it is almost impossible for a few people to complete it within a few years. The other reason is that there is a lack of scholars who focus on corpus construction. According to related statistics from P. R. China, there were no papers on “Chinese-English Parallel Corpus” before 2002, and there were only 61 papers published from 2002 to 2014. Their research topic statistics are shown in the following table (Zhai, 2015):

Table 1. Chinese-English Parallel Corpus Research Topics Statistics (2002-2014)

Themes	Construction	English translation of words (sentences)	Translation of slang or culture	Dictionary study and compiling	Align or label	Discourse and semantic text	Translation (teaching)	Others
Number of papers	15	17	4	6	7	7	3	2
Proportion	24.7	27.85	6.6	9.85	11.45	11.45	4.9	3.25

According to the above table, there were 15 papers on corpus construction, accounting for only about 24.7% of the total, almost all of which, however, focused on study purposes. In addition, it is pointed out that “the corpus construction purposes may be sorted into 5 aspects: a study on the law of translation and translation strategies, a study on the translation language features and translation norms, a study on oral interpretation, a study on translation teaching, a study on the influence of translation on language. And different types and sizes of corpora are required for different purposes” (Zhang, 2012). These five aspects generally reflected the main purposes of corpus construction in the Chinese academic circle. There were almost no papers on large or medium-sized corpus construction for the purpose of translation.

Nevertheless, in China, remarkable progress has been made in corpus construction, such as “The English-Chinese Bilingual Corpus of Harbin Institute of Technology, the Bilingual Corpus of the Institute of Computational Linguistics of Peking University, the English-Chinese Bilingual Corpus of the Northeastern University, English-Chinese Literature Corpus of the Foreign Language Teaching and

Research Press, the English-Chinese Bilingual Corpus of the Language Institute of the State Language Commission, the English-Chinese Bilingual Corpus of the CAS Software Institute, the English-Chinese Bilingual Corpus of the CAS Automation Institute, the Versatile English-Chinese Bilingual Corpus of the Beijing Foreign Studies University, the English-Chinese Parallel Corpus of the Nanjing Institute of International Relations, ‘A Dream of Red Mansions’ Parallel Corpus, and the Legal Corpus, etc.” (Huang, Fan, Li, & Zhang, 2016). In addition to these corpora, there have been many other ones that have been made in China, but most of them are at the level of less than a million sentence pairs, which fall within the small scale. Besides, “in 2010 Professor Wang Kefei presided over ‘the construction and processing of the large English-Chinese Parallel Corpus under the major bidding project of the National Social Science Fund’, which also includes a number of professional bilingual corpora to be constructed and developed.” (Cui & Wang, 2013) According to the intermediate inspection report of the National Philosophy and Social Planning Office: “Under the guidance of the chief expert, the first sub task group of the project completed the overall design and classification framework of the English-Chinese bilingual parallel corpus which contains more than 100 million Chinese characters and English words.” How many sentence pairs are there in this corpus with more than 100 million Chinese characters and English words? According to the statistical data accumulated by the author, the ration of Chinese characters and English words to sentence pairs is 51/1. If calculated by this ratio, 100 million Chinese characters and English words are equivalent to 1.96 million sentence pairs. Of course, the actual sentence pair number in the corpus is not this figure, because no two corpora can have exactly the same number of sentence pairs. But from this reference data it can be seen that although the size of this corpus is large enough for research or teaching purposes, it is too small for CAT and MT purposes. In recent years, however, the Tmxmall cloud based translation corpus platform established by Shanghai Yizhe InfoTech Co., Ltd. and the cloud based translation corpus platform being built by the UTH (uTransHub Technologies Co., Ltd.) are so remarkable for their huge scale goals and the attractive prospects. But there is yet still a long way to go to achieve their ideal goals.

The above situation shows that the shortage of large-scale corpora is the bottleneck that is restricting the improvement of the CAT and MT efficiencies. In order to break through this bottleneck, we need to study how to speed up the construction of large-scale corpora.

There are three ways to construct corpora: First, the sentence pairs translated by means of a CAT software may be saved as a TM. In this painfully slow construction method, we can get only a corpus with “high quality but small quantity”, and hence, it is impossible for us to construct a large corpus. Second, the CAT bilingual alignment function may be used to make a corpus with the collected bilingual materials. As for bilingual alignment, the SCAT software is a good tool. “The SCAT's automatic alignment function is so powerful that its exported file can easily be converted into a variety of bilingual corpus formats of other CAT software” (Yu, 2013). The accuracy of the SCAT alignment is generally between 70% and 90% (depending on the text content). But even a small number of automatic alignment errors need manual inspection and correction over the full text. In so doing, the workload is too heavy, and the constructing speed is also very slow. Therefore, this method is also a “high quality but small quantity” scheme, by which it is difficult to build a large corpus. The third way is to collect the corpora made by other people. Since the first CAT software Trados came out about 20 years ago, thousands of people around the world have been using various methods to make corpora. In order to speed up the corpus production rate, quite a few people have written some automatic alignment programs. But the corpora produced by this method contain a lot of impurities because the artificial intelligence technology is immature at present. These corpus impurities are also known as “corpus noises”, which can be classified as: 1) translation errors; 2) alignment disorder;

3) unreadable code; 4) nonverbal symbols; 5) more than two English words connected together; 6) original without translation; 7) translation without original; 8) obviously incomplete translation; 9) ultra-long or short sentence pairs, etc. If we tried to remove these corpus noises by manual operation, it would be impossible for us to accomplish the task because the workload would be so heavy that it would go beyond human capacity. Against such a background, if we abandoned such corpora in pursuit of high precision, that means the labor fruits produced by thousands of people all over the world in the past 20 years would have to be canceled. This would be a huge waste. Contrary, if we make use of these corpora, the quality is rather poor. Therefore, such method is “large quantity but poor quality”, and cannot meet the usage requirements of CAT and MT.

All of this shows that the three above-mentioned kinds of corpus constructing methods have their limitations. Consequently, we are stuck in a dilemma of taking either a “high quality but small quantity” corpus or a “large quantity but poor quality” one. These are just the existing problems and difficulties we are facing in the construction of large corpora.

The Cause of Difficulties in the Construction of Large Corpora

In order to construct a large corpus, so many constructors have tried every means to make it possible. But nowadays, we are still facing the problems which have existed long before but have not yet solved, such as: “most of the methods adopted in the corpus construction is to employ a group of experts, spend a lot of manpower and material resources in the data collection, arrangement and processing. Therefore, in the corpus construction at present, there exist the following common defects: too much manual work, low level of automation; limited scale, insufficient representation; large cost and long constructing period” (Li, Zhu, & Qian, 2008). As a result, it is still difficult to make a large corpus even though large amounts of manpower, material resources and time have been invested. Why is it so difficult? To answer this question, we need to analyze it from the perspective of value engineering:

As we know, in the field of engineering construction, a value engineering assessment needs to be made before selecting a design scheme at the beginning of planning a project. “Value engineering, also known as value analysis, is a method of combining function with cost, and technology with economy... The basic principle formula of value engineering is: $V = F/C$ ” (Ding & Fong, 2014), where, V - Value (or called performance-price ratio); F - Function (or called performance); C - Cost. As can be seen from the formula, in order to maximize the value, the Function should be as high as possible, and the Cost should be as low as possible. But the Function and Cost are contradictory to each other. According to value engineering theory, the total product cost $C = C_1 + C_2$; where C_1 is the production cost and C_2 is the use-&-maintenance cost. “To some extent, there is a reciprocal relationship between the production cost and the use-&-maintenance cost. With the increase of the product function level, the production cost C_1 will increase, and the use-&-maintenance cost C_2 will decrease (Ding & Fong, 2014). In line with this varying pattern, if we want to get a very high function, the production cost C_1 will be very high, and the total cost C will also be very high, so the value V will be very low. From the perspective of value engineering, this is a poor engineering design scheme.

The goal of value engineering is to find the minimum value C_{\min} of the total product cost under the premise of ensuring the basic product function. That is to say, “the purpose of value engineering is neither simply the pursuit of low cost level, nor the myopic single-minded pursuit of high level of functionality or multi-function but strive to properly handle the opposite but unified relationship between the function and cost, improve the level of their ratio, so as to get an optimal configuration of the function and cost” (Ding

& Fong, 2014). This combined analysis of the product function and its production cost with a purpose to get the best product value (performance-price ratio) is just the value engineering analysis method.

As for the construction of a large-scale corpus, it is undoubtedly a large-scale construction project, for which a value engineering analysis should be carried out. But in the current corpus construction process, there is a tendency to pursue high precision. In order to ensure the accuracy of “data collection (including scanning, identification, proofreading), every step of work such as preprocessing, cutting, annotation, alignment, is not only heavy, but also time consuming, because the corpus processing need to be as detailed and accurate as possible, in order to ensure the future searching accuracy of the corpus. As a result, each construction period of an accurate corpus with a moderate scale is so long” (Cai, Duan, & Zhu , 2013). According to the doctrine of value engineering, this high precision construction scheme is just equivalent to a plan of very high F value, which will make the production cost C_1 extremely high, and its performance-price ratio V very low.

On the contrary, another tendency in corpus construction goes for quantity instead of quality. This is the aforementioned method of large-scale construction by means of an automatic alignment program. Constructed by this method, the F value is rather low. But it still needs some production cost C_1 . And its use cost C_2 will be very high. So, the total cost will be so high and the V value so low.

To sum up, these two tendencies will result in two results: 1) the F value is higher, but the C_1 value is extremely high; 2) the F value is rather low, but the C value is still high. Both of these two methods will lead to a low V value. And a corpus with a low V value is difficult to meet the functional requirements of CAT and MT. So, the problem we face is not difficult to construct a “large corpus”, but difficult to construct a large corpus with a high V value. The V value is too low. This is the very reason why an optimal large corpus is difficult to build.

A Solution to the Problem of How to Construct a Large Corpus

In order to build a large corpus with a high V value, we must find a way to increase the V value. Judging from the value engineering formula $V = F/C$, if we can appropriately reduce the product function F value under the premise of meeting the needs of basic functional requirements, and at the same time significantly cut down on the production cost C_1 , and keep C_2 value more or less unchanged, then the V value may be increased.

In this case, the question is how we can properly reduce the product function F value. In the value engineering, the function can be subdivided into basic function, auxiliary function, unnecessary function, redundant function, surplus function, etc. Obviously, we should ensure to the product a basic function as well as an appropriate auxiliary function, rather than an unnecessary, redundant or surplus function. Only in this way can we properly reduce the F value.

Then, what is an unnecessary function, redundant function or surplus function? To seek the answer, let's see a case in the industrial production. In the industrial product manufacturing field, it is impossible to make a product absolutely free of deviation. In order to solve this problem, an allowable deviation known as tolerance will be stipulated. As long as the product does not exceed the tolerance, the product may be deemed as a qualified one. By doing so, an effect of “F value slightly down, C value substantially down” may be acquired. Accordingly, a high V value can be obtained, and the product profitability may be ensured. If we blindly seek a high accuracy, and allow no proper deviation, that means we are in pursuit of unnecessary, redundant and surplus functions. Such a production plan will inevitably result in a low V value and suffer a deficit in business.

Similarly, we may construct a corpus in accordance with this approach: if such small deviation (i.e., corpus noise) is permitted in the corpus construction, we may properly reduce the F value under the premise of ensuring functional requirements of the corpus. In this way, we may substantially reduce the C value, and increase the V value. In this light, we can see that the key to successful construction of a large corpus with a high V value is how to make an optimal allocation of the product function and the cost characterized by “F value slightly down, C value substantially down”.

Such an “optimal allocation” design, however, requires sophisticated computer software technology. But so far, no complete and effective solution to such technology has appeared in the CAT and MT communities. In order to seek a solution, the author, through cooperative research with a software designer, found that Type 1-2 corpus noises described previously are difficult to eliminate automatically due to the limited level of the current artificial intelligence technology. However, it is possible to automatically eliminate Type 3-9 corpus noises with special software, which needs to be further developed. If such a software is successfully developed, then Type 3-9 corpus noises can be removed automatically. The sporadic residual corpus noises of Type 1-2 can be inspected and removed by a small amount of manual work. If few such noises are found, the corpus is accepted. If many such noises are found, the corpus is rejected. By doing so, a great amount of human resources can be saved, the construction cost C_1 can be substantially reduced, and as a result, the speed of corpus construction can be accelerated. The corpus made in this way contains only a few noises because Type 3-9 noises are basically removed, with only a small amount of Type 1-2 noises remaining.

Does this kind of corpus with a few noises meets the usage requirements? Yes, because a CAT translator has to examine and select the sentence pairs whether there are noises or not in the corpus. And further than that, the translator will usually modify the selected sentence pairs more or less according to different contexts. The noises such as errors or impurities in the corpus are impossible to be chosen for use by the translator. It is good to have a corpus without any noise. But if there are a few noises in it, that is no big deal. In the translation process, what matters most is that you can find suitable sentence pairs in the corpus, which means you need a corpus as large as possible. If a corpus is abandoned due to its few noises for the purpose of pursuing a high precision corpus, the corpus thus constructed will be so small that few sentence pairs can be found for reference in doing translation. This approach of excessive pursuit of a high precision corpus without any noise will lead to getting half the results with twice the effort; hence, it is of little practical use.

On the other hand, the amount of corpora required for MT is much larger than that of CAT, and the quality of its translation is much poorer than that of CAT. As it stands now, the translation produced by MT can only be used for inexact reference, and almost no high accuracy translation can be expected from it. Compared with the large number of translation errors produced by MT, a small number of deviations in the corpus are virtually negligible. Obviously, it is not necessary to excessively pursue a high precision corpus, because excessive pursuit of high precision will have to be carried out at the expense of quantity. Without a large quantity of corpora to support the MT, the translation quality of MT will be even worse, which will inevitably lead to a result of “high quality but low efficiency”.

It is true that, as to the deletion of the noise, a CAT translator will spend a little more time on a corpus with a few noises than a corpus without any noises. However, the time spent on such noise deletion is trivial compared with the time spent on thinking about how to translate. The thinking time which is much longer is just the use-&-maintenance cost C_2 . When F decreases slightly, C_2 will also increase slightly, but C_1 will decrease substantially, so $C = C_1 + C_2$ will also be reduced substantially. Then the corpus' value

(performance-price ratio) $V = F/C$ will thus be greatly increased. This kind of corpus with a high performance-price ratio is the so called “qualified” product with an allowable deviation (or tolerance). Therefore, based on the principle of value engineering and the philosophy of high performance-price ratio, large corpus construction can thus be carried out efficiently and quickly by means of automatic software processing instead of manual operation. Only in this way can the problem of how to construct a large corpus under the condition of low cost (including human and financial resources) be finally solved.

