Metaphor in Legal Discourse

Edited by Inesa Šeškauskienė

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Inesa Šeškauskienė

Introduction

Inesa Šeškauskienė

In this volume, metaphor is discussed as it is employed in legal discourse where law is tightly interwoven with linguistic expression. Written or oral, laws are produced following established verbal patterns; a change of a single word may change the meaning of an entire paragraph; laws are interpreted using language; legal proceedings can hardly be thought of as expressed by means other than language; people in the legal profession spend a lot of time arguing for or against a particular wording of a legal norm or rule. Apparently, language is the main (or the sole?) instrument in the legal profession.

As claimed by cognitive linguists (Boroditsky 2011), language influences our thought by imposing a certain framework on our ideas. It is therefore important to study language to understand how our mind works, how it moulds our reasoning, including our reasoning about legal matters. As pointed out by Solan and Tiersma (2012, 3),

> through language we establish societal institutions, including legal ones. These institutions, like the languages through which they are created, differ from one another in salient ways, but also share a great deal of underlying structure. The more we know about the use of language in institutional settings, the better we can study particular institutions—legal ones in particular—and learn about their structure and the relationships among them.

Language is an important medium to express ideas; it is inevitably linked to culture, which includes patterns of behaviour, tradition, history, memory, and many more. It is therefore not surprising that law and legal systems, intertwined with language, are also culture-specific. The specificity is, first of all, reflected in two legal traditions: common law and civil law. The divide is an important guideline when studying linguistic expression; however, the specificity of culture is much more than the above dichotomy of legal systems. It is reflected, for example, in the complexity of legal terms in European law where new legal terms coexist with traditional terms, mostly derived from legal French, or in the terms of some social systems

like Soviet Russia (Mattila 2012, 29). Legal texts, as pointed out by Šarčević (2012, 193), do not have an agreed meaning independent of local context and are a challenge across languages and cultures. Legal texts may also pose a challenge within a single language and culture.

Language, culture, and law make up an interesting area of research when it comes to studying them through the lenses of metaphor, which during the last four decades, following a firmly established cognitive trend, has been understood as a matter of thought rather than just language. As is now widely acknowledged, metaphor is one experiential domain, usually more abstract, called 'target', thought of in terms of another, more concrete, experiential domain called 'source' (Lakoff and Johnson 1980/2003; Winter 2001). Metaphor is primarily employed to better understand and explain abstract concepts through more tangible, concrete elements of the source domain. The elements may be parts of the human body or in other ways closely linked to the human body, human reasoning, and the functioning of humans in the surrounding world; in other words, metaphors are embodied (Johnson 2007; Winter 2008). Language is one of many, and very important, manifestations of metaphor.

Due to its abstract nature, law could be treated as a target domain which people aim to understand; metaphor is an instrument of such understanding. Legal discourse, be it expressed through formal written language of legal acts, the language of legal proceedings at the court of law or police statements of spoken interactions with victims of abuse or violators, inevitably employs metaphor and discusses abstract notions in terms of concrete. Thus we know that the spatial expression *under the law* means 'obeying the law', because we understand that the vertical arrangement of items (signalled by *under*) in abstract contexts is systematically linked to our understanding of social hierarchy; the expression *evidence is obtained* is so deeply entrenched in legal discourse that we are hardly aware of its metaphoricity; the verb *obtain* in its primary meaning is associated with getting or purchasing material items, and evidence in this case is thought of as if it were some property or a concrete item; the expression is a manifestation of the object metaphor. We also know that *higher courts* are not buildings taller than some other buildings in the area but rather the ones that have more authority and power; if the *decision is binding*, it does not tie a person with ropes; it is the one that must be obeyed. All of these expressions are motivated by metaphor: abstract entities are understood in terms of more concrete, of those closer to the human body, and humans as social beings, members of society.

