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REPORT:

The International Conference "Law and Society in the 21st Century: Transformations, Resistances, Futures", Berlin, Germany, July 25-28, 2007

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The 2007 international conference *"Law and Society in the 21st century: Transformations, Resistances, Futures"* was held at Humboldt University in Berlin and was a joint annual meeting of the Law and Society Association and the Research Committee on Sociology of Law (International Sociological Association). It was co-sponsored by the Socio-Legal Studies Association (UK), the Japanese Association of Sociology of Law, the *Vereinigung für Rechtssoziologie,* and the Sociology of Law Section of the German Sociological Association and was undeniably a very ambitious and impressive event attracting more than 2 400 academics from 70 countries. Conference participants were welcomed by the German Federal Minister for Justice, the President of the Berlin Hertie School of Governance and representatives of the Law and Society Association.

Presentations were organized in over 500 thematic sessions and provided insights into every imaginable subject matter connected with law and the legal process and its link with society – from broader topics such as legal pragmatism, legal reconstruction of social relations, theories of democracy, nation-building, the intersection of law and economic relations, national, transnational and supranational institutions and politics, global civil society, sociolegal approaches to the study of crime, through more specific issues relating to substantive law (constitutional drafting, regulatory cultures, corporate law, administrative law), adjectival law (types of courts and aspects of adjudication, adversarial and inquisitorial judicial systems, access to

courts, legal infrastructure) to theoretical and practical aspects of socio-legal studies, focusing on the legal profession and legal pedagogy: professional ethics, cultural histories of legal professions, inter- and multi-disciplinarity of legal education. Eighteen featured sessions addressed the specific theme of the conference, reflecting on resistance and adaptation to the trans-national transformations that have led to redefinition of law and society in the 21st century - global governance, religious and secular law in the global system, transitional justice in the post-communist world. There were more than 30 roundtables and a special plenary "The Globalization of Constitutional Law".

Given the richness of themes and the sheer number of presentations, it was hard to be physically present at even a selection of the panel sessions. Fortunately, all the Language and Law panels were scheduled during different time slots. There were ten presentations altogether divided thematically. The first session, *Law, Language and the Political Order* comprised four talks and was opened by Cecile Brich (University of Leeds, UK) with her paper 'How Naive Was Foucault? Autopsy of a Failed Resistance Movement'. Known for his critical studies of various social institutions, in the early 1970s Michel Foucault initiated a movement of resistance to contemporary penal imprisonment in France and with his colleagues at the Groupe d'information sur les prisons (GIP) called for prisoners to send in testimonials of their experience of imprisonment and circulated a questionnaire for inmates to fill in with details of various aspects of prison life. Though he aimed to challenge the class bias displayed by French tribunals, the communicative strategies he adopted were similarly elitist and led to communication breakdown between the GIP and the prisoners. This is evidenced first and foremost in the poor rate of take-up among potential respondents. Brich suggested that this may be due to the fact that the GIP chose to communicate with prisoners through the dissemination of written questionnaires in French, disregarding the higher rate of literacy difficulties, and the proportional over-representation of non-French speakers, in the prison population. Analysis of the only completed questionnaire that has been archived further reveals a stark contrast between the GIP's flawless grammar and elaborate wording, and the brevity, broken syntax, tentative spelling and use of dialect and slang which characterise this inmate's answers. In Birch's view, whether or not the GIP's linguistic choices impeded comprehension, the prisoner's failure to fulfill expectations implicit in open questions by answering at length may be read as unwillingness or inability on the respondent's part to submit to the conventions of a genre outside of his ordinary communicative repertoire. The ultimate failure of Foucault's resistance movement can be attributed to the communication breakdown which his inappropriate linguistic choices engendered.

