Chapter 1

Language of law and legal communication

In a very basic sense, law would not exist without language (Danet 1985: 273). The concept and status of the language of law are partly related to the functions of law in society. Law is the regime that orders human activities and relations through systematic application of the force of politically organized society, or through social pressure, backed by force, in such a society (Black's Law Dictionary 1999: 889). Law interpreted as the legal system defined above performs at least two primary functions, namely the ordering of human relations and creating new ones, i.e. 'laying down the law', and the restoration of social order (*cf*. Danet, 1980, 1985). With regard to the former, the function of the law is two-fold: *regulative* and *constitutive* (Trosborg, 1995b: 32, 1997a: 19). Law defines relations and determines which deeds are prohibited ('Everything that is not prohibited is permitted'). By means of law, new relations are created where none existed before, for example, marriage relationship. The function of 'restoration of social order' is aimed at maintaining justice in case of conflicts between citizens (*private law*) or between the individual and the state (*public law*).

Naturally, the jurisprudence distinguishes many more functions of law. Functions of law have always been defined in the same way, although by various authors they were labelled differently and their various aspects were emphasized. One of the greatest legal theorists, the creator of the norm not only as an idea and a system, but also as an axiomatic foundation of any rule, Hans Kelsen (1881-1973) viewed the law as an almost ideal instrument of regulating the society and the state (Kelsen 1930, 1934).

Following Kelsen, contemporary authors distinguish functions of law by means of the criterion of the aim that the law represents by itself. The aim of law is, therefore, seen as a postulated *status quo* that is to be obtained by certain

deeds, creation of norms, organizational solutions, etc. (*cf*. Chauvin, Stawecki, Winczorek 2009, 125-126). In such an approach, probably the broadest of all, law functions can be distinguished as follows:

a) stabilization of the existing social, political, economic state of affairs (function of stabilization);
b) dynamization of desired changes in social life that can be achieved through promotion and stimulation of changes in various aspects of society (function of dynamization);
c) protection of certain values, precious from the social perspective (function of protection);
d) organizational function (organization of all the branches of a society and state; provision of institutional background);
e) repressive and educative functions, providing the general and special prevention (as – in fact – a kind of a deterrence discouraging people from infringing the written norm);
f) function of control, as a means of undertaking the permanent control and the supervision of social deeds;
g) distributive function that results from sharing various material and immaterial goods and charges in a society. The basic function in this field remains the regulation of social relations and, according to the cited authors, resolution of conflicts in particular; and
h) settlement of conflicts as a result of the observance and application of law (regulatory function).

The language of the law is conditioned by the law. The various functions of law determine to some extent not only the concept and status of the language of law itself but also its further classifications and subdivisions, types of legal texts, and status of addressers and addressees.

1.1. The concept and the status of the language of law

What is the language of law? This question was approached by both lawyers and linguists. In short, we may start with the preliminary assumption that language of law is the language used by persons qualified to practice law, i.e. lawyers involved in various professional activities, from the drafting of statutes to the drawing up of contracts. Like any professional language used for specific purposes, language of law is also to some extent specific.

The multiplicity of classificatory terms referring to the language(s) of law is enormous. In the Anglo-Saxon theory of law, *the language of the law* has been considered by most researchers (see, e.g. Mellinkoff 1963) a most convenient label for this kind of specialized language. The term was preferred to *legal*

parlance (e.g. Pei 1952: 119), or *legal language* (e.g. Rodell 1939: 181; Flesch 1946: 36; Danet 1980: 463; Klinck 1992: 133) probably for the reason that, as Mellinkoff (1963: 3-4) puts it, *legal* is so frequently used to mean lawful that it might cause confusion. Mellinkoff rejects the usage of *legal lingo* (e.g. Oppenheimer, 1926: 142), *legal jargon* (e.g. Gowers 1948: 6), *legalese* (e.g. Cooper 1953: 16), *legalistic jargon* (e.g. Hunter, 1957: 27), and *argot of the law* (e.g. Mencken 1936: 424) as being too "sweepingly opprobrious and also too narrow" (Mellinkoff 1963: 4). The proliferation of different names, not clearly defined, does not make it any easier to define the phenomenon or to determine the status of the language of the law. In this study, following most researchers, we shall use the term *language of law*, as a superordinate term, to denote language used in all legal contexts. The *language of law* partakes of some of the essence of the diverse characterizations given above.

