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‘Legal History meets Diachronic Linguistics: Understanding legal concepts and corresponding terminology.’

Lecture delivered at the Henri Pirenne Institute Medieval Seminar Series
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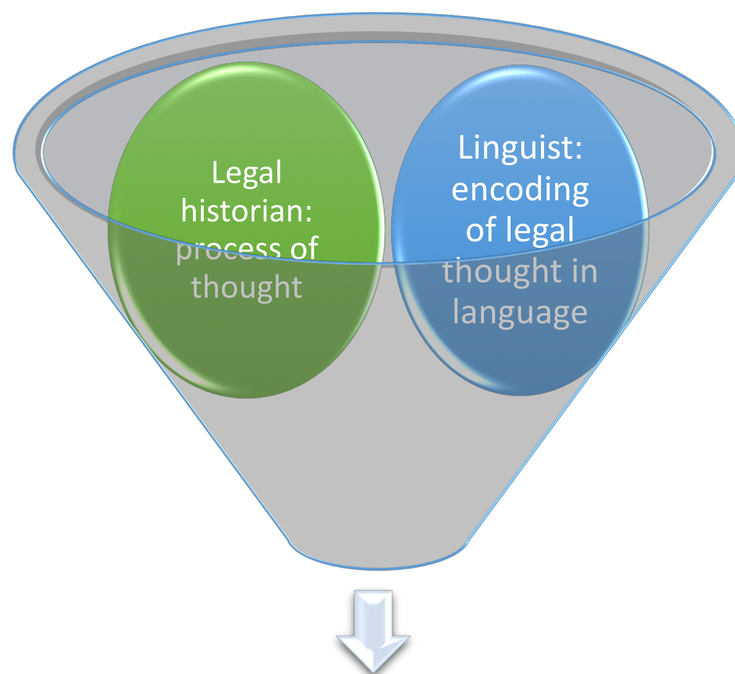
(Please DO NOT quote from this paper)

Today, I will be talking about my project, financed by the Belgian research fund FWO between 2013 and 2017, and in which I brought together legal history and linguistics. The aim of this research was to reveal the terminological and linguistics aspects of legal concepts and to understand the materialisation and evolution of legal concepts by examining the relevant terminology. This approach can be applied to all periods in legal history as well as in relation to contemporary sources.

In the example singled out for this research, I aimed to trace the advent and early use of the concept of consideration in English contract law, by studying the doctrinal development in parallel with the corresponding terminological evolution between the 14th and 18th centuries. It was essential to adopt a two-track, interdisciplinary approach and to mark out a research field beyond the mere content analysis of the case law and legal writings.



reveals how legal thought creates meaning in language and
how language creates realities in law

On the one hand, the enquiry of the legal historian revealed the historical process of the legal thought that initiated this concept. On the other hand, the pragmatic and empirical angle of studying the language in its context by the linguist showed how legal thought was encoded in linguistic expressions and meanings. This allowed for a better

understanding of the continuous interaction between the way legal thought creates meaning in language and language creates realities in law.

***Begriffsgeschichte* approach**

This approach is akin to the *Begriffsgeschichte* work undertaken in German-speaking academia, in particular by scholars such as Brunner, Conze, Koselleck and Meier who worked on the encyclopaedia *Geschichtliche Grundbegriffe*.[1] One of the methodological principles applied by the editors of this monumental work, was to analyse the semantic fields of political and social language, because language offers a reliable indicator of the thinking and contexts in which concepts are established and are shifting in meaning. Methodologies imported from linguistics sciences, such as philology, historical semantics and structural linguistics are essential tools for *Begriffsgeschichte* research.[2]

This particular aspect of the *Begriffsgeschichte* approach guided my research. Linguistic means of expression are central to law and legal texts are endowed, besides the informative and communicative purposes, with prescriptive and/or performative functions. The study of law is, among others, an enquiry into the abstract entities that make up a legal order. Law is created by man and consequently, the language used to describe this phenomenon is intrinsically linked to its specific reality. The legal reality of a legal system exists through the linguistic means of expression.

Legal terminology

Legal terminology is somewhat of an outsider in the area of specialised language. In law, it is not always possible to draw a clear dividing line between legal conceptions and non-legal conceptions. According to Hohfeld,[3] this is because of a failure to differentiate between purely legal relations and the physical and mental facts that create such relations. This is reflected in the general ambiguity and looseness of the legal terminology.