But in doing so, we need an automatic processing technique, i.e. software to process the above-mentioned Type 3-9 noises. To this end, the author, after a long-term cooperation with a software designer, has developed a “sentence database processing software”. For details, please see “A Software Solution to the Problems Arising from the Construction of Translation Corpora” (Ding Hao, 2016). In addition to its strong “noise reduction” function, the software can do repetition detection and deleting against a new corpus under the background of hundreds of millions of old sentence pairs. In addition, it can also cut a corpus into a number of sub-corpora at your option. However, it is not yet able to deal with some special nonverbal symbols that exist in some corpora. What is more, some fake corpora have appeared in the market recently. The so-called fake corpora are new ones created by slightly altering the spaces, punctuations, or symbols in the sentences of the original corpora. By doing so, more sentence pairs can be created, so as to benefit more in exchange of corpora with others or selling them. This is an unjust enrichment technical method. These fake sentence pairs are repeated ones and hence, are redundant. If too many of them are saved in a computer, the computer speed will be slowed, and the CAT efficiency will be reduced accordingly. Therefore, we need an automatic detection method to identify and clear them. But the current CAT software in the market can do nothing against this, nor can the aforementioned “sentence database processing software” can do much better. Nevertheless, much progress has been made toward this direction in the research carried out by the author and the designer. For the time being, the existing software is defined as a junior version; in the near future it will be improved and upgraded into a senior one, which will feature better performance including solving the fake corpora problem.

Once such a senior version is successfully developed, the corpus construction can then be carried out by means of a data collection method, as well as the translation memory saving and bilingual alignment methods. Of the three methods, the data collection method is a large-scale construction one which needs the sentence database processing software to process the corpus being constructed. The corpus thus processed will be characterized by a “qualified” F value and a low C value, thereby increasing the V value. With these three methods as well as the sentence database processing software, the dream of large quality corpora being constructed efficiently, quickly and economically will finally come true.

Conclusion

In order to further improve the efficiency of CAT and MT, it is necessary to construct large scale corpora. To achieve this goal successfully, we should not blindly pursue high precision. From the perspective of value engineering, to pursue high precision is to pursue an unnecessary function or a surplus function. If a corpus is constructed this way, it will be of low performance-price ratio, or in other words, neither economic, nor possible to make it large enough. Therefore, while planning a corpus construction scheme, we should take into consideration not only the function from the technical perspective, but also the construction cost from the economic perspective for mass production purpose.

The precision of the software automatic corpus construction method suggested in this paper is slightly lower than that of the manual construction method, but its impact on the actual use of CAT and MT is

modest. As a profitable compensation, it can solve the traditional contradiction between “high quality but small quantity” and “poor quality but large quantity”, and therefore has considerable advantages for corpus construction speed and performance-price ratio. So, it is a large quality corpus construction scheme featuring low cost and high efficiency and is worthy of further research and promotion in the police departments concerning translation and other relevant departments.

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The Transition Mechanism of China's Legislative Language – Based Upon the Analysis of the Law of the PRC on Public Security Administration

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[Abstract] Legal articles are the language of the rules of conduct which are written by legislative organs in accordance with legal procedures. Then the administrative and judicial organs use them to balance, evaluate and regulate social relations through the structured discourse system. Although the increase, disappearance or adjustment of the legislative language is the superficial and low-level change of law, the exploration of the transition mechanism behind them can help us examine the development path of the economic, political and cultural changes. Law of the PRC on Public Security Administration or Regulation of the PRC on Public Security Administration are both close to social life. Therefore, they have the sample effect upon the research of the transition of China's legislative language.

[Keywords] legislative language; transition; mechanism

Introduction

Legal language is the carrier and basic element of law. However, the academic circle has not reached agreement with its definition. According to Liu Hongying's opinion, legal language can be understood in a broad or narrow sense. Narrowly, legal language is the same as legislative language, which is the language used by normative legal documents. Broadly, legal language includes legislative language, administrative and judicial language and legal theory language, which are the languages used by all the legal practitioners (Liu, H, 2003). Liu Weiming feels that legal language science is an emerging interdisciplinary field which focuses on legislative language and judicial language, comprehensively analyzes and researches upon the transition of legal language and uses the fundamental principles of applied language to solve the specific language problems in the legal practices. In summary, the present definitions are different in their categories, but the legislative language is an unavoidable level, because law is essentially the structured expression of the legislative language, and then based on this expression, regulates and adjusts social relations which are composed of rights (powers) and obligations. In this article, the authors will start from the level of legislative language and analyze the transition mechanism of China's legislative language based upon Law of the PRC on Public Security Administration.

Statistical Analysis of the Transition of Legislative Language

The increase, disappearance or adjustment of legislative language is the transition process from something to nothing, from nothing to something, or from this thing to that thing. This kind of transition should be analyzed in the context of legal texts and the modernization of rule of law. The Law of the PRC on Public Security Administration has five different texts; they are *Regulation of the PRC on Public Security Administration* in 1957 and in 1986, and *Law of the PRC on Public Security Administration* in 1994, in 2006, and in 2012, respectively. If there is no special mentioning hereinafter, the Law of the PRC on Public Security Administration refers to the 2012 version of the Law of the PRC on Public Security

Administration. Among these texts, the 1994 and 2012 versions are the amended versions. From these five texts, we can find some important wording changes.

Table 1. Disappearance of legislative language

No	1957	1986	1994	2006	2012
	Regulation of the PRC on Public Security Administration	Regulation of the PRC on Public Security Administration	Regulation of the PRC on Public Security Administration	Law of the PRC on Public Security Administration	Law of the PRC on Public Security Administration
1	Secret prostitute	Secret prostitute	Secret prostitute	--	--
2	Cast the blame on other people	--	--	--	--
3	--	Hooligan activities	Hooligan activities	--	--
4	Decree	--	--	--	--
5	Labor education and rehabilitation	Labor education and rehabilitation	Labor education and rehabilitation	--	--
6	Cooperatives	--	--	--	--
7	Registered permanent residence management	Registered permanent residence or ID card management	Registered permanent residence or ID card management	--	--
8	Township People's Committee	--	--	--	--
9	Labor substitution	--	--	--	--

The rapid economic, political and cultural developments since the reform and open to the outside directly pushed the reform of the law of public security and administration. The disappearance of some terms was due to the fact that we were unable to grasp their true meanings exactly, such as *hooligan activities*. The disappearance of some other terms was due to the change of social systems, such as *cooperatives*. Some terms disappeared because of the rearrangement of function in the police department, such as *registered permanent residence or ID card management*. This is because population management is separated from public security management.

Table 2. Increase of Legislative Language

No	1957	1986	1994	2006	2012
	Regulation of the PRC on Public Security Administration	Regulation of the PRC on Public Security Administration	Regulation of the PRC on Public Security Administration	Law of the PRC on Public Security Administration	Law of the PRC on Public Security Administration
1	--	Confess the fault	--	Extend a formal apology	Extend a formal apology
2	--	--	--	Religion and Qigong	Religion and Qigong
3	--	Admonition	Admonition	--	--
4	--	--	--	Administrative reconsideration	Administrative reconsideration

The increase of important terms has not been that many, which shows the stable inheritance relationship of the legislative regulation of public security administration in China. Of course, in order to conform to the important change of legal institutions, Law of the PRC on Public Security Administration adopted some new legal concepts. For example, the promulgation of Administrative Reconsideration Law created the concept of administrative reconsideration. *Religion* and *Qigong* didn't belong to the public security administration originally, however, it has been included in the Law of the PRC on Public Security Administration just because the legislator thinks that it has the attributes of public security administration.

Table 3. Adjustment of Legislative Language

No	1957	1986	1994	2006	2012
	Regulation of the PRC on Public Security Administration	Regulation of the PRC on Public Security Administration	Regulation of the PRC on Public Security Administration	Law of the PRC on Public Security Administration	Law of the PRC on Public Security Administration
1	Fornication	Whoring	Whoring	Prostitution	Prostitution
2	Rumor whisper	Spread rumors to create trouble	Spread rumors	Spread rumors	Spread rumors
3	Arraignment	Interrogation	Interrogation	Inquiry	Inquiry
4	Repeated penalties without any change	Repeated recidivism without any change	Repeated recidivism without any change	Refuse to correct one's errors despite repeated education	Refuse to correct one's errors despite repeated education

With the rapid process of rule of law construction, the change and correction of legislative languages has become normal. For example, the change from *interrogation* to *inquiry* is a major change of the connotation of the term. To be more scientific, rigorous and accurate, some of the legislative terms are repeatedly changed, such as from *repeated penalties without any change* to *repeated recidivism without any change*, and again to *refuse to correct one's errors despite repeated education*. This kind of term change demonstrates that the role of Law of the PRC on Public Security Administration has shifted from punishment to education.

The Transition Mechanism of Legislative Language

Law is a social product. The institutional formation and reform is a complicated and multi-clue interaction process (Huntington, S. P., 1998). The transition of legislative language is also the logical result of the combined effects of multiple forces. Although the reasons for the transition are different, we can still find the transition mechanism of China's legislative language from the above-mentioned change of legal wording.

Institutional Reform is the Basic Reason for the Transition of Legislative Language

Since the reform and open to the outside, legislation and institutional reform have staggered forward. In the historical evolution of the past several decades, legislative language has been changing quietly in this reform process.

Disappearance of labor substitution. In the Regulation of the PRC on Public Security Administration of the year 1957, *labor substitution* was mentioned twice in Article Three and Article Seventeen, respectively. During detention period, the food expenses of the detainees were borne by themselves. If they could not pay for the food expenses, they could use labor substitution. When public security police station and township people's committee perform detention, they can use labor substitution. Here, the two labor substitutions represent different meanings. The former one refers to the source of the food expenses of the detainees. Now, the food expenses in the prison are supplied by national financial subsidies. The detainees don't have to pay for them. The latter refers to the fact that, given the need for rural labor, the public security police station and township people's committee will not carry out detention, they use labor substitution instead. From 1986, the term of *labor substitution* disappeared in the provisions of those legal documents of public security administration.

Emergence of administrative reconsideration. Since 2006, the term *complaint* in the Law of the PRC on Public Security Administration has been changed to *administrative reconsideration*. The direct

reason for this change was the implementation of the Administrative Reconsideration Law in 1999. Now, the term *complaint* in legal documents usually refers to a kind of remedy to internal administrative conduct by unit staff. For example, if you disagree with the unit disposal, you can complain. Reconsideration is a kind of remedy to administrative conduct of the administrative organs. If you disagree, you can send your reconsideration request to their upper administrative organ or the government at the same level. This is a kind of self-check process by the administrative organs. Therefore, administrative reconsideration demonstrates the internal supervision of administrative management punishment as well as the beginning of a new institution that gives the parties a remedy of rights.

Disappearance of labor education and rehabilitation. The disappearance of *labor education* and *rehabilitation* in the Law of the PRC on Public Security Administration was due to the abolishment of the system of reeducation through labor. In terms of the legal sources, the Decision on the Issue of Reeducation through Labor, promulgated by the State Council on August, 1, 1957 and approved by the 78th session of the Standing Committee of the National People's Congress, was the earliest basis of the system of reeducation through labor (Standing Committee of the National People's Congress, 1957). On October 22 of the same year, *labor education* and *rehabilitation* appeared in the Regulation of the PRC on Public Security Administration approved by the 81st session of the Standing Committee of the National People's Congress (Standing Committee of the National People's Congress, 1957). In 2006 when the Regulation of the PRC on Public Security Administration was abolished, and the Law of the PRC on Public Security Administration was made, the term *labor education* and *rehabilitation* disappeared.

The Normative Expression of Legislative Language is the Internal Impetus of the Transition of Legislative Language

The modification of the Law of the PRC on Public Security Administration is every process of gradual normalization of legislation. The normative expression is the internal impetus of the transition of legislative language.

Disappearance of decree. The 32nd Article of the 1957 Regulation of the PRC on Public Security Administration provided that all the other articles in this Regulation except from Article Five to Article Fifteen can be applied to public security administration rules stipulated by public security administrative punishment, except as otherwise provided by laws or decrees. The term *decree* was only used in this version. Decree is another way of the expression of law in history and by folk people. It usually referred to the combination of law and order and it also included the rules promulgated by the governors. With the clear definition of the legislative levels by Constitution and the Legislation Law, the non-normative expression of the term of decree has become the history.

Disappearance of secret prostitute. Before 2006, the term *secret prostitute* was used in all the versions of the Regulation of the PRC on Public Security Administration. *Secret prostitute* is also called *private prostitution*, which means those prostitutes who secretly engage in prostitution activities without any official permission in some countries or regions. So, the term of *secret prostitute* has its specific context. In normative sense, prostitution has never been legalized in China. So, the "secret" in *secret prostitute* has no practical significance. It is doomed to disappear because of its non-normative expression.

Disappearance of cast the blame on other people. The term *cast the blame on other people* appeared in the 1957 Regulation of the PRC on Public Security Administration, which provided it as a legal plot of aggravation if you broke the Regulation of the PRC on Public Security Administration and cast the blame on other people. *Cast the blame on other people* has strong classical and subjective colors. Legal language

should be objective, concise and easy to understand. Legal language should demonstrate procedural justice and avoid preconceived ideas. So, the disappearance of the term of cast the blame on other people is definitely certain in the other versions.

The Deep Influence of Rule of Law Civilization is the External Impetus of the Transition of Legislative Language

The legislative language has a profound humanistic color. It has different time stamp in different social backgrounds. On one hand, legislative language is a very important part of rule of law civilization. It plays an important role in inheriting rule of law civilization. On the other hand, legislative language is deeply influenced by rule of law civilization which is the external impetus of the transition of legislative language.

Disappearance of hooligan activities. The Chinese Dictionary explains the *hooligan* in the following two aspects: the first refers to the hobo and further refers to people who don't attend to their proper work or duties and even do something evil. The second aspect refers to the use of dirty means and ugly behaviors. With social development, the term *hooligan* has extended its scope rapidly and reached far beyond its original meaning. For example, *hooligan activities* are usually used to refer to insults and molestation of women.

The term *hooligan activities* is more orally expressed. The 1979 Criminal Law began the sanction of hooligan activities, the 160th Article of which provided that the act of fighting, provoking trouble, insulting women, or doing other rogue activities constituted a crime of hooliganism. Therefore, the 1986 Regulation of the PRC on Public Security Administration also used the term of *hooligan activities*, providing that gang fighting, provoking trouble, insulting women or carrying out other hooligan activities broke the public security administration, and would receive public security administration punishment. In 1983, the Decision on Punishing Criminals of Seriously Endangering Social Security by the Standing Committee of the National People's Congress (also called the Yanda Decision) raised the legal penalty for the crime of hooliganism to death (Standing Committee of the National People's Congress, 1983). As we all know, it is hard to clearly define "other hooligan activities"; some of the harmful behavior that hinders social order is also categorized as the crime of hooliganism (a kind of pocket crime) just because the Criminal Law has no provision. The result is that different regions have different standards to convict and sentence, which is obviously inconsistent with the basic legal principles of criminal law. When the Law of the PRC on Public Security Administration was implemented in 2006, the irrational legislative language of *hooligan activities* disappeared as well. From the actual effect of view, this is the symbol of the progress of the rule of law civilization.