In fact, Kurzon (1989: 283-284) argues in favour of a twofold division between *language of the law* and *legal language.* The *language of the law* is seen as one part of language related to the legal register, whereas *legal language* refers to all types of languages used in legal contexts apart from *the language of the law*.

In the Polish theory of law, most discussions on the language of law revert to the dichotomy introduced by Bronisław Wróblewski (1948). Adopting a subjective criterion, Wróblewski distinguishes between the language of the law/legal language *(język prawny)* and the lawyers' language (*język prawniczy*)[*]. The language of the law/legal language is defined as the legislator's language, or the language in which normative acts are formulated. The lawyers' language refers to texts of judicial decisions and administrative decisions as well as to the theory of law. The choice of the term implies the type of texts to be analysed. Bronisław Wróblewski strongly emphasized the linguistic dissimilarity between normative texts (construed with the help of the language of law) and non-normative texts (construed with the help of the lawyers' language), thus justifying his distinction of those two types of language (Wróblewski 1948: 54).

Further detailed divisions and subdivisions were proposed, for example, by Zieliński (1999: 50-72), and Gizbert-Studnicki (1986: 33-34). Thus, the language of the law is subdivided into the language of legal provisions and the language of legal norms/rules, and the lawyers' language – the language of lawyers' practice and the language of theory of law. Gizbert-Studnicki (1972: 224) even proposed to jointly label the terms *language of the law* and the *lawyers' language* as *language of the law sensu largo*.

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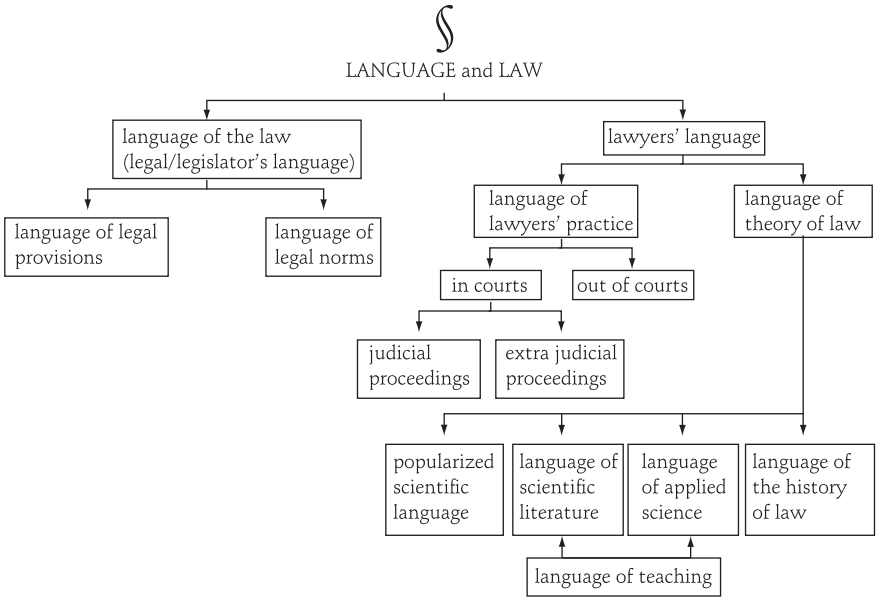
[*] The terms have been translated according to *Słownik prawniczy polsko-angielski (Polish--English Dictionary of Legal Terms),* Polska Akademia Nauk, Instytut Państwa i Prawa, Wrocław: Ossolineum, 1986. B. Kielar (1999: 184), for example, uses the terms *language of the law* and *lawyers' language* to denote *język prawny* and *język prawniczy* respectively.