This book deals with different aspects of metaphoricity in legal discourse. Nine chapters authored by eleven scholars, linguists and law professionals,

discuss the nature and role of metaphor in court proceedings, in written institutionalised texts, in the judges' argumentation, in spoken records, and other texts. Metaphor, the key topic of the book, during the last decades has carved itself an important place in the humanities and social sciences. It is now mostly investigated as a conceptual phenomenon accessible through language and actual linguistic contexts of use. The contributors of the book adhere to methodologically rather diverse approaches. Linguists tend to rely on large widely accessible corpora like BNC or COCA, sometimes on (self-collected) specialised corpora of spoken or written language. Law professionals give preference to more interpretative methodologies, to the identification of metaphor in more extended (narrative) texts or research of legal terminology in a synchronic or diachronic perspective.

Most chapters in this book are based on English data, collected from language corpora or from less accessible sources, such as police recordings or court transcripts. One chapter deals solely with the Lithuanian data. There are two chapters that focus on contrastive aspects between two languages and cultures: one of the chapters deals with texts translated from English into Lithuanian and the other raises a question of the universality of metaphor in human rights related contexts in Mandarin Chinese and British English. Further I will briefly overview each contribution.

In chapter one *The Metaphoricity of the Noun* Law, **Piotr Twardzisz** problematises the discussion of metaphoricity of professional contexts focusing on legal texts. As is well known, legal language is claimed to be unambiguous and therefore avoiding any figurativity. However, figurative language, and metaphor in particular, seems to be more deeply entrenched than one may initially think. Piotr Twardzisz aims at exploring the metaphoricity of the word *law* in a general sense and in senses derived from multiple genre-specific contexts. The research is based on the study of dictionary definitions and on COCA, an established *Corpus of Contemporary American English*, which is the author's major resource to study collocations with the word *law.* The majority of the collocations recur across different genres, for which the author provides his own account touching upon, among other things, the conventional, and hence debatable, metaphoricity of some pervasive collocations such as *break the law.* The author also discusses some methodological aspects of metaphor research, such as the (lack of) methodological rigour of Conceptual Metaphor Theory and the importance of more consistent methodology in further accounts of metaphor (Steen 2009; Steen, Dorst, Herrmann, Kaal et al. 2010). His analysis, as pointed out by the author, has implications for practitioners of English for legal purposes, for EFL learners and translators often struggling with the

idiomaticity of English. The contribution may be also important in further discussion about the role of metaphor in legal discourse.

Chapter two by **Michele Mannoni** *On the Universality of Rights through Their Metaphors* raises a very important question of human rights. The question of their universality, as pointed by the author, is of 'Western' nature and can mean very different things. Investigated in the framework of contemporary metaphor research and adhering to linguistic contexts, rights seem to have a universal bodily foundation across many languages and cultures. The author tries to answer a question whether rights metaphors in different cultures may be universally based on the same foundation.

The study is based on three large corpora: one of British English and two of Mandarin Chinese. The collocation analysis has revealed that the metaphoricity of rights is identifiable in both cultures, even though in Mandarin Chinese to a much lesser extent than in British English. However, the universal foundation of the concept of rights is very questionable. Apparently, such result is not concerned solely with the difference in the legal systems in the two countries, with China being a civil law country and the United Kingdom a common law country. There should be more deeply rooted, culture-specific, causes.

The chapter also touches upon some debatable aspects of Conceptual Metaphor Theory, which may have important repercussions in further development of metaphor theories and methodologies of their investigation. Those aspects may be of utmost importance in cross-cultural studies.

Chapter three by **Dalia Gedzevičienė** *Metaphorical Terms Denoting Intellectual Disability in Lithuanian Official Documents: Social implications* is concerned with the study of some selected legal terms. The author focuses on Lithuanian education and healthcare documents and legal acts where the terms related to intellectual disability are amply used. Her analysis of their metaphoricity has revealed that even in national legal acts some of the terms have preserved their degrading social evaluation traceable through the underlying metaphor: the constituents of compound terms refer to *backwardness, someone who is at the back, lagging behind, intellectually feeble and ineffective* and thus have a strongly negative implication stigmatising and marginalising some members of society. The analysis contributes to the social argument about the exclusion of some groups of people, with public (and legal) discourse playing a major role in the process. The chapter strongly argues for the revision of such terms so that negative social implications be removed, especially in legal acts, which by default should be socially neutral.