Transformation from interrogation to inquiry. *Interrogation* and *inquiry* are quite different in their meanings. *Interrogation* connotes the meaning of inquisition, questioning and blaming, which demonstrates unequal relations between the interrogator and the person who is interrogated. However, *inquiry* doesn't have this kind of difference in personality. In criminal proceedings, the trial, to the defendant or the crime suspect, is called an interrogation, but the trial, to the witnesses or victims, is called an inquiry. We can find the subtle distinction between these two concepts. Since the promulgation of the 2006 Law of the PRC on Public Security Administration, the *interrogation* of those people who break the public security administration was all changed into *inquiry*. The disappearance of *interrogation* reflects the notion of human rights respect and protection and distinguishes itself from the concept of an interrogation in criminal proceedings.

Shift from confessing the fault to extending a formal apology. Article 42 of the 1986 Regulation of the PRC on Public Security Administration provided that the public security organs shall confess the faults to those who are punished by mistake and return fines and confiscated property; in case the legal rights and interests of those who are so punished have been infringed upon, the loss shall be compensated for. Article 117 of the 2006 Law of the PRC on Public Security Administration provided that if the public security organ and the people's police unlawfully exercised their functions and powers and infringed upon the legitimate rights and interests of citizens, legal persons or other organizations, they shall extend their formal apologies; where damages are caused, they shall bear the responsibility for compensation according to law. These two articles demonstrate that if the punishment from public security organ is wrong, the legal consequence shifts from pure confessing the fault to extending a formal apology to the subject infringed upon. Confessing the fault is a kind of subjective attitude towards the objective fact of existence and it doesn't connote the meaning of clear responsibilities. Extending a formal apology is an actual action and it connotes the meaning of clear responsibilities. This kind of change reflects the progress of rule of law civilization behind. It is also a kind of limitation and supervision to public security responsibility and power.

The Basic Tendency of the Transition of Legislative Language

As an important law closely related to citizens, the Law of the PRC on Public Security Administration reflects the change of social life most intuitively. The transition of legislative language in this Law represents the basic tendency of the transition of legislative language in China.

Normalization

Legislative language provides a basic way for the legislator to accurately express the legislation intent. Legislative language should be rigorous and normative to guarantee its effective implementation and observation. From the evolution of the Law of the PRC on Public Security Administration, we can find the obvious tendency of the normalization of legislative language. For example, the disappearance of the terms of *decree*, *secret prostitute* and *rumor whisper* is a kind of correction to those non-normalization phenomena in legislative wording. In addition, in 2007, the Law Committee of the Standing Committee of the National People's Congress established an expert consultative committee on the normalization of Legislative language and formulated the implementation details of the expert consultative committee on the normalization of legislative language. All of these demonstrate that the normalization of legislative language is not only accepted in legislation, but it is also guaranteed by the working mechanism.

Professionalization

The professionalization of legal language is embodied in its specificity in legal circles. Legal language is different from daily language in its professionalization and uniqueness. Legal language keeps the characteristics of the pure professional language. Legislation is mainly made by legal experts, which represents the latest achievements in legal practice and legal research. Based on this, the written law is sometimes called legal expert law (Liu, H., 2003), and unwritten law is called judge-made law. Therefore, the code of laws is based upon highly developed legal knowledge and it is the embodiment of the legislative skills and developed legal knowledge of a certain country. The language in the code of laws is a professional language which is getting more away from natural language or daily life language. Only a minority of legal experts can use this kind of language as an instrument to explain and operate (Shu, G., 2000). Obviously, professionalization is a basic tendency of the modern legislative language. From the evolution and

development of the Law of the PRC on Public Security Administration, we can see the obvious tendency of professionalization of the legislative language.

Rule of Law Tendency

Rule of law tendency refers to the rule of law civilization behind the transition of legislative language. There are some possibilities of violating the rule of law spirit in the legislative language, which is unavoidable in the process of rule of law construction. With the improvement of the level of rule of law construction, the rule of law tendency of the legislative language cannot be ignored. The disappearance of such terms as *labor education*, *rehabilitation* and *hooligan activities*, and the transformation from *interrogation* to *inquiry* and from *confessing the fault* to *extending a formal apology*, all undoubtedly demonstrate the progress of rule of law civilization. The Law of the PRC on Public Security Administration not only has its substantive content, but also has procedural provisions. Therefore, the rule of law characteristics embodied from legislative language is more obvious and direct. The Law of PRC on the Standard Spoken and Written Chinese Language and Legislation Law is most closely related to the normalization and rule of law tendency of the legislative language. However, the two laws don't have special provisions about this. We suggest that in the future amendment of the laws, a separate chapter of Legislative Language Norm should be supplemented in the law. We can make the legislative language norm in the legislative skill norm as a part of the law, which is helpful to provide legislative support to the normalization and rule of law of the legislative language.

Conclusion

If the evolution of law focuses on the overall path and process of the legal system's retrogression from the present to the past, then the development of law is more concerned with the dynamic process of progress that the legal system can take now and in the future. Adapting to it, back to the past based on the 2012 text, we can understand the dynamic evolution of the legislative language. With the 1957 text as a reference to the future, we can understand the dynamic development of the legislative language. Both evolvement and development are manifested in the vanishing, increasing, adjusting and recovering of the legislative language under the combined action of the institutional reform, the normative requirements and the deep world civilization of the rule of law. At the same time, looking forward to the future based on the 2012 text, we can also predict the basic trend of the change of the legislative language in our country. Because of its own profound humanistic color, the legislative language has different imprinting times in different social backgrounds. However, the types, motivations and trends of legislative languages are basically the same. At the same time, after the legal language is structured into law, because of the actual change of the object of legal regulation, the legislative language also has the ability of limitation or expansion in its implementation.

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Legal Consideration on the Use of Weapons by the Police from the Perspective of Counter-Terrorism

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***[Abstract]** The enhancement of the social foundation, an increase in the level of armed forces and the strengthening of unexpected crime are the characteristics of the present terrorist activities. This generally requires that the counterbalanced intensity of counter-terrorism should be promoted, and the immediate problem is to enhance the police force in counterterrorism work. There are some vague areas in theory in terms of stipulating the use of weapons by the police in our country. In practice, there are also problems that are difficult to operate, and to some extent, they lag behind the actual needs of anti-terrorism work. Therefore, from an anti-terrorism point of view, we must first amend some relevant legal provisions on the use of weapons by the police forces. Secondly, we must clarify the connotation of the legal provisions on the use of weapons through judicial interpretations. Finally, we should establish a system of using weapons that meets the actual anti-terrorism needs in practice.*

***[Keywords]** anti-terrorism vision; the use of weapons; rights to use guns by police; legal consideration*

Introduction

The enhancement of the social foundation, an increase in the level of armed forces and the strengthening of the unexpected crime are the characteristics of the present terrorist activities. This generally requires that the counterbalanced intensity of counter-terrorism should be promoted, and the immediate problem is to enhance the police force in counterterrorism work. There are some vague areas in theory in terms of stipulating the use of police weapons, which lead to the phenomenon that the policeman “dare not to use, are not good at using, and are unable to use” weapons in actual combat. Based on the actual problems in anti-terrorist operations, some solutions should be put forward by thinking about the modification of some laws and regulations on the use of weapons by the police (Pang, 2015).

The Necessity of Equipping Police with Guns from the Perspective of Counter-Terrorism

The Social Foundation of Terrorism has been Strengthened

If the Kunming “3.01” case is a landmark node of China’s anti-terrorism strategy, China’s terrorist crimes not only have been confined to the frontier regions but have also developed from the specific border area to the hinterland with the transition of the social development pattern, and so terrorist crimes in China have developed from an “organized and team-oriented” to “lone wolf-style” approach and may take place at any

time in any densely populated field, both in the frontier and the hinterland. It is the reason that the social foundation of terrorism has been strengthened. Psychological studies show that in the event of a terrorist attack, 70%-80% of the population will suffer from a strong mental pain because of psychological traumatic stress disorder (Hu, & Huang, 2014), especially, due to the means used by the terrorists, such as explosions, arson, chopping and killing with knives and axes, bumping and rolling with cars, which not only have great lethality and destructive power, but also cause bloody terror at the crime scene and strongly stimulate the public's senses. If these acts cannot be stopped in time with weapons, then people's trust and confidence in the police will be severely damaged. Therefore, wearing firearms in the process of patrolling and enforcement of duty can serve to deter terrorists and prevent terrorist attacks.

Terrorists have Enhanced the Degree of Armed Forces

Throughout the world, in order to achieve the intention of intimidating society and coercing the country, the lengths terrorists go to commit crimes have gone extremely to absurd lengths, such as explosions, arson, poisoning, assassinations, hijackings, car crushing, smashing, and slaughtering, etc.; all of these are common methods. Actual examples include the St. Petersburg subway bombing on April 3, 2017 (Chen, W., 2017) and the shooting on the Champs Elysees in Paris, France, on April 21 of the same year, as well as the "4.23" incident in Bachu and the "3.01" terrorist attack in Kunming in China (Li & Ling, 2016). It can be seen from these violent incidents that terrorists' degree of bloodshed has continuously strengthened, the types of terrorist attacks have increased, and the harm to society has also grown. With the development of society, the current mode of terrorist attacks may also be escalated to mass-destruction weapons. Facing these new types of terrorist attacks, the police can stop the attacks with weapons in time to save the lives and property of the country and people.

The Paroxysmal Terrorist Activities have been Increased

Sudden occurrences of terrorist emergencies have generally taken place abruptly, so their intended targets are unprepared. It is hard for government agencies and innocent people to anticipate and accurately grasp when, where, when, and how they will take place. Once the incident occurs, it will immediately bring great panic and confusion to the community and the public. For example, in the "10.28" terrorist attacks on the Beijing Jinshui Bridge, terrorists drove across the safety line without any warning and detonated their vehicles, creating immediate disaster. Another example was the "3.01" terrorist attack at the Kunming Railway Station. The premeditated terrorists scattered in the railway station square, wielding machetes at the same time to kill unarmed and defenseless people in the square, causing 29 deaths and 143 injuries. According to news reports, the police on duty at that time did not even have a decent weapon in their hands when they faced the most vicious terrorists, so they were unable to stop the criminal acts of violent terrorists in time (Hu, T., 2016). These enabled the masses to understand that without a gun, the police cannot effectively contain crimes at the very beginning, which would threaten their own safety and lose their sense of security.

Analysis on the Current Problems of the Use of Police Weapons from a Legal Point of View

There is a Certain Fuzzy Zone in Theory

First of all, some provisions of the relevant laws and regulations are not clear. Article 62 of the Anti-Terrorism Law of the People's Republic of China: the Police, the Armed Police and other personnel who are equipped with or carry weapons according to law shall hold guns at the scene. Weapons may be used if

the terrorists use firearms, knives, lethal weapons or other dangerous methods after warning first. Weapons may be used directly in case of emergency or if the warning will lead to more serious consequences (Fu, 2017). In Article 9 of the People's Police Law of the People's Republic of China, "If the warning is ineffective, the police may use weapons as soon as they determine that there is one of the following emergency cases of violent criminal acts". The criterion of "determination" here is an objective criterion. For instance, in Item 3, there are clear regulations: "snatch or rob firearms and ammunition, explosions and highly toxic or other dangerous goods, seriously endangering public security". So, the use of weapons must have the objective existence of the criminal acts as specified in the preceding paragraph and the criminal acts should be "seriously endangering public safety". From the above, we can see that possessing guns and knives as per scenes mentioned in the Anti-Terrorism Law of the People's Republic of China is a *state*, while looting and robbery in the "People's Police Law of the People's Republic of China" is an *act*. So, it is a question of whether weapons should be used if a terrorist is armed with a gun, or if a violent terrorist attack is detected. Then, there is also controversy over whether the weapons should be used or not. Each police officer is different individual, and there are differences in physical qualities, physique and skills. When handling the same terrorist attacks, the intensity of the danger felt by each police officer is different. This requires the police to make a proper judgement whether to use weapons or not based on their own abilities and conduct of violent attacks. However, the relevant regulations do not provide a corresponding explanation for the determination of this standard.

It's Hard to Control the Intensity of Weapon Use in Practice

Article 4 of the Regulations on the Use of Police Equipment and Weapons by the People's Police of the People's Republic of China (hereinafter referred to as "the Regulations") stipulates that the principle of the use of weapons is to stop illegal and criminal acts and minimize casualties and property losses. According to this principle, even if in anti-terrorist operations, the principle of "the minimum use of force" (Zhou, H., 2010) should be observed by the police although it is on the premise of the legitimate use of weapons, which means a second shot cannot be fired if one shot can achieve the purpose of stopping the crime. Therefore, in practice, it is very difficult for the police to grasp accuracy of the limit: Suppression of illegal and criminal acts. For example, in the "3.01" terrorist attack at Kunming Railway Station, the SWAT member who fired five shots to knock down the mob admitted frankly in an interview that he was still considering whether it was legal to shoot after the rioters had been knocked down (Wang & Wang, 2016).

Laws and Regulations Lag Behind Practical Needs

For a long time, there have been phenomena in the use of weapons in the grassroots units for various reasons, including refusal, unwillingness, lack of daring, lack of skill, and inability to use weapons, and so on. It is clear that the appearance of these phenomena does not correspond with our efforts for anti-terrorist work. The reasons are caused by the serious lags of laws and regulations, which have been mainly manifested in the following aspects:

Urgency. It is an exceptionally urgent situation in facing a terrorist attack; the police must take immediate measures, or even use weapons to stop or kill terrorists. Before this process, the law stipulated that the police also needed to identify the scene before using a weapon and fulfilling the warning procedure.

Fatality. "Fatality" is the core feature of the use of police weapons. It can immediately deprive the lives of violent terrorists. However, according to Article 11 of the Regulations, the police should immediately stop using the weapon in any of the following circumstances: criminals cease to commit crimes

and obey the orders of the police, or criminals lose their ability to continue to commit crimes. It is obvious that this provision is not suitable for anti-terrorism work since there are also security risks involved in dealing with violent terrorist attacks.

Irreparability. The scene of the terror attacks is so critical. If it is required by law to promptly rescue the violent terrorist who has been stopped by police weapons, it means the police would lose precious time and limited police strength to stop other terroristic acts by the remaining violent terrorists. In actual practice, this is obviously contrary to counter-terrorism work.