Maciej Zieliński (1999: 50-72) proposes a multi-level categorization of the concept of the language of law, based on Wróblewski's division, which is shown in Table 1.1.

TABLE 1.1



In addition, Zieliński proposes to distinguish a number of paralegal languages:

a) language of officials and civil servants;
b) languages of particular subsidiary sciences of law and theory of law, such as legal logic, criminology, victimology, criminalistics, forensic medicine, forensic psychiatry, etc.;
c) language of politicians and journalists speaking and writing about law;
d) language of citizens talking and writing about legal issues.

Some researchers believe it is groundless to differentiate between legislator's and lawyers' language, because it is the lawyers who formulate the legislative acts. Also terminological and semantic differences are not distinct enough to create a basis for distinguishing these two variants (Lang 1962: 81). Opałek pointed to similarities and dissimilarities between the language of the law and common/general language (Opałek, Wróblewski 1969; see also Zakrzewski 1964). Ziembiński (1974: 211) observes that Wróblewski's distinction overlooks unwritten sources of law. In minority of one remains the opinion of Stanisław Ehrlich (1955: 383) who negates the existence of the *language of the law* and its divisions and approves of legal terms only.

Stefan Kalinowski and Jerzy Wróblewski (1978: 1-14) approve of B. Wróblewski's division, but believe the semantic criterion, not the subjective one, is the most decisive one, as the semantic characteristics of legislator's language are conditioned by the language's function. The lawyers' language is a metalanguage in relation to the legislator's language as it serves to describe the binding law, i.e. the language of the law (Kalinowski and Wróblewski 1978: 4).

Analogically, J. Wróblewski's entries 'legislator's language' and 'lawyers' language' to the draft version of the *Polish law dictionary* (*Polski słownik prawniczy. Hasła podstawowe (wersja robocza)* 1969: 23-24) reflected the functionality of the language of the law. J. Wróblewski noted though that *legislator's language* is not syntactically different from the common language. Semantically, some expressions are equal to common expressions and some are distinct, which is conditioned by (a) the requirements of precise formulation of legal texts by the legislator, (b) the requirements of uniform formulation of texts belonging to the same branch of law, and (c) the influence of elements of the functional context of a legal norm. The fact that some expressions differ from the common expressions may be explained by the influence of the above-mentioned factors and the postulate of comprehensibility of legal texts by the addressees of legal norms.

The *lawyers' language* differs from the common language in the same respect as the legislator's language does (*Polski słownik prawniczy. Hasła podstawowe (wersja robocza)* 1969: 22-23). However, there are semantic and pragmatic differences between the lawyers' language and the legislator's language. Semantically, the lawyers' language is enriched with words and expressions from the legislator's language and from sources. Pragmatically, the lawyers' language fulfils other functions than the legislators' language. The lawyers' language can be divided into several kinds differing by the words and expressions used: (a) language of bodies applying law (language of legal practice), (b) lawyers' language of science (of theory of law) which can be further diversified depending on the legal discipline, and (c) common lawyers' language (language of non-professionals).

Similar criteria of division between the legislator's language and the lawyers' language have been proposed by Zygmunt Ziembiński in both entries to the draft *Polish law dictionary* (*Polski słownik prawniczy. Hasła podstawowe (wersja robocza)* 1969: 24-25). He characterizes the legislator's language as the prescriptive language mostly based on the Polish general language. The legislator's language differs, however, in terms of specialized vocabulary used and absence of idioms. For example, "A czyni C" ("A does C") should be interpreted as "A powinien czynić C" ("A should do C"). The lawyers' language, according to Ziembiński (1969: 23), is a metalanguage in respect to the legislator's language, since it is descriptive in nature. Therefore, a statement "A should do C" in legislator's language is interpreted as a norm of behaviour,

whereas in lawyers' language such a statement is simply a description of a norm binding in the described legal system.