Chapter four by **Justina Urbonaitė** *Direct Metaphor in Selected TED Talks on Crime and Criminal Justice* is written in the framework of three

dimensional model of metaphor and MIPVU, a metaphor identification procedure developed by a group of scholars in the University of Amsterdam (Steen 2008; Steen, Dorst, Herrmann, Kaal et al. 2010) and the understanding of metaphor as a matter of thought, language, and communication (Steen 2017). The data has been collected from TED talks focusing on crime and criminal justice where legal knowledge is communicated to general audiences. Direct metaphors signalled by such expressions as *like, as if, metaphorically speaking* turned out to be frequently employed by legal experts to explain legal notions, to express criticism towards legal practices, and to support arguments. Direct metaphors are also employed to engage and/ or amuse the audience. The study confirmed previous studies demonstrating that the function of metaphor is not confined to rhetoric or explanation; it often serves several functions, which are not so easy to tease apart.

Chapter five by **Inesa Šeškauskienė** *Metaphor in Legal Translation: Space as a source domain in English and Lithuanian* focuses on the metaphoricity of spatial expressions of verticality and horizontality in the opinions of advocates general of the Court of Justice of the European Union and the translation of spatial metaphors into Lithuanian. Verticality, the main prerequisite for the deeply entrenched metaphor POWER/ CONTROL IS UP, is more relevant for English than Lithuanian, hence the well-established expression *under the law*. In Lithuanian, the above metaphor is only preserved in some cases, more often it is rendered through horizontal terms; the understanding of law as power and control over people in Lithuanian apparently features less prominently. Some other metaphors in English adhering to the horizontal dimension are realised through verticality markers in Lithuanian. Further implications of such spatial 'confusion' are also touched upon in the paper; however, to arrive at more definite conclusions as to why in one language spatial metaphors in legal discourse are based on vertical arrangement of items and in another on horizontal, more research is needed.

Chapter six by **Miguel Ángel Campos-Pardillos** *Metaphor as a Foundation for Judges' Reasoning and Narratives in Sentencing Remarks* focuses on metaphor in orally delivered judges' sentence in English courts. As is usual in a common law country, in England judges do not only deliver 'hard' facts; they also offer some interpretation and are engaged in persuasion. The researcher identifies several types of metaphors: those characterising the perpetrator and the victim, argumentative metaphors usually giving more importance to the judge's 'story', (mostly spatial) metaphors characteristic of the sentencing part, such as *length of the sentence* or *uplifting the sentence*. Metaphor thus becomes not only an

instrument clarifying more abstract notions, but also an instrument moulding the desired message and sending it to the people in the courtroom and, through traditional media and online coverage, to the society at large. Thus ideological and educational points of the sentence are very important, and the judge should be very careful when delivering it and choosing (deliberate) metaphors that 'colour' his/her speech.

Chapter seven by **Linda Berger** *Metaphors of Kairos* deals with metaphor in judicial opinions in the federal appellate courts in the United States. The term *kairos* comes from Greek rhetoric and refers, alongside ethos, pathos, and logos, to a mode of persuasion. *Kairos* is related to specific moments in time when important claims have to be made. The claims are usually rendered through metaphor. The author adheres to the understanding of metaphor as an explanatory tool when an abstract notion is clarified by referring to something more familiar and concrete, and discloses evaluative implications of specific metaphors and their role in a narrative. The analysis focuses on concrete cases of metaphor occurring in the speeches of judges. Some cases are extended systematic metaphors permeating longer texts; some are image-based. Kairic metaphors help the legal author render the story in the most effective way.