Let us take the term ‘property’ as an example: it designates the physical object (e.g. land), on the one hand, and the legal interests, rights and privileges (e.g. of the ownership of land) appertained to such physical object, and in the latter case the term is used figuratively. One of the reasons for this ‘looseness’ of legal terminology is that although certain terms refer to highly complex legal concepts, the actual language is imported from general language registers and many terms refer to everyday physical things, while actually describing an abstract legal concept. According to Pollock and Maitland:

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[1] O. Brunner, W. Conze, R. Koselleck (eds.) (2004) *Geschichtliche Grundbegriffe. Historisches Lexikon zur Politisch-sozialen Sprache in Deutschland,* Stuttgart: Klett-Cotta, 9 volumes. There were other similarly important German works: J. Ritter, K. Gründer, G. Gabriel (eds.) (1971 - 2007) *Historisches Wörterbuch der Philosophie*, Basel: Schwabe, mainly concerned with the history of philosophical concepts; R. Reichardt, E. Schmitt, H.J. Lüsebrink, J. Leonard (1985-) *Handbuch politisch-sozialer Grundbegriffe in Frankreich 1680-1820*, München: Oldenbourg Wissenschaftverlag

[2] R. Koselleck (2006) *Begriffsgeschichten*, Frankfurt: Suhrkamp, especially at pp. 32-55

[3] W. N. Hohfeld (1913-1914) Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, in: 23 *Yale Law Journal*, 16-59, at p. 20

> "Few, if any, of the terms in our vocabulary have always been technical terms. The license that the man of science can allow himself of coining new words is one which, by the nature of the case, is denied to lawyers. They have to take their terms out of popular speech; gradually the words so taken are defined; sometimes a word continues to have both a technical meaning for lawyers and a different and vaguer meaning for laymen; sometimes the word that lawyers have adopted is abandoned by the laity."[4]

This demonstrates perfectly the difference between the notion of concept as a cognitive category (ie. constituents of thought) on the one hand, and as a linguistic category (ie. semantic meaning) on the other.[5] To understand the fundamental nature of legal language, it is important to make that distinction. But it also shows the intrinsic link between the two and the inevitable confusion that can be created when they come together.

At the heart of my research on consideration, is precisely such a term that has migrated from a general language usage, comprehensible to the ordinary man, to a specialised use no longer comprehensible to anyone but the legal specialist. It is the process of this migration that I have examined using linguistic and corpus-based methodologies.

<u>What is the concept of consideration and where did it come from ?</u>

In medieval England, there was no such thing as an informal promise that could be contractually enforced. The instruments most used for executory promises were covenant and debt, but these were based on primarily proprietary notions and could not easily evolve within the given procedural constraints. To make informal undertakings and promises legally enforceable, a new form of action was necessary. Yet the nature of the common law dictated that this should grow 'organically' out of the existing actions, rather than from substantial and radical changes to the law.

At the end of the 14th c. and beginning of the 15th c. the action of assumpsit materialised which, in turn, led to the development of the concept of consideration. This new action first introduced the notion that an informal promise can be legal enforceable and so its basis became the very occurrence of breaking a promise. Consequently, allowing for the breaking of a promise to become actionable then led to the question of how to ring fence this, i.e. how to draw the limit beyond which promises can no longer be considered as enforceable. That is when the concept of consideration arose:
- it was necessary to spell-out the circumstances and the motivating reason for making a promise;
- the promise must be "met with" or "supported by" some element of consideration and the presence of consideration is what makes a promise contractually binding.

