



Sources of Language and Law

www.legal-linguistics.net

This pdf document provided by SOULL can be cited as:

Christensen, Ralph: "Friedrich Müller's experimental turn of legal positivism"
In: SOULL – Sources of Language and Law, <https://legal-linguistics.net> (Last update: 9.7.2020)

All rights reserved.

Friedrich Müller's experimental turn of legal positivism

The corpus method is not a panacea. The use of corpus data will not do away with disagreements as to the meaning of statutory terms. Instead, the corpus method removes the determination of ordinary meaning from the black box of the judge's mental impression and renders the discussion of ordinary meaning one of tangible and quantifiable reality."

With its scientific aspiration, Friedrich Müller's work stands post Kelsen and post legal positivism. However, here too, "post" does not mean application or uncritical extrapolation.

In Friedrich Müller's work, the fulfilment of the scientific aspiration of legal theory in practical reality starts with the question of what is actually happening when a legal system is valid.

1. The blind spot of reality

Old "legal methodology", as developed by Gerber and Laband, excluded extra-legal knowledge, in order to create the identity of law in the first place. The subject of the discipline was the definition of statutory concepts and their connection on principles modelled on Aristotelian logic. Any political and historical knowledge that had been contained in traditional public law was excluded.

Today, this direction is reversed. External knowledge is sought. The precondition for this was the overcoming of informational naivety which assumed that the necessary knowledge is easily accessible, suitably portioned and certain without doubt.

Meanwhile, with the keyword of "normative domain", a level of reflection of integrating external knowledge into the process of norm concretisation was provided for.

2. The language as blind spot

In the more recent methodological discussion, in a separate chapter on “interdisciplinarity”, interrelations with other disciplines are being portrayed. History, economics, social sciences and natural sciences can be found in specific sections. There is also a section on interrelations with the humanities. Yet one discipline is missing: linguistics. Although, with legal linguistics, this discipline has developed a specific sub-discipline dedicated to legal problems, with a busy field of publications and many conferences.

Taking into account the structural openness of language, applying the law by interpreting linguistically framed norms is never just an act of recognition, but also has a constitutive nature.

Yet now, language is taken out of the focus again. At first, it is granted “that legal science cultivates an implicit theory of language which denies a good deal of the results of the discipline of linguistics.” Then you could think of overcoming this implicit theory of language by making use of the widening of the focus by newer legal methodology. However, the opposite is happening: “Apparently, legal science as the science of case-resolution guided by law is not allowed to question the basic assumption that such guidance is possible through the means of language – just like, regardless of the stance of the according determinism, in the dispute over determinism it is not allowed to question that the subjects addressed by norms can actually be determined by normative precepts. Without this basic assumption, law as a normative concept would, by and large, be invalid.” Thus, the problem of language is deported into the realm of metaphysics and not to be considered for further analysis anymore. Obviously, this whole process of exclusion is taking place within a footnote.

This exclusion has a systematic reason. Jurists regard the language as their private property. Which is astonishing, considering that many people can speak, even if not quite as well as the jurists. So, why the jurists? The reason given for this is that, when external knowledge is used, the normative standards, as far as they are capable of binding, must be adhered to. Thus, legal science must overcome the idea that its exclusive characteristics lie in the definition of statutory terms and their logical connection.

3. The experimental turn of the statutory language

The question of what is actually happening, has also been asked by Friedrich Müller with regards to language. One does not necessarily receive the answer to this question from the speaker. The reflective knowledge that speakers have available stays way behind their real know-how. One rather has to observe the speakers in their practical action, run the tape and log. It is the same with the jurists. When you ask a judge, what he does, he gives you an abridged presentation of what he once heard in a foundations lecture. Then, with some occasional cynicism, he goes on and distances himself from this, without ever fully elaborating his own real know-how. This way one learns nothing. Instead one has to analyse the texts of the courts; and namely not with regards to what they say in their self-description, but with regards to what they practically do

in their connections.

The old theory of “legal method” defined the exclusive characteristics of legal science too narrowly and thus excluded the essence of the law-generating process from the theoretical reflection. Surely, the incorporation of external knowledge must be controlled by the language of the law. So, what is the meaning of a legal term?

The empirical method of co-occurrence analysis presumes that the meaning of a term is determined by the phrases that regularly co-occur in its textual environment. Today, in relation to certain textual corpora, this can be evaluated by a computer.

Yet of course, there are limits here too. For soon a level of complexity is reached which, on the one hand, does more justice to the holistic character of language, but on the other hand cannot be worked off practically anymore.

The machine-based evaluation of corpora of sources, too, cannot replace the decision.

Procedure-based argumentation will always be central to this work. Without argumentation, the increase of information by the new media would be a mere addition. The knowledge needs a qualitative interconnection that is orderly arranged and structured in itself. Technical access to information does not provide a semantics or interpreted knowledge, only dead quantities and characters. So, there is indeed a risk of the new possibilities of big data, namely that by means of masses of texts dischargingly little is said and that at the same time the decisive performance of processing information gets forgotten.

So, dictionaries and computers can help us to discover a multitude of semantic variants and to relate them to contexts. But they do not show us the limits of the language. For the only limit in language is comprehensibility. Empirical analysis, hence, does not take away the burden of the dispute as to which of the found meanings might be the best one for our purposes.

So, what remains of the exclusive characteristics of the law? Obviously, the direct linguistic control through the statute in simple cases. More importantly, though, it guarantees and enables the process of argumentation in all the hard cases. Hence, in all the significant cases the control through the statute is an indirect one. Here the court must keep an eye on the relevant scope of the arguments and, if necessary, either expand or restrict it ex officio. Most importantly, however, it must guarantee equality of arms and procedural fairness in the dispute over the meaning of the terms. This is required by the standards of the constitutional state. Finally, the reasoning must lay out which arguments have reached the state of argumentative validity, i.e. have integrated or refuted all objections they are faced with.

So here too, the state is not an intervention state which takes away the language from the citizens. Nor is it a welfare state which speaks for the citizens and distributes the meaning according to need. Instead, it is a regulatory state which

secures that the dispute about meaning takes place and is decided on the right level.