Chapter eight by **Lucia Morra** and **Barbara Pasa** *Ordre Public: Research into the origin and the evolution of legal metaphor* analyses the metaphorical concept of *ordre public* 'public order' and its evolution from a cognitive perspective. Tracing back the origin of the locution to a speech by Montesquieu, the chapter follows its development as it was used in a number of legal texts, mostly by French authors and in French legal acts before the 20th century. The authors demonstrate the evolution of the content of the phrase until the 20th–21st century when a European notion *ordre public* emerged; eventually, national exceptions were coined in the light of the principle of human dignity. The development of the notion is closely linked to the development of the society and tied to the system of values, as is evident in the rulings of the European Court of Justice.

Chapter nine by **Michelle Aldridge** and **Kate Steel** *The Role of Metaphor in Police First Response Call-outs in Cases of Suspected Domestic Abuse* touches upon the role of metaphor in police–victim interactions. The analysis includes two types of metaphors: 1) those used by victims to describe the abuse, usually linked to size, strength, volatility, and invasiveness, and 2) those employed by police officers. The first type of metaphor is mainly employed to enhance the emotional weight to their narrative and increase the impact of the narrative on police officers (POs); the second type, usually the journey metaphor, is employed to better structure the victim's narrative into a statement, to put some order into the

victim's description. The police usually try to neutralise the account of the incident, which is probably the reason why POs use much fewer metaphors than the victims. The authors argue that these contrastive styles re-inforce the power asymmetries in the call-outs and potentially contribute to the victims reporting that their voice is not heard.

Legal discourse, despite its persistent attempt at clarity, is notoriously problematic and sometimes called obscure (see Wagner and Cacciaguidi-Fahy 2006). As can be seen in the chapters of this book, legal discourse, like many other discourses, is not immune to metaphor. In legal discourse metaphor helps understand more complex ideas through more tangible, concrete things; its realisation may be culture-specific. In addition, metaphor is often also evaluative, even in legal discourse. Sometimes the evaluation is so deeply entrenched that people may be hardly aware of it; the reasons and origin of the evaluative load are not always obvious. Metaphors also play an important role in constructing arguments and is often employed for rhetorical purposes.

The chapters in the book are very different in their foci and methodological approaches. However, the problems raised and solutions offered often cross the boundary of a single community or culture. The book may be of interest to lawyers, linguists, metaphor scholars and other readers with an inquisitive mind. The volume may be of use to educators and students engaged in studying such type of discourse, often posing problems related to the specificity of a particular branch of law (contract, criminal, intellectual property, etc.) and the intricacies of legal language and culture. Understanding how metaphor works in legal discourse may help all engaged in legal discourse understand the underlying intentions, patterns of behaviour and reasoning, and provide guidance to constructing their texts.

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CHAPTER 1

THE METAPHORICITY OF THE NOUN *LAW*

PIOTR TWARDZISZ

Abstract

The chapter explores the metaphoricity of the noun *law*, as it is used across different genres. Metaphor originates in the verb, therefore we seek where and how the noun *law*, as a syntactic object, inherits metaphorical senses from its preceding verbs. Genre-based corpora are used as data sources. This analysis has two aims, which are only partially fulfilled: to determine the metaphoricity of *law* in a fairly general sense, with its amount and quality across different genres, and then to establish the metaphoricity of *law* with its forms of linguistic expression. The latter would have practical implications for practitioners of English for legal purposes, especially in their writing tasks where the key noun *law* appears. Overall, the analysis provides us with a more abstract understanding of the noun *law* and organises our knowledge of how *law* combines with preceding verbs.

Key words: law, metaphor, collocate, collocation, pattern.

1. Introduction

The language used in legal contexts—and especially English legal language—has been analysed extensively in its specific lexical, syntactic or pragmatic aspects (e.g. Groot de 1998; Tiersma 1999; Mellinkoff 2004/1963; Kocbek 2006). As an example of language for specific purposes, the (sub)language used for legal purposes has been distinctly branded as either *legal language* or *language of (the) law*. Any potential referential differences implied by these two labels will be overlooked, here. Legal language, especially in its written form, has been accorded some autonomy from language for general purposes. As opposed to general language, legal language has been seen as free of figurative expressions and

other similar devices (Tiersma 1999, 128). The seriousness of topics covered by legal writing requires that legal language be unambiguous. Thus, authors of legal texts are cautioned to keep their writing free of all varieties of literary devices.