In ‘What the F***? Offensive Language and Neocolonial Control’, Diana Eades (University of New England, Australia) examined contemporary neocolonial legal practices in Australia from linguistic, anthropological and criminological perspectives. She presented a historical overview of colonial legal discriminatorial practices that made it possible to arrest Aboriginal people for ‘indiscipline’ or ‘immoral behaviour’, not applicable to the rest of the population. Given that ‘four-letter words’ are extensively used in private conversations, as well as public broadcasts, the author showed that in Queensland, Australia, people are charged with and imprisoned for using offensive language. Although this legislation was repealed in 1984, the Queensland Summary Offences Act 2005 singles out the use of ‘offensive, obscene, indecent or abusive language’ as a criminal offense. Citing a magistrate in an offensive language case the author emphasized that Aboriginal people are charged with offensive language at 15 times the rate of non-Aboriginal people. Aboriginal people continue to be overpoliced, and owing to the specifics of the ‘policing process’, the first stage – police intervention – provides an easy mechanism for police in the criminalizing of Aboriginal people. Once stopped for using offensive language, it is easy for a situation to develop where the Aboriginal person is charged with public drunkenness or resisting arrest, which together with using offensive language is so common that is referred to as the ‘trifecta’. Research has shown that Aboriginal people are not involved in more criminal activity than non-Aboriginal people; it is only more likely for non-Aboriginal people to get off for swearing. One of the most recent and glaring examples of discriminatory approach was the arrest in November 2004 of an Aboriginal man, for being a public nuisance after swearing at police officers in the street. Within hours of being apprehended the man bled to death in a police cell with broken ribs and a torn liver as a result of being kicked by a police officer. In 2007 an all-white jury found the police officer not guilty of manslaughter and assault. Such incidents testify to the fact that the criminalization of Aboriginal people through the selective policing of the use of ‘offensive’ language is the concurrent counterpart to earlier legislation which punished Aboriginal reserve residents for crimes such as ‘indiscipline’ or ‘immoral behaviour’ and is a token of contemporary neocolonialist discriminatory practices.

In ‘The Methods of Expressing Obligation and Prohibition in English, Hungarian, and Polish Statutory Instruments: Comparative Analysis of Deontic Modality’ Aleksandra Ewelina Matulewska, Karolina Kaczmarek and Przemyslaw Wiatrowski (Adam Mickiewicz University, Poland) presented an analysis of the semantic and syntactic structure of prohibitive and imperative clauses in English, Hungarian and Polish statutes. Their talk focused on the semantic components that mark modality and the overt and covert surface realization of this category by diverse grammatical and lexical

means across the three languages. They distinguished between unconditional duty as an obligation to perform which is binding no matter the situation, conditional duty as an obligation to perform only in specific circumstances, and limited conditional duty, defined as an obligation to perform only in specific circumstances with a guaranteed minimum or maximum limit of performance where the level of performance above or below the guaranteed limit is at the actor's discretion. The presenters gave extensive examples of translations of EU statutory instruments into Polish and Hungarian, which clearly indicated that translators were not well acquainted with the legal language of the respective jurisdictions. This lack of profound knowledge of the generic conventions of the specialized target discourse materializes in non-standard legal means of expressing deontic modality and leads to the evolution of new EU Polish and Hungarian legal languages.

The final presentation in this session was 'The Text and Context of European Directives' by Diana Yankova (New Bulgarian University, Bulgaria). The author highlighted the fact that to date there have been little or no substantive studies of the important linguistic elements in EU law and their implications for understanding and application of the law; language and communication issues have not been informed by scholarly discussion. The idiosyncratic communicative situation within which EU legal texts are created is shown to have an immediate bearing on the texts produced. Within this context, concepts including text type, original text, translation, text producer and text recipient acquire new meaning and merit new interpretation. One motivation for analyzing EU directives is the role these instruments play in the process of approximation of legislation and the purpose they fulfill. Directives occupy a special place among statutory texts since they are binding in regard to the results to be achieved, but not to the exact methods of achieving these results, which is left to the discretion of each Member State. The presentation analysed the specific functional, linguistic and communicative characteristics of the legal genre in the context of European legal texts as representing a unique set of features and conditions. It looked at the linguistic situation in Europe and the language policy in the EU with special emphasis on the translation regime of EU institutions. The participants in the communication and the role of the translator in the law making process in the EU was discussed and the issue was raised if we are witnessing the creation of an interculture and a new hybrid text type.

Due to last-minute cancellation of three papers, the second Language and Law session, *Law, Language, and Forensic Evidence* had only one talk - 'A Diachronic Analysis of Judicial Language in Domestic Violence Rulings' by Frances E. Olsen (University of California, USA) and Carole E. Chaski (ALIAS Technology LLC/Institute for Linguistic Evidence, Inc). The authors

presented a computational linguistic analysis of a database of all published American appellate cases in the Westlaw system that deal with domestic violence from the founding of the United States to 1900, using lexical and n-gram approaches to test current hypotheses about the utility of phylogenetic models of language change. By examining the language that judges and one influential group of elite lawyers employed, the authors attempted to throw light on the ineffectiveness of previous (and ultimately current) domestic violence policies, indicating that diachronic relations display systemic changes in lexical semantics and pragmatics and provide a testbed in which to examine the derivation of texts from a linguistic perspective and implicate legal precedent and ideology from a legal perspective.