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[4] F. Pollock, F.W. Maitland (1895/1968) *The History of English Law before the Time of Edward I*, vol. II, Cambridge: CUP, at p. 31

[5] "Der Begriff ist eine erkenntnistheoretische Kategorie, die Bedeutung eine linguistische." in: H. Felber (2001) *Allgemeine Terminologielehre, Wissenslehre und Wissenstechnik. Theoretische Grundlagen und philosophische Betrachtungen*, Wien: Termnet, at pp. 58-59; also: H. Mattila (2012) Legal Vocabulary, in: P. Tiersma, L. Solan (eds.) The Oxford Handbook of *Language and Law*, 27-51, at pp.27-28

As the new action emerged it was also necessary to find adequate language to describe it. As Holdsworth contended: it became “obvious that some word or expression was needed to differentiate the agreements which could be enforced […] from the agreements which could not.”[6] A phrase or word was required that would link the recital of the principle bargain to the clause that explained the motivation of the undertaking. The word/phrase described the concrete situation of a causal link between two elements necessary to making an agreement: something is said/given/paid/done in consideration of something said/given/paid/done (e.g. “the promise of delivery was made in consideration of payment in two instalments”). Here lies the origin of the clause ‘in consideration of’. By the end of the 16th century, the use of that clause became more common place, but not exclusive. As late as 1579, Rastell’s entry for contract in his dictionary does not include the word ‘consideration’, but rather ‘recompense’. And way into the 17th century ‘consideration’ and ‘cause’ can still be found used as synonyms.[7]

This concept appears to us today as a long-standing concept carved in stone, but it actually took a long and, at times, haphazard path to evolve. The results of studying the language confirmed a concordance between the hesitant and at times confused development of the concept, on the one hand, and the terminology used in discussions of the issue in case law, on the other. It also revealed the many proposals and attempts that were made before legal thinking settled on the terminology as we know it today.

Language

The theoretical view of language adopted for this research was that of systemic, functional linguistics.[8] It is a pragmatic view which considers language as an act of communication and which stresses the function, notably the social function, of the use of language when people interact with each other. This means that the lexical or grammatical analysis considers the elements in the language by describing how these function. So for example, the approach goes beyond traditional grammar classification of words and considers the function they play.

Corpus linguistics and concordance methodologies

The linguistic tools were borrowed from the corpus- and concordance-based methodologies. Corpus and concordance work as a method of exegesis on the basis of detailed searches of words and phrases in multiple contexts and among large amount of texts, goes back as far as the Middle Ages, when biblical scholars manually indexed the

[6] W.S. Holdsworth (1925) *History of English Law*, vil. VIII, London: Methuen, at p.3

[7] e.g. in Cowell’s Interpreter (1637) contract is defined as “a covenant or agreement with lawful consideration or cause.”

[8] Also called systemic functional grammar or systemic linguistics. The standard reference work is: M. Halliday (1985/1994) *An Introduction to Functional Grammar*, London: Edward Arnold; see also C. Laske (2017) *Legal History meets Lexical Semantics*, Chapter III, PhD thesis, University of Ghent, forthcoming monograph; C. Laske (2013) Translators and Legal Comparatists as Objective Mediators, in : J. Husa & M. Van Hoecke *Objectivity in Law and Legal Reasoning*, Oxford : Hart Publishing, pp.213-228, at pp.214-217

words of the Holy Scriptures.[9] Subsequently, it has also been practised by literary scholars[10] and lexicographers.[11] The first computer-generated concordance tools appeared in the 1950s, when it took twenty-four hours to process 60,000 words and used punched-card technology for storage! Modern corpus work, as we know it today, emerged in the 1980s and 1990s.

Corpus-based research is a study of language based on large collections of computerised texts which is the corpus. While concordance-based study is the use of linguistic software that retrieves alphabetically or otherwise sorted lists of linguistic data from the corpus in question. These methodologies and tools allow us to examine the legal language in its textual context by making it possible for detailed searches of words, phrases and lexical/grammatical patterns in multiple contexts and among a large amount of electronically held texts, providing information on the data that is both quantitative and qualitative, empirical rather than intuitive. Approaching terminology in its textual dimension also show how concepts cluster in texts which, in turn, reveals how alliances between concepts shift over time. This way of analysing diachronic evolution allows for the research to objectify claims of semantic change. As Firth wrote: “you shall know a word by the company it keeps.”[12]

The Corpus

The corpus of texts I have constituted for this research was designed in a cyclical process to make sure it satisfies the requirement of ‘representativeness’.