Nevertheless, over the last few decades, new trends have appeared in legal linguistics. The (English) language used in legal contexts has been extensively analysed for its potential metaphoricity. Researchers have focused on various aspects of legal language and discourse in search of metaphorical expressions or metaphorical concepts; it has often been claimed that metaphors pervade legal language despite its alleged literalness and avoidance of ambiguity (Bosmajian 1992; Cohen and Blavin 2002; Morra, Piercarlo, and Bazzanella 2006; Twardzisz 2013). Moreover, legal thinking is claimed to be fundamentally based on *conceptual* metaphor, as introduced and developed in Conceptual Metaphor Theory (CMT) (Lakoff and Johnson 1980; Lakoff and Turner 1989; Lakoff 1993; Kövecses 2002). In opposition to the classical view of metaphor as a rhetorical device, conceptual metaphor constitutes a complex mental phenomenon. The exclusively decorative and rhetorical character is rejected in the light of the fact that metaphor is argued to permeate speech and thought. Under this view, language serves as an outlet—a physical representation of the otherwise mental construct of the metaphor.

According to the researchers who have focused on the metaphorical aspects of legal language, a shift from "visually-oriented" to "aurally-oriented" figures of speech has been taking place in American legal language (Hibbitts 1994). This shift concerns metaphors focusing on vision (e.g. *judicial review*, *observing the law*) to metaphors highlighting hearing (e.g. *law as dialogue*, *conversation*, etc.). The recognition of the reconfiguration of legal language in terms of its altered metaphoricity means acknowledging its metaphoricity in the first place. The figurativeness of legal language has been amplified by the capacious concept of "legal fiction" (Fuller 1967; Schane 2006). Rather than mere personification, descriptive representation is achieved through the "corporation as a person" fiction. In legal discourse, companies and other legal entities are depicted as *possessing* property, *entering* into contracts, or *acting* in ways characteristic of humans. Therefore, it has become natural in legal texts to render non-human entities as if they were human, or human-like (Twardzisz 2013). Legal language in the EU context provides a backdrop for research on grammatical metaphor and metonymy, as opposed to semantic metaphor (Stålhammar 2006). Neither type of metaphor relates to conceptual metaphor in the narrow sense. While conceptual metaphor is a mental construct, both semantic metaphor and grammatical metaphor are linguistic

phenomena: semantic metaphor is about substituting one word for another and grammatical metaphor is about substituting one grammatical structure for another (Halliday and Martin 1993, 79). Grammatical metaphor is also typical of specialist texts where the reification of processes into objects takes place regularly; in academic writing, for instance, the high frequency of nouns (and nominalisations), as opposed to verbs, has been confirmed by contemporary research (Biber 2006; Biber and Gray 2010). Similarly, legal documents are amenable to the condensation of information and economy of form provided by grammatical metaphor (Stålhammar 2006, 100).

Legal language has been researched for metaphor—of all stripes—and there are certain indications that such discourse abounds in figurative expressions. There are also good reasons to believe that the rigorous discourse of legal matters includes elements which dilute this formality. In the main part of this chapter, the metaphoricity of the key noun *law* will be examined. This noun is used both in specialist texts and in popular texts about law and legal matters. Determining the metaphoricity of *law*, its exact amount and quality, would be valuable to all those who write, speak and think about the law. This is one goal which will only be touched upon in the course of this analysis. There is also another goal: establishing the metaphoricity of *law*, with its forms of linguistic expression, which would be beneficial to all those who invoke the noun *law* in their professional discourse. The practical results of this analysis can be seen as guidelines for academic and specialist writing, where the key noun *law* appears. The results show a more abstract understanding of the noun *law* and organise our knowledge of how *law* combines with preceding verbs.