Space factor. In recent years, many violent terrorist incidents have frequently occurred in places such as Xinjiang and Kunming. Weapon usage authority in these regions was relaxed by both laws and policies, which played an active role in using weapons by the police. However, in other regions, the law is generally applicable, and the legislative level of local regulations obviously does not meet the requirements of anti-terrorism work.

Suggestions on Improving the Legal Provisions on the Use of Police Weapons

Develop More Detailed Legal Norms

The procedures on the use of weapons should be refined and quantified legally, and the specific operational procedures and related legal situation in the Regulations should be further refined. For example, those who are, or are, planning to commit a violent act by using firearms, knives and other weapons or other dangerous methods should be warned first before police weapons are used. Article 9 of the Regulations stipulates that the weapons can be used directly if the warning is inefficient. But how to judge if the warning is inefficient? There should be a clear provision. As another example, the purpose of firing a weapon is to subdue, rather than kill the terrorists, so it should be clearly stated in the Regulations that the non-vital parts of the body, such as arms and legs should be the shooting target unless the only option is to kill the rioters. The violent terror “crisis situations” which are often encountered by the international and domestic police and easily classified should be incorporated in the counter-terrorism legal rules to enhance the operability of the weapons. Only in this way, can we avoid the situation where the police dare not to use weapons because of the concerns about illegally using guns.

Strengthen the Legal Effect

The Regulations play an important role in guiding the use of police weapons. However, this legislation relating to the right to life remains at the level of administrative law and it is very necessary to raise it to the legal level. Legislation can effectively straighten out the relationship between the upper law and the lower law to avoid the phenomena that the police have difficulty mastering the standard of using guns, have hesitation in using guns or dare not use them. In this way, there will be a uniform standard of using police weapons and it will be easy for the police to identify whether weapons “can be used” or “cannot be used” at the scene of a violent attack. If the Regulations are to be upgraded into law, it will be more authoritative and legal, which will provide a legal basis for judging the legitimacy of the use of police weapons and will help to protect the legitimate rights and interests of the police.

Refine the System, Conditions and Procedures of the Use of Police Weapons

Develop a clear and relevant system.

First, raise the legislative level of the Regulations. The Regulations should be raised from the level of administrative regulations to the level of national legislation as soon as possible, which can be the

solution of the current low level of legislation of the use of police weapons and can enhance the regulatory effectiveness of the law on the use of police weapons and equipment. At the same time, the relevant administrative departments can promulgate the more operable implementing rules on the basis of the unified legal regulations, making the legal system become more hierarchical and ensuring the exercise of the police's right to be unified and standardized (Chen, C., 2012).

Second, make clear the basic principles of the system of the use of police weapons. Because the realistic law enforcement environment is more complicated than the circumstances stipulated in the law, it is impossible for legal norms to cover all the circumstances. Therefore, a number of basic principles for the use of the police weapon system should be made clear during the process of legislation; this is extremely important for guiding the police to use weapons correctly in law enforcement (Chen, C., 2012).

Refine the conditions and procedures for the use of police weapons. In order to further enhance the operability of the legal system for the use of police weapons, it is also necessary to further refine the conditions and procedures after clearly defining the basic principles of using weapons, which fundamentally play a role in standardizing the use of weapons and preventing the misuse of weapons. Specifically, the specific procedures for dealing with violent attacks by the police weapons can be further improved in the following aspects:

First, identify the situation. It is key for the police to decide whether to use weapons or not, as well as to determine the legal basis for the police to use the weapons. However, there is no clear stipulation or definition of Identification in the relevant laws, regulations and judicial interpretation. To understand Identification literally, there are two meanings: one is to judge, and the other is to be clear. It is an undoubtedly an unrealistic requirement for the police to “judge clearly the state of affairs” when facing a violent terrorist attack and to make a decision to use weapons or not at the same time (Chen, C., 2012). Therefore, Identification means that the police conduct a timely and proactive analysis on a series of situations such as the crime scene, the aftermath of the violent attacks and the extent of danger of the terrorists and make the decision of whether to use the weapons or not based on daily training and work experience.

Second, give a warning. Normally, the warning is the procedure established in the system of the use of police weapons in most countries. Legal procedures for carrying out warnings according to law can not only deters the perpetrators sufficiently and can force criminals to stop committing crimes, as well as respect the rights of life of the perpetrators. In China, the following issues can be discussed about warnings. The first is the form of warning. There are no specific provisions on the form of warning in our country. Generally speaking, a verbal warning and a warning shot are the two common ways. The author believes that the warning shot may intensify tensions among violent terrorists and may even lead to high-intensity confrontation between the terrorists and the police. In addition, warning shots may cause accidental injuries to unrelated personnel, and delay the best time of using weapons, failing to effectively stop the crime and posing a hidden danger to their own safety. The second is the content of the verbal warning (Wang & Wang, 2016). There are no specific provisions in Chinese law regarding the contents of the verbal warning. The author believes that the content of the verbal warning should include at least two aspects. One is to show identity to the terrorists, which is particularly important when the police use weapons in accordance with the law. The other is to inform the consequences of disobeying orders to the violent terrorists. These two points can guarantee the legitimate rights and interests of the police to use weapons (Chen, C., 2012).

Conclusion

The use of police weapons is a manifestation of legal coercion and plays an important role in safeguarding national security and protecting the social interests and legal rights of citizens from the perspective of counter-terrorism. Although there are still some imperfections in the legal system under the background of current anti-terrorism in our country, with the development of our society, we should continue to improve the relevant laws and regulations in the light of the actual situation of anti-terrorism and formulate the scientific operating procedures and rules in accordance with the laws and provisions. In order to give full play to the effectiveness of weapons and safeguard the public interest in violent terrorist attacks, the police should understand the relevant laws and regulations as much as possible and master the operational norms of weapons skillfully.

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Capillary Electrophoresis Technology Application and the Science and Technology Law

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***[Abstract]** The advancement of science and technology is the foundation of the Science and Technology Law, and the Law can provide a sound social environment for scientific and technological progress and form a mechanism for encouraging technological innovation. As a new type of separation and analysis method, Capillary Electrophoresis (CE) has developed rapidly since the 1980s. With the advantages of high sensitivity, high resolution, high speed, low dosage and low cost, it has been widely used in food nutrition and safety, clinical sample testing, medical analysis, life science research applications, environmental pollutants testing, forensic science analysis and so on. However, there are few standards for the application of capillary electrophoresis technology. This article introduces the capillary electrophoresis technology and the present applications and carries on the prospects of its future application.*

***[Keywords]** capillary electrophoresis; application; forensic science*

The advancement of science and technology is the foundation of the Science and Technology Law, and the Law can provide a sound social environment for scientific and technological progress, form a mechanism for encouraging technological innovation, and promote economic development greatly (Changzhen, 2001). In the era of rapid progress in science and technology, the work of science and technology legislation is lagging behind the progress. This article uses capillary electrophoresis technology as an example to discuss the importance of science and technology legislation.

Introduction

Capillary Electrophoresis (CE) is a new type of liquid phase separation and analysis technology which uses a capillary as a separation channel and is driven by a high-voltage DC electric field. In 1981, Jorgensen and Lukacs (1981a, b, c) pioneeringly proposed capillary electrophoresis technology. It has become a mature technology presently with the following characteristics. First, the electrophoretic separation is carried out in capillaries of small diameter (generally less than 100 μm), and such a thin capillary means very few sample volumes (nL or even PL) and reagent consumption (typical μL). Second, it uses high-voltage DC power as the driving force, and the present CE commodity instruments can provide up to 30 kV separation voltage. Hutterer and Jorgensen (1999) reported the use of high voltage of 120 kV for electrophoretic separation. The high separation voltage meant quick analytical speed, usually in tens of minutes to complete the analysis task, and faster separation could be completed in 1 minute or even seconds. Moreover, CE has a high separation efficiency, capillary column performance per meter is up to hundreds of thousands, even millions (Cifuentes, Canalejas, & Diez-Masa, 1999; Shao, Shen, O'Neill, & Lee, 1999).

CE enables the separation science to move from the level of micro-upgrading to the level of nano-upgrading and make single-cell analysis and even single-molecule analysis possible. In the meantime, the separation analysis of biological macromolecules such as sugars and proteins, which have troubled us for a long time, has taken a new turn for CE and its rapid development.

The common capillary separation modes are Capillary Zone Electrophoresis (CZE), Micellar Electrokinetic Capillary Chromatography (MECC), Capillary Electrochromatography (CEC), Capillary Gel Electrophoresis (CGE), Capillary isotachopheresis (CITP), Affinity Capillary Electrophoresis (ACE), Capillary Isoelectric Focusing (CIEF) and Nonaqueous Capillary Electrophoresis (NACE). Some scholars also categorize Capillary Array Electrophoresis (CAE) and Chip Capillary Electrophoresis (CCE) to capillary separation modes.

Due to many advantages of CE, its application and development is constantly being innovated and improved. It has become a very active frontier area in analytical chemistry and chromatography. Some of the authoritative Analytical Chemistry journals, such as *Anal. Chem.* and *J. Chromatogr.* make regular reviews on CE.

Applications of CE

The high-resolution efficiency and wide range of applications of CE have made people sit up and take notice. CE has had breakthrough applications in various fields (Xu & Chem 1995; Yiming, Guoan, Wei, & Yanhua, 1997) and has become an essential technological platform in today's science field. As a mainstream technology, CE has helped biologists accomplish human genome sequencing work; it also has important applications in the fields of food nutrition and safety, clinical sample testing, drug analysis, application of life science research, environmental pollution charged particle detection, forensic science analysis and so on.

Food Nutrition and Safety

Food safety is one of the most important problems at home and abroad. However, due to the complex matrix of food samples, how to quantitatively analyze the target quickly and accurately is an important problem in food testing. Capillary electrophoresis technology can be used for nutrient analysis, food additive analysis, non-food additives and chemical pollutants analysis (Xia-Meng, Xin-Lei, & Xin-Ying, 2016). Hai-ying, Wang, Hua-rong, Yan-hong, & Li-sheng (2009) tested myoglobin and hemoglobin in poultry and livestock muscle with good accuracy, which provided a more practical method for the evaluation of meat index parameters. Guijun and Wenhui (2010) established a capillary electrophoresis method for the simultaneous determination of 8 kinds of food additives including bright blue, vanillin, sorbic acid, benzoic acid, sunset yellow, new red, amaranth, lemon yellow. Cuicui, Xiaotong, Ailin, & Shijie, (2017) set up an analytical method for simultaneous determination of three common benzimidazole bactericides (thiophanate methyl, carbendazim and benomyl) in fruits and vegetables by high performance capillary electrophoresis.

Clinical Sample Testing

CE shows important advantages in clinical sample testing. It is mainly used to detect the protein content of body fluids such as blood, urine, saliva, tears, etc. or to detect the contents of the above-mentioned liquids. Li-ming, Yan-jie, Jin-long, Li-yang, Gui-qiong, Xiao, & Guo-sheng, (2012), through analyzing the content of hemoglobin (Hb) in each system by capillary electrophoresis system and combining it with the result of gene test, pointed out that capillary electrophoresis system can effectively separate and quantify the components of hemoglobin and screen Hemoglobinopathy effectively, which provides a fast and accurate diagnostic basis for Thalassemia and Hemoglobinopathy screening and diagnosis. Junjun and Man (2017) successfully made specific β -actin magnetic beads to detect low concentrations of urine protein and applied the CE method to verify the relevant, which laid the foundation for the specific immunomagnetic beads combined with CE to detect low concentrations of urine protein. Li, & Li et al. (2017) pointed out that pre-

implantation genetic diagnosis of couples with deletional alpha thalassemia in Southeast Asia could be performed by using fluorescent PCR combined with CE.

Medicine Analysis

Pharmaceutical analysis is an important part of medical science and a necessary foundation for the advancement and development of medical science (Yang, Yulin & Bo, 2017). As a simple, rapid, reliable and sensitive method for the detection of trace drug components in biological samples, pharmaceutical analysis is very important to understand the absorption, distribution, metabolism, transformation of drugs in the body, to reduce the toxic side effects of drugs, to modify the molecular structure of drugs and to improve the curative effect. CE technology has the dual advantages of electrophoresis and chromatography technology and has been widely used in drug research and analysis. Min, Wei-ye, Xiu-ling, Li-ping, Ceng, & Jie (2017) established high performance CE method for the simultaneous determination of four cephalosporins drugs for injection, such as cefotaxime (CTX), cefazolin (CFZ), ceftriaxone (CRO) and cefminox (CMN), using [Bmim] [BF₄] ionic liquid as the background electrolyte. Fengqin (2017) optimized the establishment of several CE methods for the study of cell-to-cell interactions, including online anti-platelet aggregation activity evaluation of *Cynanchum paniculatum* extract, the interaction of platelet-rich phenolic acids with antiplatelet activity, and the interaction of small molecule compounds with anti-inflammatory activity with macrophages. CE is a promising method for on-line assessment of cell-drug interactions, including binding constant assays, cell electrophoretic analysis, cell release material analysis test and so on. It is worth mentioning that as chiral drugs vary in their biological activity, pharmacological effects, metabolic processes and toxicity, considering the rational use of drugs and the great social and economic value, the separation of chiral drugs has become a hot research issue in the world (Tingting & Chong 2017). CE has a natural advantage in common chiral resolution methods.

Application of Life Science Research

CE research in life science includes the detection of proteins, peptides, amino acids, sugars, nucleic acids, bacteria and other microbial and cellular metabolites. Xiao-qing, Yu-jie, Lin-fang, Man, Bei-bei, & Bin (2017) made uniform and stable polyacrylamide coated capillaries and established a new method for the analysis of metallothionein (MT) in rat livers by large-volume sample stacking-capillary electrophoresis-ultraviolet detection (LVSS-CE-UV). Qiang, Ge, Hua, & Feng (2017) used kinetic capillary electrophoresis to solve for the dissociation constants of proteins to single-stranded deoxyribonucleotides and analyzed their reliability. Tuerxun · Jianaer, Xiaoya, Ruikang, & Deqiang (2017) adopted affinity capillary electrophoresis to examine the interaction of alpha-lactalbumin with [C₂mim] [Glu], alpha-lactalbumin and [C₂mim] Br.

Detection of Environmental Pollutants

In a variety of environmental media, including soil, sludge, surface water, groundwater, environmental pollution may cause various types of ecological hazards and further endanger human health, which have gradually drawn people's widespread attention. Xingyi (2017) used fluoroquinolones and sulfonamides, the two most commonly detected antibiotics in environmental waters as targets, and simultaneously analyzed and detected seven antibiotics by Capillary Electrophoresis (CE-UV) with a photodiode array detector (PDA). Kang, Erhu, Yanan, & Xueliang (2016) studied the separation of heavy metal ions such as Ba²⁺, Cr³⁺, Cd²⁺, Pb²⁺ and Ni²⁺ by capillary zone electrophoresis (CZE) using weak complexing agent glycolic acid.