Bożena Hałas (1995: 39) adds one more functional division of the language of the law. Preserving the traditional names, Hałas (1995: 39-44) proposes the following variants of the language of the law:

a) the legislator's language (*język prawny*) whose function is to give a linguistic expression of legal norms;
b) the lawyers' language (*język prawniczy*) which allows to encode synthetic formulations of the legislators' language, their interpretation and analysis.

The two categories are to some extent homogenous.

c) sociooperative professional language (*socjooperatywny język zawodowy*) whose function is to make the language of the law more economic for the purposes of legal practice. Depending on the legal profession, the language used is more or less subjective. The least subjectivity is observed in judges' and prosecutors' utterances, as their role and linguistic behaviour is perceived as public activity. On the other hand, the attorneys' usage of discourse is most subjective as the primary goal of an attorney/counsel is to convince the court of the correctness of the presented standpoint and, by linguistic means, to reach the requested judge's decision. The sociooperative professional language is the language of many texts related to legal actions, such as speeches of the parties, minutes of trials or court sessions, expert opinions, legal advice;
d) legal jargon (*gwara prawnicza*) that is quite informal, mostly oral, and is used between professionals in informal settings. For example, lay judges are called *apostołowie* (apostles), advocates – green penguins (from the colour of jabot on their gowns, and *postępowanie nakazowe i upominawcze (*proceedings by writ of payment) has been replaced in legal jargon by *nakaz* (writ).

The above contemporary division proposed by Hałas is partly based on B. Wróblewski's classic subjective division, but her division reflects the general change in the research perspective. The area which has been of growing interest in the study of language of law is its analysis in terms of pragmatic functions.

The linguistic diversification of language of law has given rise to the question of how it should be treated: as a separate sublanguage or dialect (O'Barr 1981; Charrow, Crandall and Charrow 1982; Charrow and Crandall 1978; Klinck 1992); a register (Bolinger 1975: 358-363; Gustafsson 1975a, 1975b; Gizbert-Studnicki 1986; Danet 1985; Brodziak 2004); a (stylistic) variety (Kurzon 1986: 58; Hałas 1995; Jadacka 2002; Malinowski 2006: 240); or a technical language (Schauer 1987: 586; Mounin 1979) (compare also detailed discussion of different approaches in Klinck 1992: 133-164 (for English) and Choduń 2007: 31-59 (for

Polish)). Perhaps it is all merely a question of special terminology built-in within the ordinary use of language.

The problem with the above terms is that they are not unequivocal in linguistics. For example, 'varieties', according to the subject matter, are sometimes referred to as 'registers', though this term is applied to different types of linguistic variety by different linguists (Quirk *et al.* 1972: 20). An individual adopts one of the varieties as his or her permanent form of English, note further Quirk *et al.* (1972: 21). With varieties according to subject matter, the same speaker has a repertoire of varieties and habitually switches to the appropriate one as occasion arises. The number of varieties the speaker commands depends crucially upon his or her specific profession, training, range of hobbies, etc. The type of language required by choice of subject matter, involving lexical and grammatical correlates, would be roughly constant against variables (dialect, national standard). Some obvious contingent constraints are however emerging: the use of a specific variety of one class frequently presupposes the use of a specific variety of another. The use of a well-formed legal sentence presupposes an educated variety of English (Quirk *et al.* 1972: 22).

According to Western linguistic tradition, a national language may be divided into two broad types, i.e. general purpose language (LGP) and special purpose language (LSP). It could be argued of course that the concept of 'general' language, which is an abstraction derived from a society's division of knowledge, into general and special, does not exist. There are as many general languages as there are special languages because each group of specialists has a different notion of what constitutes the general knowledge which forms the basis of their subject. The question, however, is whether the latter is a subdivision of the former or *vice versa,* whether they are quite independent of each other, or perhaps the answer is to be found somewhere in between – so the two overlap (Roszkowski 1999: 12).

Irrespective of the existence of various approaches and perspectives, most scholars though consider language of the law a special sublanguage or LSP or *Fachsprache* (cf. Petöfi et al. 1975 with regard to the language of jurisprudence). There exist various approaches concerning special languages or sublanguages.