Two papers were scheduled for *Language and the Criminal Law*, the third Language and Law panel. In 'Evidence Transformed: UK Police Interviews', Kate Haworth (University of Nottingham, UK) presented results from a linguistic analysis of police-suspect interviews in England, and the transformations they undergo between this initial stage until their presentation in court. Her findings in assessing the validity of the current use of police interview data as evidence at trial raise real concerns with the present format of this process. She briefly outlined the background history of police interviewing in the UK, focusing on the introduction of the Police and Criminal Evidence Act 1984. This legislation was partly enacted in response to high-profile miscarriages of justice involving interview evidence and led to the exigence that all interviews with suspects be audio recorded. The corpora for the analysis were 200 recent police interviews. Notwithstanding the new legislation, it was shown that serious problems are still encountered. In stark contrast to the strict principles of preservation applied to physical evidence, interview data go through significant transformation and 'contamination' along the route from interview room to courtroom. Haworth focused on the conversion of the data from audio tape to written transcript, and the influence of future audiences (the police, Crown Prosecution Service, lawyers, judge and jury) on the initial interaction in the interview itself. Despite the safeguards provided by PACE 1984, there is nonetheless a level of routine distortion and contamination unintentionally built in to the current system of presenting UK police interviews as evidence.

The second paper in this panel was 'An Examination of Alleged Equality between Professional and Lay Judges in Deliberation in the Upcoming New Trial System in Japan', was delivered by Syugo Hotta (Ritsumeikan University, Japan), who presented a quantitative and qualitative study of linguistic communication between professional judges and lay judges under the proposed new trial system in Japan to commence in 2009. Under this new system, three professional judges and six lay judges, to incorporate and

reflect citizens' 'common sense' in the administration of justice, make up a body which presides over specific types of criminal cases. Professional and lay judges are claimed to be 'equal' in discussing the case in the deliberation room. Hotta underscored the fact that details have not been elucidated as to in what respect they are equal and attempted to identify the purported 'equality' between them through the examination of mock deliberations. On introducing the new system, the courts, prosecutors, and the bar association have collaboratively held mock trials in various areas of Japan. The linguistic exchanges in four mock deliberations where exactly the same case was deliberated was used as corpus for the research. Hotta applied several methods in examining utterances by professional and lay judges in order to evaluate their alleged equality. Using Austin's speech-act theory, the author demonstrated that professional judges overwhelmingly resorted to the more 'powerful' performative utterances, while lay judges used more informative speech, signaling the inequality in the process. He then analysed turn-taking patterns, number of utterances of both groups, direct or indirect arguments: whether they were based on arguments presented in court, or on one's speculation or consideration or on facts, not presented in court as evidence or argument. The communication dynamics between lay and professional judges suggests that in reality they are not equal in their capacity and that inequality might be suppressing the lay judges' active participation in the deliberations. Therefore, the goal set forth in the ideal deliberation, i.e., equality between lay and professional judges, is scarcely realized in the mock trials examined.

The fourth Language and Law panel, *Language and the Rule of Law* started with the presentation 'Perverted Justice: The Instant Messages of Some Convicted "Sexual Predators"' by Ronald Butters, Phillip Carter and Tyler Kendall (Duke University, USA). The authors presented an analysis of a single case in the US of alleged attempted sexual molestation of a minor via the Internet, aided by a vigilante organization, called Perverted Justice which seeks out sexual predators who might use the Internet as a means of contacting youths. Their adult undercover 'decoys' enter online chat rooms and wait for unsuspecting 'marks' to contact the decoys through Instant Messages. Attorneys for the defendant asked Butters for linguistic advice on behalf of a man who had been charged with the use of the Internet for attempted inducement, enticement and coercion of a person under the age of 18 to engage in sexual activity. Linguistic testimony was not allowed because the defense had not given sufficient warning to the prosecution that an expert was to testify. The defendant was found guilty and sentenced to six years in prison. The presentation focused on two important issues: the extent to which linguistic analysis can properly function in such cases, and the broader socio-legal issues involved in Internet crimes based on false identities. According to the authors, the linguistic and contextual analysis revealed that the