Application of Forensic Science Analysis

The emergence of capillary electrophoresis technology has greatly promoted the development of forensic science. In addition to the DNA technology widely used in forensic identification, CE is also used in the analysis of poisons and drugs, explosions and shoot remnants analysis, dye analysis, text color analysis. Capillary electrophoresis has been used in drug analysis (Huang, Zhang, Ma, & Bai, 2007) for nearly 30 years, including general screening (Weinberger & Lurie 1991) and in-depth analysis of seizures of drug, like heroin (Lurie, Chan Spratley, Casale, & Issaq, 1995; Walker, Krueger Lurie, Marché, & Newby, 1995; Lurie 1996), cocaine (Lurie, & Klein, et al., 1994, Lurie, 1997, Lurie, & Hays, et al., 1998), opium (Lurie, 1997), Arabian tea (Lurie, & Klein, et al., 1994), anabolic steroids (Lurie, & Sperling, et al., 1994), propoxyphene (Lurie, & Klein, et al., 1994), methadone (Lurie, 1996), LSD, and amphetamine (Lurie, 1992), etc.

CE can be used for explosive residue analysis and shooting residue analysis in explosion and shooting residue analysis (Can, Hongcheng, Hongling, Jun, & Yangke, 2016). Chun-Yang, Kadan, Cui-Jie, Li, Jun-Fu, & Wen-Lin (2011) established a systematic analytical method for the determination of trace inorganic explosive residues, based on the capillary electrophoresis with indirect UV detection and micellar electrokinetic chromatography. Hongcheng, & Hong, et al. (2014) separated TNT and DNT and realized the accurate qualitative test of both.

Burkinshaw, Hinks, & Lewis (1993) took the lead in the capillary electrophoresis technology for fiber dye analysis. Stefan et al. developed an extraction system consisting of water, formic acid and acetic acid (Stefan, & Dockery, et al., 2009). Two types of basic dyes on acrylics were detected by CE-mass spectrometry method, as a result, seven cationic dyes achieved baseline separation within 5 min. Moreover, this method has high detection sensitivity and can analyze dyes on a single acrylic fiber of 2 mm.

CE has unique advantages in the analysis of text writing colorants due to its high separation efficiency, fast analysis speed, and small sample size required. Pengcheng, Lin, & Lijuan, (2006) conducted CE separation of 40 domestic pure blue ink handwriting marks and studied the effects of aging methods such as sunlight and bright light irradiation on the change of handwriting marks of pure blue ink. Hong, Zhiyong, & Hong, (2008) established a method for the identification of water-soluble pen inks by capillary zone electrophoresis. Szafarska, Wietechapostuszny, Woźniakiewicz, & Kościelniak (2011) analyzed color inkjet inks using a CE method. Król, Karoly, & Kościelniak (2014) demonstrated excellent discriminability with 23 color inkjet printing inks extracted from paper using micellar capillary electrokinetic chromatography.

Summary and Outlook

Capillary electrophoresis has the characteristics of high separation efficiency, fast analysis, less sample usage and low running cost. CE has no less than other methods such as liquid chromatography, and meanwhile, it has better separation and detection results for macromolecule compound protein and polypeptide which are difficult to be analyzed through liquid chromatography. These characteristics make CE widely used in many fields such as industry, agriculture, medicine and health, environmental protection, forensic science and so on, has gradually become a supplement and replacement method for separation analysis of HPLC, GC, TLC and the like and become one of the widely used important separation and detection techniques. Until 2016, 42 capillary electrophoresis method standards have been formulated (Xiaoqian, & Xinying, et al., 2016). Related to the late start and short development history, the standard

number of capillary electrophoresis method is much lower than the method standard of classical chromatographic techniques such as liquid chromatography, gas chromatography.

The disadvantage of capillary electrophoresis is the sensitivity of UV detection is not so high that cannot be used for sample preparation. With the increasingly mature technology of capillary electrophoresis and mass spectrometry, the problem of low detection sensitivity of CE has been solved to a certain extent, therefore, the application of capillary electrophoresis has been greatly expanded. CE will play an increasingly important role in rapid sample analysis.

Science and technology legislation is a legal tool for pioneering advanced productive forces, which can promote scientific and technological progress, develop productivity and promote scientific and technological research and development. Scientific and technological Innovation Calls for the Construction of Science and Technology Legal System. Science and Technology Law has become an interdisciplinary subject that requires urgent development. Therefore, the basic theoretical research on science and technology law and conduct research on the social laws of technological development should be increased, the related research centers and educational institutions should be established, and the talent team construction of Science and Technology Law should be strengthened.

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Municipal Government's Identity in Its English Work Reports: A Diachronic Corpus-Based Case Study

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[Abstract] *This paper employs a corpus-based discourse analysis method to explore Hangzhou government's identity in its six years' English Work Reports. Self-reference employment and the context were analyzed. The result shows that Hangzhou government enhanced citizens' political status by its service function, which brought a governance transformation in 2013.*

[Keywords] *identity; discourse analysis; China's municipal government; Hangzhou English work reports; diachronic; corpus-based*

Introduction

Annual English translations of work reports are specific forms of political discourses by which the municipal government internationally publicizes its leading image and political ideologies (Azizuddin, 2016). The government's leading image in China has been of great concern by foreign countries on the aspect of political identity because it directly influences the policies and possibilities for cooperation (McTavish, 2015).

In English translations of the government's work reports, the spokesman or the writer constructs the political identity through different self-references to deliver an international image (Schemikal, 1981). The aim of the article is to unravel how the political identity is established and represented in English work reports by the municipal government. The realization of self-reference requires a social relatedness (Schemikal, 1981, p. 4). As these statements involve comprehensive social contexts, identity is always constructed in specific social contexts for obtaining the speaker or the writer's self-realization (Bhatia, 2004). In sociology, observation of self-references is in dynamic process of separation between an "observer" and an "observed" (Schemikal, 1981, p. 5). Therefore, in different years with changes of social contexts, identity construction is dynamic. Many following researches (Hyland, 2001, 2002) have further confirmed the influence of social contexts to identity construction. Therefore, the present study examines the government's identity from a diachronic perspective, concerning the influence of social and temporal changes.

Methods

The corpus of the present study contains six diachronic sub-corpora of *Hangzhou Municipal Government's English Work Reports* publicized in Hangzhou government official English website (<http://eng.hangzhou.gov.cn/>) from 2008 to 2013 (marked respectively as *EHZR08*, *EHZR09*, *EHZR10*, *EHZR11*, *EHZR12*, *EHZR13*). Each sub-corpus consists of around 10,000 words, which can be considered as parallel in number. According to Hangzhou Municipal Foreign Publicity Office's interview data, the work reports after 2013 have not been translated and publicized so far due to the government's cautiousness of diplomatic events. The English versions were stably translated by the same authorized

department, so the influence of the translator’s individual subjectivity to the self-reference employment can be removed in the analysis.

By identifying the “author’s self-identity” (Ivanic, 1998) in references, self-reference presentations were defined by observation and manual calculation. Subjective consciousness is always “first person” in that it is for some subject (Neiser, 2015; Kriegel, 2009; Zahavi, 2005). By means of Antconc 3.4.4w, a concordance search engine, the frequencies of the four self-references in the six sub-corpora were generated in “Wordlist” to describe the changes of the reference quantities employed by the government through the six years. For revealing the implicatures delivered by the frequencies of the self-references, their presentations were annotated with semantic tags and semantic explanations for semantic analysis by Wmatrix (Rayson, et al., 2004) and USAS (Rayson, 2008). Wmatrix, a software tool for corpus analysis and comparison, was employed to retrieve the semantic frequency list of each sub-corpus (Rayson, 2008). The USAS Category System is a semantic tag system written for grouping word senses in semantic tagger function of Wmatrix.

Findings and Analysis

Data retrieved in concordance show self-references in EHZR includes four specific presentations: “we”, “city”, “Hangzhou”, “government”. To put in “cryptic self-references” and get rid of “counterfeit self-references”, manual verification was supplemented by checking the concordance of the four words. For example, self-references with modifiers were counted into the data like “municipal government”, and “the whole city”, while those expressions conceiving words of the four self-references but not expressing the speaker’s position and viewpoints were excluded manually, e.g. “E-government”, “Hangzhou Art Expo”, “city” or “Hangzhou” used as syntactic object: “The ranking of financial total and power put Hangzhou in the fifth place”.

For verifying the citizens’ political status constructed by government in its discourses, the frequencies of four self-references in six corpora were calculated with Antconc3.4.4w. (see Table 1).

Table 1. Frequencies of Self-References in 2008-2013 Hangzhou Municipal Government’s English Work Report

Frequency Sub-corpus	<i>we</i>	<i>Hangzhou</i>	<i>city</i>	<i>government</i>
EHZ08	0	15	1	3
EHZ09	1	16	1	2
EHZ10	2	18	10	5
EHZ11	0	2	77	2
EHZ12	0	9	116	15
EHZ13	224	1	2	3

For comparing the diachronic employment changes of the four self-references, the statistics in six sub corpora were further processed into a stacked proportion column (see Figure 1)

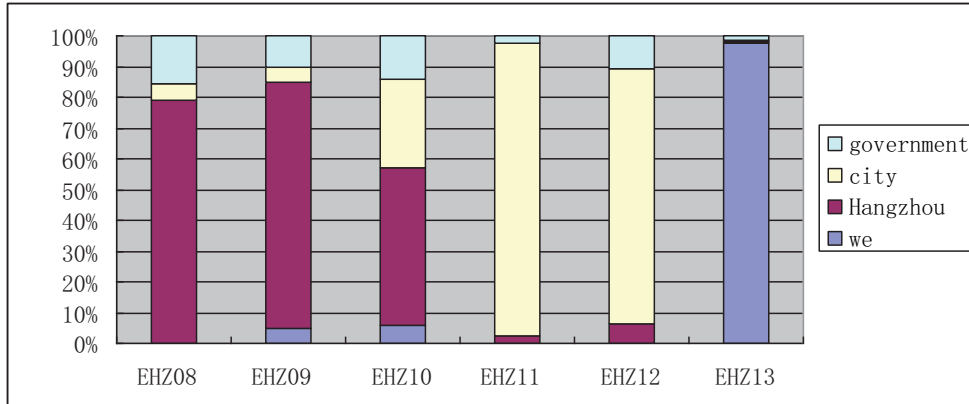


Figure 1. Changing Proportion Trends of Self-References Employment from EHZR08 to EHZR13

In Figure 1 we can see that in Hangzhou Government’s Reports from 2008 to 2012, the self-reference “government” is constantly low (around 0), and “Hangzhou” and “city” are predominant in self-reference employment. “Hangzhou” has been decreasing and “city” has been increasing through the years. While in 2013, “we” surged drastically to a peak “225” and almost replaced all of the other three presentations.

For exploring the implicatures delivered by the frequency statistics above, the senses of the four self-reference presentations were analyzed and compared based on the semantics tags and explanations of USAS (Rayson, 2008) (see Table 2).

Table 2. Semantics Tags and Explanations of the Four References based on USAS

Self-reference	Semantic Tag	Semantic Explanation
government	G1.1	Terms relating to government institutes and governmental activities
city	M7	Terms depicting geographical/conceptual spaces
Hangzhou	A4.1	General/abstract terms denoting types, groups
we	Z8	Pronouns

In Table 2, “government” is annotated as an identity referring to a specific government institute, which excludes other possible social groups. Its low frequency employment reflects that Hangzhou government avoids referring itself as the sole prerogative identity in governance. “City” emphasizes a geographical concept, while “Hangzhou” emphasizes the proper name for a specific identity. Both refer to the political administrative object in EHZR, but from different perspectives. The dominant status of the two self-references during the first four years demonstrates that it is mainly referred as the object in governance actions. “We” is a pronoun containing different possible identities with the variation of the context (Bhat, 2007). Compared with the other three self-references which do not define “identities”, “we” is a more variable concept conceiving a set of plural possible identities. For identifying the identities comprised in “we”, its prediction collocations and their frequencies were retrieved and analyzed to define the “actors” (see Figure 2). The statistics were processed by Echarts into visual scale map.

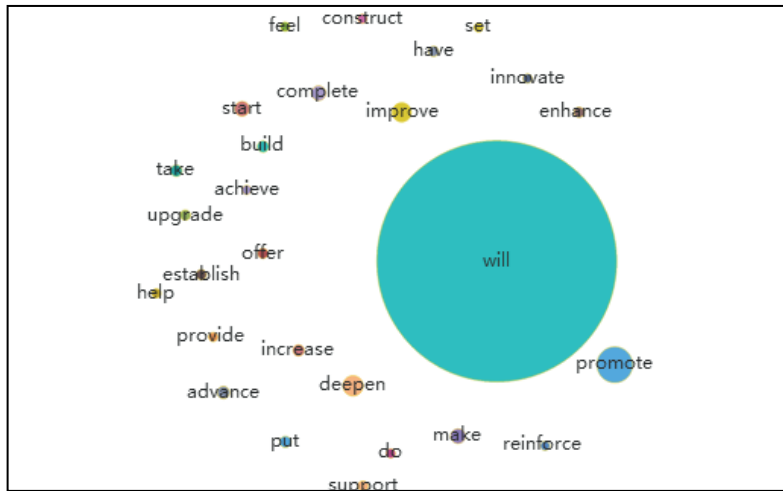


Figure 2. Prediction Collocations of Self-Reference “we” in EHZR13

From Figure 2, we can see that the modal verb “will” accounted for the vast majority of the predictions. “Will” indicates the preparing and aspiring state that the governance content is planned to be engaged in or achieved in the future. Besides, the notional verbs are mostly specific actions for city construction and development, such as “promote”, “build”, “increase”, “deepen”. It can be inferred that the identities in “we” are the participants in the city construction.

Participants in “we” may vary greatly with the context changing. For example, in the following sentence:

We will carry out the project of improving Hangzhou farmers’ qualities. (2011 Hangzhou English Municipal Government Work Report) (e.g. 1)

“We” contains identities engaging in tasks of “Agriculture Department”, “Labor Department”, probably at a higher and more general level- “the municipal government” and “the mayor”, or at a more basic level- “the village committee” and “the farmers”. While in e.g.2, the executing participators are the Financial Department and its stuff.