Lothar Hoffmann (1987) introduced the concept of *sublanguages* meaning "subsystems of the total language system, actualized in the texts of specific spheres of communication". Common language and special language are both subsystems of our *total language system*. They use the same elements and structures of a certain language system. However, they use them in specific ways and with specific frequencies of occurrence, depending on the intention, purpose and the content of the text or discourse. Any language system includes an open-ended repertoire of sublanguages. Most sublanguages are special languages, which belong to a definite subject field. Any special language

> *represents the totality of linguistic means used in a limited sphere of communication on a restricted subject in order to enable cognitive work to be done and mutual information to be conveyed by those acting in the said domain* (Hoffmann 1987: 298).

We may logically assume that special purpose language is a language that can only be understood by those who share a certain amount of factual or field specific knowledge in addition to the generally shared linguistic knowledge. Sager (1993: 96) insists that special languages are the means of linguistic communication necessary to convey specific information among specialists belonging to the same field. The shared language elements are those linguistic units and structures that are generally found in both general and special purpose languages, e.g. words having the same meanings, such as function words, and grammatical structures. These language elements make it possible for laypersons and field specialists to communicate with one another, but the limited number of such shared elements also makes communication difficult, because it is often impossible to express complicated, field specific concepts in ordinary language without losing at least some of the exactness or conciseness usually required in special purpose language. One 'technical' term could be used instead of ten 'ordinary words'.

A significant consequence of regarding special languages as subsystems of national language is the fact that they are subject to linguistic, historical, geographical and other changes, notes Roszkowski (1999: 13). They include both written and spoken texts. There are contemporary special languages as well as old, standard and non-standard. Also, there exist various registers and 'levels' of sublanguages. Finally, special languages can have regional or geographical varieties. Thus, special language represents a broader concept which allows to encompass the phenomenon of legal language. Special language is more than a mere register, a question of style or special terminology. Moreover, it has a culture specific nature. First indications of a cultural influence on discourse structures can be found in Robert Brooke Kaplan (1966) who noticed that foreign students appeared to have some trouble with Anglo-American discourse structures (Kaplan 1966: 247) – deviations from the "English linearity".

The autonomy of legal language resides, according to Stanisław Roszkowski (1999: 10), in the semantic relations of the lexicon. Once constituted a system, the language of the law represents an entire universe of legal meanings. Thus, having a lexicon constituted in a manner different from that of the ordinary language, and involving terms related to each other in ways different from those of ordinary language, legal discourse must be autonomous of the ordinary language. This is a structuralist approach according to which the sign is arbitrary: thus, for example, a particular word (signifier) need not inevitably have only one signified. Therefore, an ordinary word need not have the same meaning in a legal context. But more than that, since the 'meaning' of the sign is determined by its relations within the semiotic system, a sign in one such system

(law) must have a different 'meaning' of the sign in another system (ordinary language).

Taking the standpoint of jurisprudence, we may also come to similar conclusions, i.e. that legal language is, following Herbert Lionel Adolphus Hart's thesis (1954), unique unto itself – *sui generis* (the opposite opinion in, e.g. Malinowski 2006: 234-240). To support his thesis, Hart differentiates four distinctive characteristics of legal language. First, legal language presupposes the existence of a legal system, a system of rules of law (Hart 1954: 42).