defendant could have believed that the decoy was not a minor and secondly, it did not clearly indicate that he attempted to induce or entice the putative youth to commit an illegal sex act. The linguistic analysis came to the conclusion that the 'youth' was in fact an adult pretending to be a minor with the purpose of creating a titillating fantasy role-play. The second part of the presentation explored potential avenues of criminal defense and the nature of the legal and ethical challenges. By examining the pseudo-epistemology of sexuality and the production of the historical and cultural matrix in which it is made intelligible, the authors concluded that sexual subject formation is highly embedded within the social and the cultural that carry with them univalency in possible language interpretation, leading to automatic presumption of guilt.

In 'Is Judicial Formalism Compatible with Rule of Law Ideals?' Marcin Matczak (University of Oxford, UK) shared results of an empirical study aimed at assessing the level and structure of formalism in judicial reasoning. The study was based on a quantitative analysis of the standards judges use to decide cases, covering formal standards (e.g. literal interpretation, reference to precedents), 'external' standards (e.g. purpose of a particular regulation) and general constitutional or EU law standards (e.g. equality rule, proportionality rule). It was shown that despite wide opportunities to use general standards when interpreting legal text, judges limit themselves to a literal interpretation (plain meaning) of the rules. Judges use the 'priority of most locally applicable rule' approach and reduce the scope of interpretation premises available. The question arises as to whether formalism in judicial reasoning is in fact compatible with rule of law ideals. Matczak reported that a significant part of legal texts (i.e. constitutional and EU law regulations) are virtually unused by judges when they decide cases. He raised the issue whether prioritization of the most locally applicable rule at the cost of general standards means prioritization of particular lawmakers' input into the legal system, and not the legal system as a whole – including general standards that should influence decisions taken in individual cases. Does this prioritization support the rule of law or rather the rule of men? The author offered an alternative framework, based on Kripke-Putnam semantics and its implications for the interpretation of legal language, in an attempt to resolve areas of vagueness and overgeneralizations.

The last paper in this panel was 'Legal Definitions in War on Extremism', by Anita Soboleva (Jurists for Constitutional Rights and Freedoms, Russia) and focused on the important question of individual word meanings in context. It dealt with recent Russian legislation on crimes of extremism, incitement to religious and ethnic hatred, discrimination and ethnically motivated crimes and their interpretation by law enforcement and judiciary in their legal

practice. This new legislation was shown by the author to raise issues involving strict construction, broad construction, correlation of linguistic and political arguments in interpretation, and vague and ambiguous language in criminal law provisions and to pose questions about whether law enforcement and judiciary discretion are sufficient tools adequate for preventing abuse of law, in cases when the law is vague or too general. How, for instance, can one know whether one is an extremist, given a page-length definition of extremism, which includes such actions as libel of state officials by physical persons, NGOs, and mass media, if they disseminate false information about extremist activity of these public officials; creating violent obstacles to the work of state institutions; public appeals for, or justification of, or even simple expressions of sympathy with alleged extremist acts? This broad definition of extremism appears to forbid any call for civic disobedience or even justification of such disobedience. Most of the activities mentioned in this definition also constitute separate crimes or administrative offenses and are included in the Criminal Code or the Administrative Offenses Code. Soboleva concluded that such legislation raises serious concerns about the future of free speech and legitimate restrictions on free speech.

The setting of the conference provided an atmosphere conducive to scholarly debate on newly emerging aspects of legal and societal order in Europe and the world and supplied the context for critical appraisal of existing frameworks, as well as informed notions and conceptualizations for the future. What better venue to hold such an impressive and timely event than Humboldt University – a modern seat for higher education, founded in 1810 epitomizing modern education in the former divided city of Berlin, itself a tangible symbol of the rapid political, legal, societal, economic changes and transformations at the turn of 21st the century. The next conference of the Law and Society Association will be held May 29 - June 1, conjointly with the Canadian Law and Society Association, in Montreal, Canada. I would highly recommend it to any researcher or practitioner interested in the convergence of socio-legal issues and in general in the intersection of language and law.

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