We will promote consumption in services such as tourism, culture, leisure, entertainment, health, fitness, etc. (2013 Hangzhou English Municipal Government Work Report) (e.g. 2)

These participating identities in self-reference concepts also take on different degrees in participative subjectivity. In e.g. 2, the centered participative identity mainly refers to the Business Department who set up economic policies to propel consumption in service. In the practice, citizens are also the participators who respond to and observe the government’s policy. Therefore, the government department plays the leading role while the citizens practice the action. This reflects the government intrinsic quality that it plays the role of leading the citizens to carry out the governance affairs. Therefore, in “we”, citizens are the indispensable units of work undertakers in grass-roots and cooperative objects. The datum of “we” up-rushing in 2013 reflects different identities are abruptly manifested in governance, in which citizens’ identity was greatly included and strengthened, though in different degrees.

Discussion

The establishment of service function was proposed in 2013 *Hangzhou Government's Work Report* for the first time: "Take the establishment for service-oriented government as the key in work for the first time", "do practical work and construct a government satisfied by citizens" (2013 *Hangzhou Government's Work Report*). The statement by Hangzhou government was closely followed the "service-oriented government ideology" put forward in 18th CPC (Communist Party of China National Congress) in 2012. For the first time, the aim to "establish a service-oriented government" (the 18th *CPC National Congress Report*) was set up in 18th *CPC National Congress Report*. Thus, Hangzhou government's new functional positioning was the localization of the national governance orientation. A "service-oriented" government was established for meeting people's increasing public service requirements (Martin, 2016). During and after the transformation, more political terms highlighting citizens' identity were produced in multiple forms of national political discourses. For example, Chairman Xi raised "Huode Gan (sense of gain)" in the Tenth Meeting of Central Leading Group for Comprehensively Deepening Reform. "Making people have a sense of gain" was interpreted as a decisive rule to measure the gold content of any reform (Xi, 2015). Therefore, the improvement of citizens' identity in government's work reports was caused by service-oriented transformation.

Conclusion

This paper has described a corpus-based approach to analyze the identity constructed by government in its diplomatic discourses. Compared with perceptual comments on the government's image, the results obtained from quantitative analysis were more objective and systematic. The data of frequencies measure the senses in discourse in quantity. The context analysis based on semantic tags and word collocations specifies and enhances the senses obtained from frequency analysis. The result showed that the Hangzhou government is establishing itself as "citizen-centered" in governance. Further discussion on national political environment and international governance situation verified the discourse analysis result from a comprehensive social and historical perspective. The analysis showed that the service transformation in Hangzhou's governance is due to the influence of the national governance orientation. It explained the case study result from a higher political level, generalizing the case study result into common local governments through the whole country. The study also revealed self-publicizing effects produced by discourse features in government's diplomatic documents. The employment of different self-references may deliver different political status information. The strategic use of discourse features helps government to establish a desired international image in diplomacy.

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Corpus Based Resources and Tools

EHRZ: <http://eng.hangzhou.gov.cn/>

Antconc Tools: <http://www.laurenceanthony.net/software/antconc/>

Wmatrix Tools: <http://ucrel.lancs.ac.uk/wmatrix3.html>

Sketch Engine Tools: <https://www.sketchengine.co.uk/>

Big Data in Cybercrime Governance and the Legislation

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[Abstract] Since its innovation, the Internet had led to increased vulnerability, and Cybercrime has been a serious global problem that needs a strong technical and legal response. This paper examines the trend and the challenges of these crime in cyberspace and attempts to provide some suggestions on cybercrime governance in the era of big data. It reveals that the combination of social and government data under the guidance of sound laws and regulations will provide a powerful resolution.

[Keywords] cybercrime; big data; social governance; legislation

Three consecutive telecommunication fraud cases in August 2016, “Shandong prospective college student Xu Yuyu was defrauded to death on Aug 19 (Sun, 2016)”, “Song Zhenning, a sophomore at Shandong University of Technology, was defrauded to death on Aug 23 (Sun, 2016)”, “Guangdong female college student was defrauded to death on Aug 28 (Sun, 2016)”, brought cyber fraud, which was already in sight of the regulatory agencies, into the focus of ordinary people, causing a strong social response in the short term. The scale of the cybercrime black industry far exceeds the imagination of the outside world. A conservative estimate of the number of the employees in the entire industry chain is more than one million. Therefore, the governance of cybercrimes has reached a moment of urgency.

Introduction

According to CNNIC (China Internet Network Information Center) data, China has the largest number of Internet users in the world. By the end of 2016, the number of Internet users in China reached 731 million, of which mobile terminal users reached 95.1%, and the Internet penetration rate reached 53.2% (National Computer Virus Emergency Response Center, 2017). The information network has been promoting social progress at high speed, but meanwhile, it also causes many loopholes in the cyber-security of information networks due to their enormous openness. This is reflected in the high incidence and rapid growth of cybercrimes. The cyber-security situation is becoming increasingly complex and diverse in form. Generally, A lack of understanding of the various types of attacks, characteristics and possible results may set an obstacle in trying to defend the information security (Uma & Padmavathi, 2013).

The Features and the Trend of Cybercrime

Compared with the cybercrime definition made by the Council of Europe’s Cybercrime Treaty and that made in the United Nations *Manual on the Prevention and Control of Computer Related Crime*, (Gordon & Ford, 2006, p. 14), cybercrime is defined as: “any crime that is facilitated or committed using a computer, network, or hardware device.” The advanced modern information technology has driven the development of the network and the development of the network has spawned the mutation and upgrade of cybercrime. Compared with traditional crime, cybercrime has the following features. First, the crime scene is virtual, and the space is borderless. Second, criminal behavior is highly concealed because the cyber-criminals use techniques and tools to hide or forge their identities. Third, criminal methods are intelligent and professional. Fourth, the cost is low, but the spread is fast and has a wide range. The scholars in China

classified present cybercrimes into four categories: offenses against the order of network, and management, offenses against computer information systems, offenses against computer assets, and misuse of network (Qi, Wang, & Xu, 2009).

With rapid globalization, low cost of mobile phones and ease of access to Internet, cybercrimes have developed quickly and shown new trends: diversification of criminal subjects, broader spectrum of criminal objects, smart and advanced criminal methods, complicated criminal processes, and costly results. According to Wu Shenkuo, the Secretary General of CNNIC, the outstanding features of cybercrimes in judicial practice are as follows: First, the criminal subject is becoming younger and more specialized, and has a better ability to evade supervision and control; second, the crime forms have become increasingly variable and hidden; third, criminal activities increasingly organized and grouped (Xinhua net, 2018).

General Challenges of Cybercrime Governance

Cyberspace is not only a space of freedom from physical constrictions and state intervention but has increasingly emerged as a necessary medium through which contemporary social, economic, and political mobilizations occur (Muralidhar, 2015, p. 19). The evolution and development of information and communications technologies of cyberspace has brought many benefits, but also the threat and practice of serious cyber-attacks, cyber-espionage and cybercrime within the virtual, networked ecosystem that we live in. It is in the governance of behavior in cyberspace where the solution to cybercrimes must lie. The challenges are as follows in fighting cybercrimes.

The subjects of cybercrime generally have fairly high computer or network technology, and a considerable number of people who use high-tech criminal means to commit cybercrime are often skilled computer or computer experts based on the statistics. The objects of the cybercrime are mostly intangible digital data or information, moreover, the criminal traces are hard to find out. In addition, it is difficult to detect and collect evidence of the cybercrimes. More importantly, most of the countries are not fully equipped with the legal infrastructure to establish policies and laws to prevent the growing number of such crimes.

Big Data and Cyberspace Security

Big data is typically defined by reference to the volume, variety and velocity of data that can be collected, stored and analyzed, but also by the diversity of data-capturing technologies that are applied to specific fields to generate novel insights on criminal behaviors and to initiate new forms of criminal justice practice (Smith, Moses, & Chan, 2017, p. 267). At present, with the development of information technology, our country is accelerating into the age of big data application in the Internet of Everything. Mobile internet, Internet of Things, cloud computing and cloud storage technologies have profoundly affected the patterns of goods and services, brought great convenience to people in the areas of shopping, transportation, payment, social networking, and communications, and provided important support for public services and social governance as well. While creating value, the Internet and big data have also brought many worrying security issues. The collection and aggregation of big data have increased the risk of leakage of citizens' personal information. Coupled with the lack of proper management of certain companies, some personal information data are maliciously stolen by hackers, and some companies even have the behavior of illegally trading personal information data. The leakage of personal information from citizens has led to various types of cybercrimes, especially telecommunication fraud cases.

As a coin has two sides, big data is proving very useful for filling in the gaps in law enforcement technology, providing insights and detecting anomalies that can help prevent and combat crime. In May 2009, the U.S. government took the lead in setting up the first data open portal in the world, *data.gov*. A major purpose of releasing the data was to drive innovation through big data analysis, as well as to promote government transparency and accountability. The opening of government data may bring precious data assets to the big data industry, and at the same time, realize the value realization of the data that sleeps in the hands of the government. The internal sharing of government data may eliminate the data interval of each department, implement data fusion with the help of technology, conduct data analysis to improve government governance capabilities, and at the same time, benefit the big data technology partners. In the field of cyberspace security, big data opening may make an important contribution to crime prediction and prevention, helping to determine whether a crime is a traditional crime or a new cybercrime.

Chinese Legislation and Cyberspace Security

Cyberspace security will be challenged from both internal and external causes. Internally, system software and hardware defects, defects in management systems and human weaknesses may all result in security incidents. The continuing threat of hostility and hacking are the external causes of security incidents. Cybersecurity threatens national security, the lives and property of citizens, social finance and economic stability, and social stability.

Increasing cybercrimes in China have resulted in the involvement of criminal justice in the field of Internet violations far exceeding the framework of intervention based on traditional criminal law theory. Firstly, legislators expanded the scope of penalties by amending the constituent elements. For example, one item was added to Article 286 in the Amendment (IX) to the Criminal Law of the People's Republic of China: "Any network service provider that fails to perform the information network security management obligations as prescribed in any law or administrative regulation and refuses to make corrections after being ordered by the regulatory authority to take correction measures shall be sentenced to imprisonment of not more than three years, criminal detention or surveillance in addition to a fine or be sentenced to a fine only under any of the following circumstances." Secondly, Legislators have added new provisions in the subsections of the criminal law to separately criminalize the help of traditional crimes and the conduct of crimes at the stage of preparation, making the intervention of criminal law no longer subject to the general principles of the general principles of criminal law. Finally, at the practical level, the criminal offenses of the Internet have already been treated as crimes in judicial practice. There have also been cases of penalties under both newly-added Article 287A and Article 287B. ("Article 287A: Whoever commits any of the following conducts by using the information network shall, if the circumstances are serious, be sentenced to imprisonment of not more than three years or criminal detention in addition to a fine or be sentenced to a fine only." "Article 287B: Whoever, while obviously aware that any other person is committing a crime by using an information network, provides Internet access, server custody, network storage, communication transmission or any other technical support, or provides advertising, payment settlement or any other assistance for the crime shall, if the circumstances are serious, be sentenced to imprisonment of not more than three years or criminal detention in addition to a fine or be sentenced to a fine only.")

On June 1, 2017, *Cybersecurity Law of the People's Republic of China* became effective, giving resolutions to the current problems of cyberspace. The law further defined the scope of key information infrastructure. It provides corresponding punishment measures for overseas organizations and individuals that attack and destroy China's critical information infrastructure and increases provisions to punish new

cyber-criminal activities such as wireless fraud. On December 27, 2016, *National Cyberspace Security Strategy* was released. It not only clarified China's major positions and propositions regarding the development and security of cyberspace, but also clarified the strategic principles and major tasks for several years in the aspects of defending the sovereignty of cyberspace, safeguarding national security, protecting key information infrastructure, strengthening the construction of online culture, combating internet terrorism and crimes, improving network governance system, strengthening network security foundation, improving network space protection ability, and strengthening international cooperation in cyberspace.

Conclusion

With the guidance and protection of laws and regulations, making full use of big data of the government and integrating social data is an inevitable trend in building a three-dimensional security prevention and control system. By combining traditional data and social data, and sharing information, a comprehensive three-dimensional prevention and control mechanism can be established to prevent and control crime more effectively, promptly and comprehensively.

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Permissive Clauses in Copyright Contracts in Polish, English and Japanese

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[Abstract] *The purpose of this paper is to present one method of expressing deontic modality, namely permission, in Polish, English and Japanese contracts. The author analyzed the corpora of approximately 70 contracts formulated in Polish, English and Japanese languages. The contracts with the clauses transferring copyrights were analyzed, namely: (i) publishing agreements, (ii) licenses, (iii) copyrights agreements, and (iv) others. The author juxtaposed exponents of deontic modality (permission) extracted from the corpora with the usage of AntConc program (Corpus Analysis Tool). As Biel (2010, p. 1) mentioned: “Corpus-based and corpus-driven studies of language have become a mainstream methodology used in many branches of linguistics”. Such analysis was implemented in legal translation as well. As a result of the analysis, the list of deontic modality exponents of i.e. verbs expressing deontic modality, as well as collocations with these verbs are presented. Additionally, the gathered data may be a perfect source for finding functional equivalences because the research was carried out on comparable texts. A translator is less likely to make a mistake when using comparable texts because such texts are the most reliable source of equivalents.*

[Keywords] *copyrights; contracts; deontic modality*

Introduction

Firstly, the author would like to focus the reader’s attention on what modality is and how different scholars define this phenomenon. von Fintel (2006, p. 1) defined modality as “a category of linguistic meaning having to do with the expression of possibility and necessity”. He differentiated 5 types of modality:

1. Epistemic (Greek *episteme*, meaning ‘knowledge’) is what is possible or necessary given what is known and what the available evidence is;
2. Deontic (the object of our interest, Greek: *deon*, meaning ‘duty’) concerns what is possible, necessary, permissible, or obligatory, given a body of law a set of moral principles/rules, etc.;
3. Bouletic (or boulomaic) is possible or necessary things, given a person’s desires;
4. Circumstantial (or dynamic) is possible or necessary, given a particular set of circumstances;
5. Teleological (Greek *telos*, meaning ‘goal’) is what is possible or necessary to achieve a particular goal (see von Fintel 2006, p. 2).

In our context, the stress would be imposed on the deontic modality in copyright contracts. Such documents (meaning: contracts) are legal texts in which the task is to establish rules between the parties. As the agreement should be considered as binding on the one hand, it is also the law of the other party in the contract, and vice versa. In the agreements, obligation, prohibition and permission are expressed with modal verbs and other elements expressing modality. In each contract deontic modality will be present, because the principle of the contract is that the parties agree on what is allowed, what should and what they do not agree to. The Parties undertake to fulfil specific tasks to perform or refrain from certain actions by formulating orders, prohibitions or permissions. Contracts are marked with modality, i.e. the information about a specific grantor’s relation to the described state of affairs (Grzegorzczkowska, 2004, p. 39).