The second distinctive feature results from the first feature and concerns the use of legal terms (see Chapter 3 on semantics of legal discourse). The uses presuppose the related rules of law that give the words contextual meaning (Hart 1954: 42-43). Legal language presupposes particular rules of law, against the background of which legal language obtains its meaningfulness and particular meaning (Morrison 1989: 295) (see Chapter 6.3. of the present study on legal interpretation). For example, the word "dog" is part of ordinary English, and its meaning can be given verbally by naming its genus and differentiating features or by pointing to one and saying, "That is a dog" (Hart 1954: 46). In contrast, because there is nothing to which we can point and say, "That is a company", there are no such things as companies apart from the law (Hart 1954: 38, 42, 45-47). The word "company" is a legal word (a law word) whose meaning is given only by and accessible through the law. In using "company" we know what we are saying only insofar as we know the law of companies. Moreover, any "ordinary words or phrases when with the names of corporations take on a special legal use, for the words are correlated with the facts, *not solely by the rules of ordinary English* but also by the rules of *English law...*" (Hart 1954: 58), as in the following example: "The Chrysler Corporation can pay a bill". In Hart's view, all of legal language ultimately would be *sui generis* because even such apparently ordinary English words as "can" take on a special legal meaning when we use them with words such as "corporation" that have meaning only in and through rules of law (Morrison 1989: 297).

To illustrate Hart's logic, below there is a definition ("elucidation" in his terminology) of the expression: "a legal right" (1954: 50, 52-55):

> *(1) A statement of the form "X has the right" is true if the following conditions are satisfied:*
> *a) There is in existence a legal system.*
> *b) Under a rule or rules of the system some other person Y is, in the events which have happened, obliged to do or abstain from some action.*
> *c) This obligation is made by law dependent on the choice either of X or some other person authorized to act on his behalf so that either Y is bound to do or abstain from some action only if X (or some authorized person) so chooses or alternatively only until X (or such person) chooses otherwise.*
> *(2) A statement of the form "X has the right" is used to draw a conclusion of law in a particular case which falls under such rules.*

Hart's third distinguishing general characteristics of legal language is that sentences of legal language differ in meaning, import or effect (or all three) depending upon who utters them, where, and when (Hart 1954: 43-44). This feature reminds us that an institutional context plays an important role in analyzing legal communication (see Chapter 5). It also is similar to speech act analysis, and particularly a performative-verb analysis of the sort for which J.L. Austin is famous (1962) (see Chapter 4.5.).

The fourth characteristic of legal language rests on a distinctive feature of a universal function of any rules which function is to apply to more than one fact. For rules of law, the variation among fact patterns is an essential element in the application of legal rules (Hart 1954: 45) because the same pattern of facts can be unified under different rules to yield the same or different legal conclusions (Hart 1954: 44-45). This phenomenon of different rules applying to the same facts Hart calls the multiciplicity-of-applicable-rules.

Such rule-governed determination of legal meaning, a proposition first arrived at by Kelsen, and with minor emendations still adhered to by Hart, was deemed to be the distinctive characteristic of legal language in jurisprudence. We should like, however, to take our analysis one step further. A theoretically adequate analysis of the legal discourse must take account of the socio-cultural extensions of legal language, to include the factor of power and inter-group relations (see Chapter 6 on legal power).

Another approach enquiring a similar problem, i.e. what kinds of factors make a language of law distinctive, is taken by Dennis R. Klinck (1992: 143-164). Klinck highlights in this respect a complex relationship of three factors: form, function, and context of expectations. Although function may underlie the distinction of language types, what is crucial are the formal characteristics of the language related to function of language and function of the particular context or occasion of use, of authorial "intent", and of audience expectation (Klinck 1992: 152).

Since the formal features (attributes of the text itself) and functions of legal language will be discussed in other Chapters of this work, Chapters 4. and 1.3. respectively, we will only refer to context of use and audience expectation. Klinck does it from the point of view of speech act theory, as the notion of "legal language" as a complex issue involves, according to him, a whole speech situation: that is, addresser, text (as a formal construct), addressee, and what he calls "occasion" (1992: 163). We will look closer at legal speech acts in Chapter 4.5., but we can agree at this point with Dennis Klinck that speech act theory may add a dimension to our reflections about "legal language" (1992: 155).

Stanisław Roszkowski (1999: 14) pointed to one possible way of empirically investigating the nature of the sublanguage of law, i.e. by means of language corpora. A variety of corpora may be used as a tool to investigate a hypothesis that the language of law is different from unconstrained natural language in many