Biber has represented this process schematically as follows:

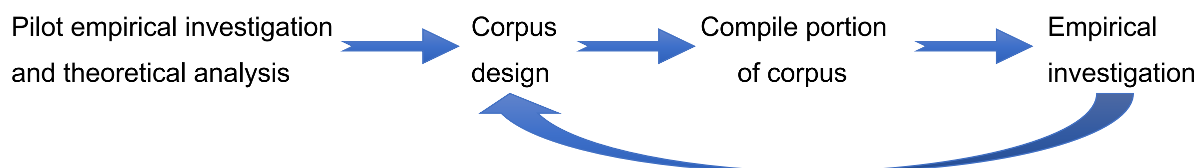

Figure 4: Biber’s cyclical process to achieve ‘representativeness’ in corpus design[13]

The sources that were used for the selection of texts were reports of cases in the common law courts: the Year Books and early Law Reports between the 14th and 17th centuries and from the mid-18th to the mid-19th centuries. For comparison’s sake, I also studied a selection of abridgments and lexicons/dictionaries from that same period.

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[9] M. Albaric (2004) Hugues de Saint-Cher et les concordances bibliques latines (XIII-XVIII siècles), in: L-J. Bataillon, G. Dahan, P-M Gy (eds.) *Hugues de Saint-Cher (+1263), bibliste et théologien: Etudes réunies*, 467-479

[10] e.g.: A. Becket (1787) *Concordance to Shakespeare*, London: G.G.J. and J. Robinson

[11] e.g.: S. Johnson (1755) *Dictionary of the English Language: in which The Words are deduced from their Originals, and Illustrated in their Different Significations by Examples from the best Writers*; Ancestor of the OED (first published in 1884 as unbound fascicles) *A New English Dictionary on Historical Principles; Founded Mainly on the Materials Collected by The Philological Society*

[12] J.R. Firth (1957) A synopsis of linguistics theory 1930-1955, in: *Studies in Linguistic Analysis*, Oxford: Philological Society, 1-32, at p. 11

[13] D. Biber (1993) Representativeness in Corpus Design, in: *Literary and Linguistic Computing*, Vol. 8, No. 4, 243-257

The use of these documents are not without challenges, as they are neither systematic nor official, nor standardised, but scant, personal and erroneous in matters of factual details at times.[14] Moreover, the texts from which the corpus was constituted, are reports and notes in varying registers, different structures and styles. These were written in Anglo-French, except for three (later) documents which are in Middle English. The facts of the case are sketched briefly and the arguments described succinctly.

The result was a diachronic corpus consisting of four main sub-corpora:
1. Late 14th/15th c. corpus: period during which the action of assumpsit materialised and with it the shift from primarily proprietary thinking to that of promissory exchange.
2. 16th c. corpus (Tudor, mainly Elizabethan era): period that saw the establishment of the concept of consideration in the case law.
3. 17th c. corpus (mainly early Stuart era): dating from the first half of the 17th c until the Interregnum (1649-60). By that time, the concept of consideration was well established.
4. Mid 18th/early 19th c. corpus drawn from a variety of reports. It is a collection of cases decided by Lord Mansfield and his colleagues, in which the idea of consideration as moral obligation was defended.

The study

The diachronic linguistics analysis was a very detailed study of terminology, lexical and grammatical patterns, proximity of terms, clusters and collocations, all always within their textual context.
For today's lecture I have singled out two aspects of the results for discussion:
The first observation to make is that while certain aspects of the new legal action were already established and confirmed in subsequent cases, the terminology still lingered behind and remained on well-trodden paths. So, for example, the promissory notion increasingly present in informal agreements was not necessarily expressed by the use of the term 'promise'. With today's hindsight, we understand that promise was actually already at the heart of the new legal thinking, but the terminology continued to refer to prior discursive elements of proprietary concepts. The study showed that terms such as 'covenant' and 'debt' (both proprietary concepts) continued to be used. Also, the term 'contract' was not very prominent in the vicinity of 'consideration' in the earlier corpora. While the legal mind was progressing along a path of new ideas, the language expressing such innovations remained conservative.

The second finding I wish to outline is the semantic shift of the term 'consideration' from general language usage to specialised technical use - from the use that can be understood by the ordinary man, to that only comprehensible to the legal mind.

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[14] The Year Books have been compared to the (early) *Lois de Lille*, see D. Heirbaut (2012) The spokesmen in medieval courts: the unknown leading judges of the customary law and makers of the first continental law reports, in: P. Brand, J. Getzler (eds.) *Judges and judging in the history of the common law and civil law: from antiquity to modern times*, Cambridge: CUP, 192-208

For the purposes of my study, I grouped the language surrounding the search term ‘consideration’ into three main types of language uses:

<u>(i) general language meaning/use:</u>

For example: “The court’s decision was made in consideration of all the facts.”