Modality can be expressed through various linguistic means, for example deontic verbs, modal verbs, personal and non-personal modal predicates which connote the infinitive, syntactic constructions tying specified object to a specific behavior, as well as the construction of non-deontic *verbum* (in the present

tense and future) (see Matulewska & Gortych, 2009, p. 67). For the purpose of this analysis only one modal meaning has been distinguished, namely: permission.

In the English language to express deontic modality the most commonly used modal verbs are *shall*, *must*, *may only* and semi-modal structures *is to be*.

Modality in the Japanese language is said to be resources responsible for understanding the area between what is allowed and what is not allowed. The modality is made up of two categories: (i) modality representing certain information (i.e., “He will definitely come.”), and (ii) modality, which represents the range, including the request (i.e., “Better to do it.” “Do not do this.” “It should be.” “You can do it.”). Modality consists of probability and typicality. Modality is comprised of: (i) the degree of information commitments (liabilities), and (ii) the degree of will (intention) to perform an action (tendency).

Modality in Law

There is a widespread view that legislative language is reducible to norms expressed in terms of three deontic modalities, that which is required, prohibited and permitted (Jackson 1999, p. 17). In the English language the correct choice by translators from amongst the relevant modal auxiliaries *shall*, *may*, *may not*, *must*, and *must not* would render possible the correct interpretation of a translated proposition.

Also, in the English language, the most controversial modal is *shall* which is claimed to be the most misused word in all of legal language (Schiess, 2005). The Plain Language Campaign wants to delete all forms of *shall* from legal language. In addition, Bryan Garner, editor-in-chief of the *Black’s Law Dictionary* and author of various legal writing books and manuals, called one of his chapters “Delete every SHALL” (2001, 105). It is said that *shall* “offends the principle of good drafting. It does not always retain its meaning throughout a document,” (Banful, 2013).

There are different meanings of *shall* which can lead to many problems. For example, Garner (1995, pp. 939-941) provided and exemplified the following functions of *shall*:

- a) imposing a duty on the subject of the sentence;
- b) imposing a duty on an unnamed person (not on the subject of the sentence);
- c) giving permission (in the meaning of may);
- d) imposing a conditional duty;
- e) acting as a future-tense modal;
- f) expressing an entitlement not duty;
- g) being directory in the meaning of should.

It should be noted that the use of simple present is the most frequent option to substitute for *shall*. Moreover, in some languages, including Polish, the simple present tense is used regularly in all normative provisions irrespective of the text type (e.g. in contracts, legislation, and testaments, etc.) to express an obligation. However, lawyers use *shall* because it is some kind of hallmark of traditional legal writing. Nonetheless, it is the translator’s task to properly interpret the source text modality and change the modal verb *shall* into proper verb or word phrase in the target text.

Deontic Modality

Permission in Polish

Permission means that a certain behavior is allowed. Permission expresses the competence or authority to perform a specific action or one is entitled to exercise one’s rights.

To express permission in Polish, we use the following verbs or exponents of deontic modality: *móc* [may], *ma prawo* [have a right], *jest uprawniony* [to be entitled], *dopuszcza się* [is allowed], *zezwała się* [is permitted], *wolno jest* [must be] (cf. Matulewska, & Gortych, 2009, p. 75), *przysługuje prawo* [have the right], and *służy prawo* [have the right], for example *ma prawo* [has the right], but in English it is verb *may* or sometimes *will + allow*, *permit*, *be entitled to* or structure *to be able to* itself. Also, it is possible to find *to have a right to/of*. Other exponents of deontic modality: *upoważniać* [to authorize] also expresses permission.

Below are some examples of expressing permission in agreements which transfers copyrights in third person singular, namely *może* [may] (occurs 28 times):

Ex. 1: Twórca może uzależnić zgodę od zmiany sposobu oznaczania autorstwa Projektu Szaty Graficznej.

[The author may determine his/her consent concerning the change of the designation of the Author's Graphic Design.]

It allows us to conclude that all examples can be seen through the scheme: X może coś zrobić [X may do something].

Ex. 2: Zamawiający ma prawo dalszej odsprzedaży egzemplarzy Utworów i rozporządzania autorskimi prawami majątkowymi do nich bez zgody Wykonawcy w zakresie praw nabytych na podstawie niniejszej Umowy.

[The Client has the right to resell copies of Works and dispose of copyrights without the Contractor's consent in respect of the rights acquired under this Agreement.]

Ex. 3: Zamawiający ma prawo korzystać i rozpowszechniać Dzieło oraz jego opracowania bez oznaczania ich imieniem i nazwiskiem Wykonawcy.

[The Client has the right to use and distribute the Work and to make compilations without indicating Contractor's name and surname.]

The phrase ma prawo "X has the right" appears 22 times in a research material and appears in a classic scheme: subject+verb+object; X ma prawo do czegoś/coś zrobić [X has a right to something/to do something].

Here are two more examples of expressing permission, but with less frequency, for example *przysługuje prawo* [have the right] which appears 3 times, and *upoważnia do* [authorizes] – 6 times.

Ex. 4: Nabywcy przysługuje prawo dalszej odsprzedaży nabytej części autorskich praw majątkowych do każdego z dzieł wymienionych w Par. 1 bez zgody Autora, jednakże pod warunkiem, że nie skorzysta on z prawa pierwokupu w terminie miesięcznym od dnia powiadomienia o treści umowy.

[The Buyer is entitled to further resell of the acquired part of copyrights to each of works listed in para. 1 without the author's consent, however, provided that he does not exercise his right of pre-emption within one month of the date of notification about the content of the contract.]

Ex. 5: Wykonawca upoważnia także Zamawiającego do wykonywania jego autorskich praw osobistych.

[Also, the Contractor authorizes the Employer to exercise his or her personal rights.]

To sum up, the contracts include many expressions which express modality – permission. It is not only because of the grammatical but also lexical means.

Also, permission can have different forms:

- unlimited – móc [may], mieć prawo [have a right]
- conditional – móc [may], mieć prawo [have a right]
- external – to have the right to.

Permission in Japanese

Traugott (2006, p. 120) claimed that in Japanese there are no expressions for strong obligation, and scholars have found the change agent-oriented/deontic> epistemic to be largely irrelevant. For example, Akatsuka (1992) argued that the conditional construction *S1 temo, S2* is equivalent to the *may* of permission. That means the conditional sentences in Japanese may express deontic permission. Moreover, Akatsuka and Clancy (1993) pointed out that conditional sentences express deontic notions such as ‘permission,’ ‘necessity,’ and ‘obligation’ (equivalent to *may, should, and must* in English), and Choi (2006, 161) adds: “that these sentences pragmatically express desirability/undesirability of the action” (see also Clancy, Akatsuka & Strauss 1997).

Permission 許可 (*kyōka*) in Japanese can be expressed with the verb form (て-form) もいい (*te-form*) *mo ii* (You may do ~). In the below examples there is used such verb expressing permission: ことができる *kotogadekiru*.

Ex. 1: やむを得ない事情があるときは、甲乙が協議の上、期日を変更することができる。

Yamuwoenai jijō ga aru toki wa, kō otsu ga kyōgi no ue, kijitsu o henkō suru koto ga dekiru.

[When the unavoidable circumstances happen, Kou and Otsu may, after consultation, change the deadline.]

Ex. 2: 本著作物の校正に関しては甲の責任とする。ただし、甲は、乙に校正を委任することができる。

Hon chosakubutsu no kōsei ni kanshite wa kō no sekinin to suru. Tadashi, kō wa, otsu ni kōsei o inin suru koto ga dekiru.

[Kou takes the responsibility for the correction of this work. However, Kou may commission the correction to Otsu.]

In the Japanese language, it looks completely different. There are no specific modal verbs as in the other languages, but there are phrases expressing deontic modality, e.g. すること *surukoto* or ことになっている *kotoni nattiru* or even bare infinitive. There is a modal form of ‘must’ なければならない *nakerebanaranai*, but it should be added to the verb and then we have なければならない *nakerebanaranai* (‘you have to’). And when there is permission to do something we use 可能 *kanō* or 可 *ka* (‘you may’) and 不可 *fuka* (‘you may not’).

Ex. 3: DVD-ROM、メモリーカード等の電子媒体(将来開発されるいかなる技術によるものをも含む)に記録したパッケージ型電子出版物として複製し、頒布すること。

DVD - romu, memoriikādo-tō no denshi baitai (shōrai kaihatu sa reru ikanaru gijutsu ni yoru mono o mo fukumu) ni kiroku shita pakkēji-gata denkosshuppan-mono to shite fukusei shi, hanpu suru koto.

[Copy and distribute it as a packaged electronic publication recorded on electronic media such as DVD-ROM, memory card (including anything developed in the future).]

Moreover, in Japanese, one sentence may be translated two different ways: with and without the modality.

Ex. 4: 甲は、本実演を適宜修正、加工することができる。ただし、本実演及び乙のイメージを害さないよう配慮するものとする。

Kō wa, hon jitsuen o tekigi shūsei, kakō suru koto ga dekiru. Tadashi, hon jitsuen oyobi otsu no imēji o gaisanai yō hairyo suru mono to suru.

[Kou may modify and process it as appropriate. However, consideration shall be given not to harm the present demonstration and the image of the company.]

So that depends on the way how do we translate, it may be: It is determined that party A in case of X does something (and here there is no modality in Japanese), but *できる* *dekiru* and potential form can express modality.

In the example no. 3 (above) there is a provision that a party can make corrections and film processing, and then we have a sentence ending with *とする* *tosuru*, which can be translated as ‘but cannot do it so as not to destroy the image of the movie or party B’.

To sum up, deontic modality in Japanese legal language we can distinguish the following examples:

- *する* *suru*... – require some specific actions, declare the rules.
- *しなければならない* *shinakerebanaranai*... – to impose a new obligation on someone, there is no room for non-compliance in legal provisions, e.g. *努めなければならない* *tsutomenakerebanaranai*... – strong demand for diligence.
- *するものとする* *surumonotosuru*... – weak obligation; used in politics or when someone want to slow down the action; there is an interpretation that warning is not necessary if there are national reasons, e.g. *努めるものとする* *tsutomerumonotosuru*... meaning ‘to establish a care policy’ (por. 条例案での語尾の使い方).

Permission in English

In research conducted by Biel (2014, p. 166) the most frequent exponent of permission is modal verb *may*. This research was conducted on EU documents. Similarly, Matulewska (2010, p. 85) claims that the most popular exponent of permission in English is the modal verb *may* (she analyzed the different types of contracts), and *will*, accompanied with: *allow*, *permit*, and *be entitled to*. She divided permission into three categories (three submeanings 2009: p. 141): (i) unlimited permission, (ii) conditional permission and (iii) external permission. Bazlik, Ambrus and Bęclawski (2010, p. 93) state that the most common modal verb for permission is also *may*, and the second place has the verb *can*, which is more problematic because of its polysemous meaning, and can be confused with, e.g. possibility rather than permission.

Permission in the contract is when the parties in the contract agree to certain arrangements. The most common verb expressing permission in English is the modal verb *may*. What’s more, thanks to the Plain Language Campaign, we can increasingly see the use of the modal verb *will* with the use of an additional verb expressing permission, such as *allow*, *permit*, *be entitled to*, or *be able to* (see Matulewska, 2010, pp. 85-86).

Below an example of expressing permission in English contract:

Ex. 1: *The parties mutually agree that the Contracting Party shall be entitled to the first*

publication of the Specific Work within two years following the date of the acquisition of the rights.

*Ex. 2: Authors **may** use parts of the Work (e.g., tables, figures) in subsequent works without asking the X's permission.*

Examples with conditional permission in English contracts:

*Ex. 3: **If** the representations referred to in section 3 above are found to be false or if a defect of title is detected in the Specific Work, the Contracting Party **shall be entitled to** withdraw from the contract or demand the reimbursement of paid remuneration along with statutory interest from the payment date to the date of reimbursing the remuneration.*

*Ex. 4: **In the event** it becomes necessary for either party to file a suit to enforce this Agreement or any provisions contained herein, and either party prevails in such action, then such prevailing party **shall be entitled to** recover, in addition to all other remedies or damages, reasonable attorney's fees and court costs incurred in such suit.*

*Ex. 5 (Plain Language Campaign): You **have the right to** enter into this Copyright Form and to make the assignment of rights to ASME.*

The most common verb expressing permission in English is the verb *may* in the analyzed research material. However, you can also use the phrase *shall be entitled* and in connection with the Plain Language Campaign, use the phrase 'have the right to' preceded by the personal pronoun "you". The research conducted by Biel (2014), Matulewska (2009, 2010), Bazlik, Ambrus, Bęclawski (2010) and the analysis presented here show main similarity, concerning the most frequent modal verb for presenting permission, namely: *may*.

Conclusion

In this article, deontic modality (permission) in three different languages was presented. The examples were excerpted using the AntConc program, and thanks to it, the reader can see the frequency of occurrence of selected features of modality in the agreements. The occurrence of certain terms or expressions reveals schematic sentences in the structure of the contract. Also, it presents the variability of languages and contrastive analysis of three languages in respect of deontic modality.

To sum up, it is worth mentioning that it is typical of Polish and English languages to use in the majority of cases the same exponents of deontic modality for expressing various deontic sub-meanings. However, we cannot say the same about the Japanese language which has completely different sentence structure and has different ways of expressing modality. It should be also stressed that it is difficult to find proper exponents of deontic modality in legal texts, especially to transfer the modal meaning from the source text into the target text. When it comes to the Polish language, the present tense indicative is the typical grammatical exponent of permission. The characteristic is the use of the 3rd person singular and plural. Verbs take the form of the indicative in the present tense or future (cf. Bańcerowski, Grzybek, Kaczmarek, & Matulewska 2012, p. 1264). In the English language, the most typical grammatical structure is passive voice, and in Japanese there is present tense. However, it is very important to say that such a conclusion cannot be generalized in all legal texts as copyrights contracts are only a small part of legal texts.

Below, the listing of most frequent exponents of permission used in Polish, Japanese and English contractual clauses (copyrights contracts):

Table 1. The Most Frequent Exponents of Permission used in Polish, Japanese and English Contractual Clauses (Copyrights Contracts)

Modality	Polish	English	Japanese
Permission	present tense indicative	may	もいい (te-form) <i>mo ii</i>
	future tense indicative	shall have a right of/to	ことができる
	be able + infinitive	shall be entitled to	<i>kotogadekiru</i>
	be able to + be + passive participle	shall be allowed to	
	to have the right, have the right, you have the right to + infinitive	to have a right of/to shall be permitted to shall be able to	
	móc mieć prawo przysługuje prawo prawo służy		

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What Status and What Place for Tamazight (Berber) in Algerian National Law?