Before moving on to the next section, let us summarise the meanings of the noun *law* based on its comprehensive definitions from the *Oxford English Dictionary* (OED). According to the OED, the noun *law* is a borrowing from early Scandinavian. It was used in Late Old English (ca. 1000) as *lagu*, which functioned as a strong feminine noun. The entry *law* in the OED is divided into 4 major groups of senses: (i) a rule of conduct imposed by authority; (ii) without reference to an external commanding authority; (iii) scientific and philosophical uses and (iv) senses relating to allowance or indulgence.

Naturally, the general group of senses under (i) clusters the most prototypical and frequently used sub-senses, which are summarised below (disregarding the obsolete cases).

1. The body of rules, whether proceeding from formal enactment or from custom, which a particular state or community recognises as binding on its members or subjects. In this sense usually *the law*.

Often viewed, with more or less of personification, as an agent uttering or enforcing the rules of which it consists.

2. One of the individual rules which constitute the 'law' (sub-sense 1) of a state or polity.
3. Laws regarded as obeyed or enforced; controlling influence of laws; the condition of society characterised by the observance of the laws.
4. With a defining word, indicating one of the branches into which law, as an object of study or exposition, may be divided (e.g. *commercial law*, *ecclesiastical law*, *international law*, etc., *the law of banking*, *the law of nations*, etc.).
5. Applied in a restricted sense to the Statute and Common Law, in contradistinction to 'equity'.
6. Applied predicatively to decisions or opinions on legal questions to denote that they are correct.
7. The profession which is concerned with the exposition of the law, with pleading in the courts, and with the transaction of business requiring skilled knowledge of law; the profession of a lawyer.
8. The action of the courts of law, as a means of procuring redress of grievances or enforcing claims; judicial remedy.
9. The body of commandments which express the will of God with regard to the conduct of His intelligent creatures. Also (with *a*, *the* and *plural*) a particular commandment.
10. The system of moral and ceremonial precepts contained in the Pentateuch; also in a narrower sense applied to the ceremonial portion of the system considered separately.

The second group of senses under (ii) focus on the following issues:

11. Custom, customary rule or usage; habit, practice, 'ways'; *law of (the) land*: custom of the country.
12. A rule of action or procedure; one of the rules defining correct procedure in an art or department of action, or in a game (e.g. *law of the jungle*).

In the "scientific and philosophical uses" group of senses (iii), there are the following sub-senses:

13. A theoretical principle deduced from particular facts, applicable to a defined group or class of phenomena, and expressible by the statement that a particular phenomenon always occurs if certain conditions be present.

14. The order and regularity in Nature of which laws are the expression.

Finally, the most restricted group of senses (iv) "relating to allowance or indulgence" focus on:

15. An allowance in time or distance made to an animal that is to be hunted, or to one of the competitors in a race, in order to ensure equal conditions; a start; in phrases *to get, give, have (fair) law (of)*.

Having introduced the noun *law* as defined in the OED, let us proceed to the presentation of the methods used in our analysis of its metaphoricity. In the following section, the details of our corpus-based search and analysis are laid out. The data obtained from a large corpus enable sufficient representativeness of various uses of the noun *law*. It is important that despite unfathomable usages of this noun, this limited analysis has produced balanced results, obtained fairly automatically from diverse sources.

2. Methods

The source of the data is the *Corpus of Contemporary American English* (COCA) (Davies 2020–). At the time of conducting the search (June-July 2020), COCA supported eight sub-corpora based on distinct genres: TV/MOVIES, BLOG, WEB-GENL, SPOKEN, FICTION, MAGAZINE, NEWSPAPER and ACADEMIC. In the first instance, we have also approached the entire corpus, which we label here as ALL-GENRES.