<u>(ii) general language meaning but use in a legal context:</u>

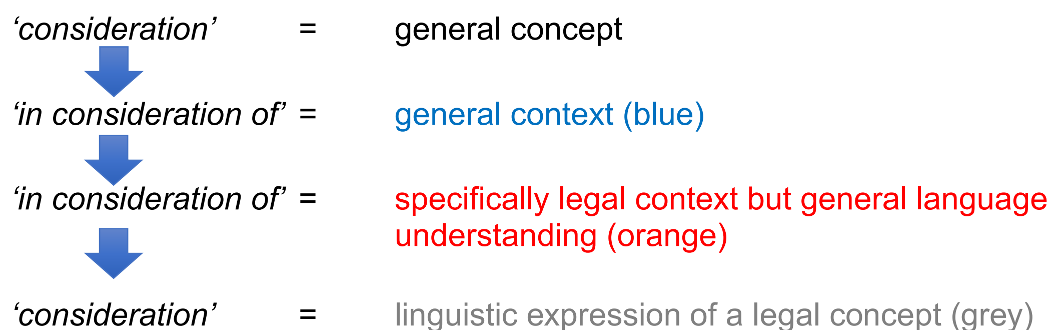
For example: “The payment was promised in consideration of the marriage to his daughter.”

<u>(iii) specialist/technical/abstract meaning and use</u>

For example: “The instrument imported a prima facie consideration.”

The main pointers to the use of technical language can be observed in the interaction between the lexical and grammatical patterning, because every meaning of a specific word will tend to have different patterns.[15]. Words with technical meanings ‘behave’ differently from the same words in general language contexts. The study showed how a prepositional expression denoting a causal relationship (*in consideration of*) gave rise to a fully-fledged legal term crystallising the new concept which had hitherto only been expressed through paraphrasing. This raises interesting questions on how neologisms develop.

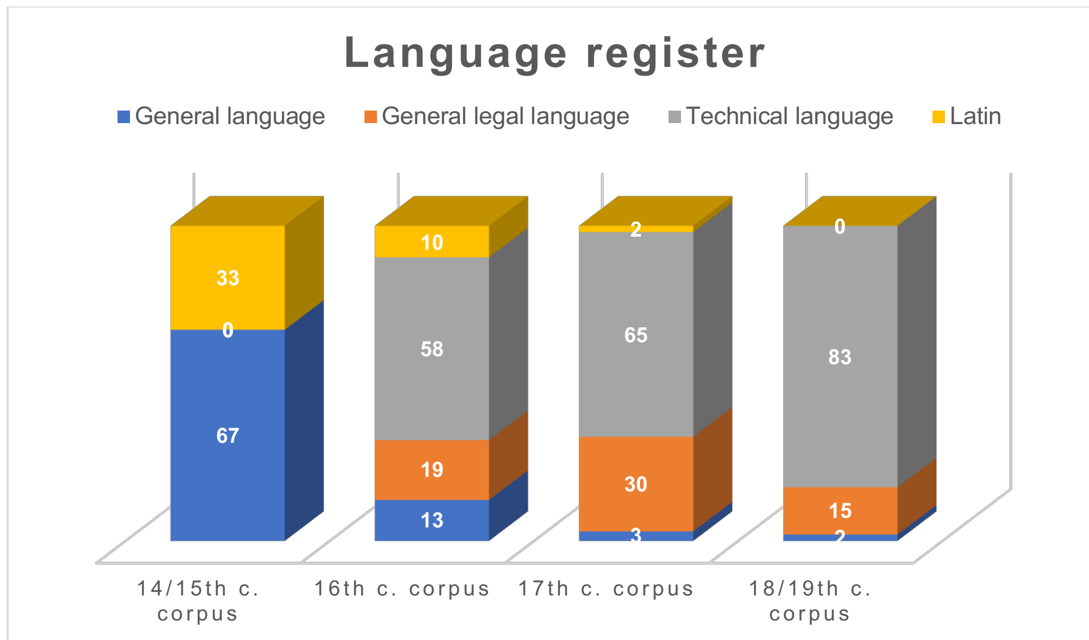
As we consider the use of the terminology that encodes the concept of consideration, we shift along a linguistic continuum:



From <u>‘consideration’</u> as a general concept to <u>‘in consideration of’</u> in a general context (blue), to <u>‘in consideration of</u>’ in a specifically legal context, though still within a general language understanding (orange), to <u>‘consideration’</u> as the linguistic expression of a legal concept (grey). As the concept gained in stature, so did its position as an autonomous concept. This was reflected in the use of the term ‘consideration’ no longer solely in the context of a causal connector but as a stand-alone noun and cover-term for the conceptual thinking of how to make informal agreements enforceable. The term ‘consideration’ stood hitherto for a legal concept that has continued to evolve to the present day.

[15] J. Sinclair (1991) *Corpus Concordance Collocation.* Oxford : OUP at 103; see also A. Goldberg (1995) *Constructions: A Construction Grammar Approach to Argument Structure,* Chicago: University of Chicago Press; S. T. Gries, D. Divjak (2009) Behavioral profiles: A corpus-based approach towards cognitive semantic analysis, in: V. Evand, S. Pourcel (eds.) *New Directions in Cognitive Linguistics,* Amsterdam and Philadelphia: John Benjamins

The chart below is a visual representation of how the term 'consideration' was used in the four subcorpora:



Language register for 'consideration'

General language uses of 'consideration', as represented by the blue part of the stacked columns, fall substantially with time. In the earlier sources, it is frequently used in the sense of the court or the judges 'taking (something) into account' when reaching a decision. From the late 16th century, this use is less frequent: in the Elizabethan corpus it falls to a 13% share.

The principal semantic shift in the use of the term 'consideration' appears to have happened during the 16th century. We can observe two main changes. First, there is an increased use of the collocation 'in consideration of' as a causal conjunction between the two elements or events necessary for striking a contractual agreement. While this particular collocation could be used in any situation of exchange, the textual context clearly shows that we are dealing with specialist technical matters of the law. In other words, both the meaning and function of the collocation is in a general language sense but it is the lexical and semantic context that is technical.

Second, as we move further into the 16th and into the 17th century, we find an increase of 'consideration' in technical uses, represented here by the grey part of the stacked columns. The lexical variety of its textual context is relatively poor and semantically restricted. The term consideration tends to be combined with a limited set of words, which is indicative for the use of specialised language. Furthermore, it appears as a full noun in a function of participants, accompanied by adjectives and prepositions, and associated with material processes. All these grammatical pointers put the word consideration in prime positions within the clauses, a position where it appears in its own right and as a

signpost for a concept, rather than as a mere causal link between two other prime elements. It is in this sense that the word is used in a way akin to a concept.

As we come to the decisions taken by Lord Mansfield and his fellow judges between the mid 18th and the early 19th century. The proportion of the very abstract use of the term ‘consideration’ has considerably increased. The term was then being used, as it is today, denoting an established legal concept.

Why is the use of linguistics methodologies important ?

To conclude on a more general note, it must be stressed that this type of study need not be restricted to either the Middle Ages/Renaissance or the common law of contract. The approach and methodology adopted are cognitive models that have allowed us to go beyond the conceptual and doctrinal framework of the law and gain a deep level understanding of the origins and evolution of legal thinking and the terminology.

Two concluding remarks should be made here. First, studying the language of the law from a diachronic terminological angle in combination with the basic premises of the *Begriffsgeschichte* approach, reveals the etymological, terminological and historical aspects of terms. Such knowledge of the evolution of terminology equips us with a better understanding of how to adapt and use it differently in the present and future, for example, for legal language reforms, for newly emerging bodies of laws or for statutory interpretation. Judges in the US have recently used corpus linguistics methodologies for the interpretation of meanings of legal texts and case law.

Second, a linguistic and terminological approach also adds to a better comprehension of the conceptual evolution of the law and of its socio-cultural content. This represents an important contribution to a better understanding of the differences or similarities between legal systems. A better grasp of the origins and evolution of specific aspects or elements of the law or a legal system, can contribute to a contextual approach for, among others, comparative law, legal translation or legal harmonisation projects.