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[Abstract] Despite its constitutionalization in Algeria since 2016, Tamazight remains a marginalized language, minorized, if not ignored. It is the government's poor parent. Until nowadays, Tamazight is struggling to find itself. Ignored by the Administration and by Justice, it hardly plays the walk-on part in the Algerian national education system. It has already been a year and a half since it was officialized; it is only to its stammering in the effective life of the people who speak it (i.e.: the Amazighofones).

[Keywords] language; Berber; Tamazight; constitution; official; national; linguistic; law; political; minority; justice; sociolinguistics

Introduction

“Every people has the right to speak its own language and preserve and develop its own culture, thereby contributing to the enrichment of the culture of mankind.”

(Article 13 of the Universal Declaration of the Rights of Peoples, proclaimed in Algiers, 4 July 1976).

This statement echoes the French writer Stendhal who said that “the first instrument of the genius of a people is its language” (Stendhal, 1823). The more so as that is truer as regretted it as Michael Millward (the Representative of the United Nations Educational, Scientific and Cultural Organization) for Morocco, Algeria and Tunisia, stated in his declaration to Maghreb Arab Press (MAP), “With the disappearance of a language, it is a piece of our common world heritage that is eclipsing” (Millward, 2016).

“The language is the mother, the homeland” (Ait Menguellet, 2005) said this Kabyle author, singer, poet and composer, about the Tamazight, in an interview to Liberty newspaper.

It is in this wake that Algeria has formalized Tamazight, in its latest Constitution in force, a fundamental text signed on March 6, 2016 and published in the Official Journal of the Republic (JORA) No. 14 of March 7, 2016. This was predictable after its Moroccan neighbor, did so in 2011. This constitutional revision was adopted by Parliament on February 7, 2016. It is only justice for millions of Amazighs whom count Algeria as their country. It is the end of a millennial denial of an important side of the Algerian identity. “This is the dream of a generation who militated and worked so that this language finds its place in the concert of the laws of the nation” (Haddadou, 2016). The fight for the recognition of Tamazight in Algeria is legitimate. It is the native language of this country. The first claims began at the time of the French colonization.

Despite the hard competition faced throughout the centuries in front of great languages of great civilizations, such as Phoenician, Latin, Arabic and French, Tamazight has maintained its existence, while prestigious languages such as Aramaic or Egyptian, which produced great empires, have disappeared (Haddadou, 2016). But even though it is true, for how much longer will it exist if we do not care about it? Indeed, Tamazight is dying. Remote of the education system and political life; ignored by the Administration, scattered over a vast geographical area, desert and mountainous zones, it miraculously

survived only in the popular memory of the older people. In the absence of a means of safeguarding it (it being just an oral language), the effects of time have been devastating. “In traditional Africa an old man who dies is a library that burns,” (Hampathe, 1991). This sentence describes the situation of the Tamazight. Mammeri (1980) also pointed out the problem, echoing Hampathe Ba, stating, “It was time to catch the last voices before death caught them”. It is a manner of sounding the alarm and calling the government to do everything possible to safeguard this language, but it is in agony nowadays.

Evolution of Texts or Evolution of Mentalities?

If the Amazigh dimension has come a long way in the fundamental Algerian texts (i.e., Constitutions), flagrant contradictions and deliberate confusions are remaining legions. Until 1989, the fundamental texts totally omitted the Numidian, Berber and Amazigh characters of the Algerian reality.

The troubles of October 1988 pushed the politicians of the time to amend the Constitution in 1989. Moreover, it was for the first time in the history of modern Algeria, that the fundamental Algerian text referred to the Amazigh dimension (as shy as it is), in its preamble, in Paragraph 3 which states,

“Placed in the heart of the great moments which the Mediterranean has known in the course of its history, Algeria has found in its sons, from the time of the Numidian Kingdom and the epic of Islam to the colonial wars, its heralds of liberty, unity and progress at the same time as the builders of democratic and prosperous states in the periods of grandeur and of peace”. (JORA, No. 09, 1989, p. 188)

Thus, the principal objective that can be noticed in the preamble of the Constitution of February 28, 1989 was reduced to the key affirmation of the Numidian character (i.e.: Berber, Amazigh) of Algeria. Seven years later, to consolidate this acquirement and give it a framework and a legal character, the Constitution of November 28, 1996 (JORA No. 76, 1996, p. 6) enshrined and clearly mentioned in Paragraph 4 of the preamble, the Amazigh dimension of modern Algeria.

But this (shy) recognition was not to the taste of the whole political class of that time. The troubles of 2001 left more than 128 dead in Kabylia. Thus, the authorities again, were forced to throw their weight and calm the spirits. It was in this context of extreme tension that the Algerian Constitution was amended by law 02-03 of 10/04/2002 (JORA, N ° 25, 2002, p. 11). This latter was inserts in its text:

[Article 3(a)-Tamazight is also a national language.

The State works for its promotion and its development in all its linguistic varieties in use throughout the national territory.]

The climate of claims of the Arab Spring added anxiety to that of the Kabyle Black Spring of 2001. These events caused fear in the political spheres of the country; which led the public authorities to amend the Constitution once again, after parliamentary debates, in 2016. In fact, the following was inserted in particular in its Article 4:

“Tamazight is also a national and official language. The State works for its promotion and its development in all its linguistic varieties in use throughout the national territory.”
(JORA, No. 14, 2016, p. 6).

But despite this constitutional progress, Tamazight still faces a blatant lack of political will. It doesn't have a place or right to be cited among the Algerian civil society and certain realities of the ground push us to question ourselves: What place is there for the Tamazight among the Algerian society?

Critical and Analytical Reading of the New Constitution

From our analytical reading of the new Constitution and in accordance with our understanding, we have noted some criticisms that we think are both objective and relevant.

About the Draft

The wording of Article 4 of the 2016 Constitution states: “Tamazight is also a national and official language”. Already, from an editorial point of view, it would have been much better to reformulate the entire Article 3 instead of grafting an article (a) (bis in French), less aesthetic than sensible. The provisions of the articles in question as contained in the new Constitution are as follows:

“Article 3. Arabic is the national and official language.

Arabic remains the official language of the state.

A Supreme Council of Arabic Language is created at the office of the President of the Republic.

The Supreme Council of the Arabic Language, in particular, works on the prosperity of the Arabic language, mainstreaming its use in scientific and technological fields and encouraging translation into Arabic for this purpose.

Article 4. Tamazight is also a national and official language.

The State works for its promotion and its development in all its linguistic varieties in use throughout the national territory.

An Algerian Academy of Tamazight Language is created at the office of the President of the Republic.

The Academy based on the experts work ensures the necessary requirements to promote the Tamazight language in order to be established later on as an official language.

The implementation instructions of this Article are to be defined by virtue of an organic law.” (JORA, No. 14, 2016, pp. 5 - 6).

From the point of view of ethics and seeking to give some form of parity, and an open mind, seeking compromise in the supreme interest of the Nation, even if he is not a jurist or a legal expert, in our humble opinion, a better draft and merging of the two articles is as follows:

“Article 3. Arabic and Tamazight are national and official languages”. (Our own proposal).

About the Interpretation

The use of the term “later on” contained in Paragraph 4 of Article 4 above is very confusing. From its reading, one would understand that Tamazight’s “officiality” alongside Arabic, “official language of the state”, is not immediate. Even with a positive attitude, someone has to comprehend that as “to come”, “to be build”, or “to be defined later” (Chaker, 2016).

Article 3 of the new Constitution states: “Article 3. Arabic is the national and official language and Arabic remains the official language of the State”.

Thus drafted, its second provision is clear and unequivocal: “Arabic remains the official language of the state”. If “Arabic remains the official language of the state”, one can only wonder what and where

Tamazight would be “official language”? The formulation is therefore incoherent, at least sibylline (Chaker, 2016).

Concerning Article 4 of the new Constitution, Paragraph 3 written as follows: “An Algerian Academy of Tamazight Language is created at the office of the President of the Republic”. Until now, nothing has been done or even decided. As nothing is urgent, we can take all the time, and at the same moment Tamazight continues inexorably to wither and suffer pangs of rejection, intolerance and especially lack of memory.

From the Legal and Institutional Context

In order to rationally estimate and evaluate the scope of Tamazight’s “officialization”, it must be put into perspective in its legal context. Since the amendment of the Constitution in 2002, Tamazight was already “a national language” (JORA, No. 25, 2002, p. 11). The Constitution of 2016, promoted it as an “official language” (JORA, No. 14, 2016, p. 6). Unfortunately, the whole legal arsenal in favor of the Arabic language remains in use while ignoring the new status of Tamazight, in violation of the measures enacted by the New Constitution. All the previous texts have remained in use. They are neither amended, nor adapted to the new fundamental text of the country, nor repealed.

As an obvious conclusion, the Algerian authorities, while recognizing in 2002 the Tamazight as a “second national language” and in 2016 as a “national and official language”, had just made a formal and symbolic concession to the Kabyle Berber contestation and controversy. But to a common legislator, Arabic is and remains the exclusive language of institutional and public areas (Chaker, 2016).

What is to understand? Concretely, someone can perceive that the status of the “national and official language” is reduced to a form of patrimonial legitimacy recognition – Tamazight and Berbers are just part of the historical and cultural heritage of Algeria – and to a tolerated optional education where it is claimed. It is just a sort of civilizational and cultural heritage to put and keep in the museum!

About Data and Reality on the Ground

Since the 1995/1996 school year (even after it was promoted as a National Language in 2002 and even devoted as an Official Language in 2016), after 22 years that it is tolerated in the education system, the teaching of Tamazight has difficulty in taking off. Tamazight is taught only in Berber-speaking areas (i.e. Amazighofones) and only from the fourth primary grade.

About the National Character of Tamazight

Since 2002, Tamazight has been a National Language. Since 2016, it has been both a National and Official Language. But in the reality of the Amazigh daily life, the report is bitter. Generally the Amazigh child enters school when aged 6 years old. He begins his schooling in the Arabic Language. It is not normal for an Amazigh-speaking child to begin his first steps in school in a language that is not his mother tongue. The Algerian education system obliges him to make his first tender years in an Arabic (a foreign language for him), a language that is not of his parental and social environment. He will not begin studying Tamazight (his mother tongue) until he will be 10 years old! (i.e. only from the fourth primary grade onward).

In fact, someone could ask whether this negative policy of mother tongues that was introduced since the independence of Algeria, and the subsequent planning that does not overlap with the historical and socio-cultural reality of the Algerian nation is not responsible for the decadence of the education system in general and language teaching in particular?

The Algerian education system policy, instead of normalizing and standardizing the preschool linguistic potential of children, attempts to discharge them and transplant new linguistic experiences unrelated to their previous linguistic and cognitive heritage. That is even more true “since a person’s mother tongue is the language in which he is most adept, in which he can best express himself, which he can best understand, it follows that it is the language in which, for him, learning can best take place. For this reason, a worldwide educational principle has developed in that all education is best achieved when it is given through the medium of the learner’s own language “(Clifford, 1983)

Within this reality, how can we qualify Tamazight as a National Language, if it is only taught to Amazighofones and only by their fourth year of schooling? This denial of rights is an ultimate to the official recognition of Tamazight.

On What Concerns the Script (the Writing)

This question has severely divided teachers, politicians, administration and activists, as does the religious trend. Here, unfortunately, the opinions of the student and the user are not taken into account. From this debate of extreme positions, three propositions emerge.

1. The use of the Arabic character is the wishful thinking of Arab and religious politicians. For them, any form of writing the Arab characters is anti-Islamic! This category of people relates the Arabic character to the text of the Holy Coran. From this opinion, unfortunately, was born a marginal tendency that rejects any form of tolerance and compromise. As a result, the Arabic characters option is not unanimous among users.
2. Defenders of the Tifinagh character highlight the authenticity of the Berber script, over several millenniums. However, how do we make it catch up to modernity for a writing that is more than three thousand years old?
3. Finally, for the majority of users (pupils, teachers, linguists and researchers) it is the Latin characters that are privileged. The explanation is very simple; first this practice is highly recommended, standardized and widely broadcasted by INALCO. The Latin alphabet, with its highly responsive keyboard in Information Technology and the field of computing, it dominates almost all uses: data entry, word processing and printing. All of this adds to the advantages of Desktop Publishing with its high compatibility with computer technologies. Objectively, the Latin character is the best able to ensure the wide diffusion of Tamazight or even its universalization (Chelli, 2012).

About Future Constitutional Guarantees and Amendments

In all countries, the Constitution is considered the fundamental text that protects the rights of all citizens. However, the provisions of Article 212 of the new Constitution relating to the constitutional amendment leave something to be desired, which reads as follows:

“Article 212: None of the following shall be the object of a constitutional amendment:

1. *The Republican character of the State;*
2. *The democratic order based on a multi-party system;*
3. *The role of Islam as the religion of the State;*
4. ***The role of Arabic as the national and official language;***
5. *The fundamental liberties and the rights of man and of the citizen;*
6. *The integrity and unity of the national territory;*

7. *The national emblem and the national anthem as symbols of the Revolution and the Republic.*

8. *The reelection of the President of the Republic for once only.*”

Reading the measures of this article shows that Tamazight, proclaimed “also national and official language” (JORA, No. 14, 206, p. 6) is not protected in the same way as the Arabic language is from a possible future constitutional revision! Is this a lapse of memory, or a simple omission? Certainly not. The consequences of Tamazight's omission in such an article can be disastrous for Tamazight. It means that the perennialism of Tamazight depends only on the will of the moment especially in this weakened political climate.

Implications and Conclusion

Even though the new Constitution gives a taste of incompleteness, it should be remembered that the promotion of Tamazight to the rank of National and Official Language remains a major event in the life of the Berber speakers of Algeria, and remains one of the prominent political decisions of the year 2016.

“The status of national and official language for Tamazight is considered an important advance as it provides a lawful basis that opens opportunities and possibilities to its development” (Oussalem, 2017).

The legal and constitutional promotion of Tamazight, the status of National and Official Language, is a “huge step in the right direction” (Dourari, 2017)

However, much remains to be done to concretize this historic decision which will remain a de jure and not de facto advance until an academic institution is created and until the feasibility of this decision is converted to facts. As long as this is not the case, this decision is purely symbolic and consists in calming the identity claim.

We believe that it is high time, all over the world, to ban all forms of linguistic, social and political apartheid from the backward spirits of some ruling classes.

We believe that a legal framework alone is insufficient. Tamazight needs real and effective government support. For too much laxity and less consideration would make us speak of “the language resettling and not the language planning” (Achab, 1995).

Tamazight requires an academy, laboratories and research centers, redeployment plans and all the government's attention. It will need a budget, political means, economic and human incentives. All as it will be necessary to amend the constitutional text in order to banish confusions or even contradictions. In addition to this, Tamazight will need all the vivacity and vigilance of its daily users and this all the time. That is the sine qua non condition for Tamazight to regain “its place in the concert of the laws of the nation” (Haddadou, 2016).

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