Our analysis places focus on the noun *law*, namely concrete realisations of the general sequence [[verb][*the*][*law*]]. We examine the influence of the preceding verb on *law*, and vice versa. As we want to reconstruct the metaphor that accompanies *law*, it is necessary to test this particular sequence of elements. Let us briefly explain why a sequence involving a verb is crucial. Without doubt, there are differing opinions about how and where metaphor originates (see, for example, Gibbs 1999; Stefanowitsch 2004). It is possible to detect metaphor(icity) in, for example, a complex noun phrase, or any expression for that matter. Yet, in order to demonstrate where exactly this metaphor resides, one needs to resort to a clausal paraphrase, which involves an inflected verb. Moreover, metaphor is sometimes conflated with metonymy as basically the same kinds of effects. Numerous authors have pointed out that metaphor and metonymy are too difficult to distinguish from each other (Lakoff and Turner 1989, 103; Radden 2000, 93; Radden 2002, 408; Barcelona 2002, 232; Ruiz de Mendoza Ibáñez and Díez Velasco 2002, 489). Thus, in order to keep metaphor and

metonymy apart, one needs to acknowledge the fact that the former is more of a verbal issue, while the latter is more a nominal phenomenon. In this analysis, we adopt the position that metaphor originates primarily in verbs and a neighbouring noun receives its imprint; therefore, we want to examine how *law*, as a post-verbal noun, combines with a preceding verb. The string [[*the*][*law*]] may be part of a larger noun phrase, in which case the word *law* may function as a pre-modifying element for another noun. However, in our analysis, we limit ourselves to the clipped sequence [[verb][*the*][*law*]], assuming that *law* functions as a syntactic object of its preceding verb. Even if *law* is not strictly the syntactic object of its preceding verb, it is semantically related to it.

The data obtained constitute strings of three items, including the definite article *the*, thus our corpus-based search undertakes a collocational analysis of the sequence [[verb][*the*][*law*]]. These three-item sequences were retrieved using the search query "the law_v*" in the COCA "collocates" search window. The search item "the law" (without asterisks) was aligned with the "verb.ALL" option, selected in the part-of-speech drop-down menu. The hit limit was set at #1000 in the options menu, with up to two collocates immediately to the left of the search item. The option "find collocates" was activated. The same parameters were set in all the searches carried out in the study. Altogether, eight genre-based frequency lists (i.e. TV/MOVIES, BLOG, WEB-GENL, SPOKEN, FICTION, MAGAZINE, NEWSPAPER and ACADEMIC) were obtained, topped with one collective list (ALL-GENRES), which collated all the previously-retrieved data.

As argued in Ackermann and Chen (2013, 236), it seems necessary to resort to human intervention once the relevant collocation lists have been established. The raw data obtained in the form of frequency lists were manually post-edited. It was noted that a widespread phenomenon characterising raw frequency lists—the proliferation of different inflectional verb forms of the same stem—was also applicable in our data set. The nine frequency lists under examination have included different inflectional verb forms of the same stem (e.g. *break*, *breaking*, *broke*, *breaks*). These forms have been collapsed under one-word type (*break*). The frequencies of these inflected forms have been summed up, and the totals have been listed next to the basic forms. Only the basic forms have been considered in our collocational analysis. Different derivational forms (e.g. *disobey*) of the same base have also been put under one basic word type (*obey*). Moreover, some archaic forms littering the lists were removed manually, for example, *serveth*, *sayeth*, *maketh*, *keepeth*, etc.

The cleaned frequency lists are ordered in terms of word types (left-side verb collocates of *the law*), with the most frequently occurring ones at the

top and the least frequently occurring ones at the bottom. The latter constitute once-only occurrences (*hapax legomena*). In order to keep our analysis manageable, we trim all the frequency lists, retaining only these word types with frequencies of 5 and above. The word types with frequencies of 4 and less are quite numerous across all genres examined. Due to their low frequencies, these word types are less significant to our statistical analysis or conclusions concerning semantics.

The results of our corpus searches provide us with quantitative information about which verb collocates combine with the noun *law*. Such frequency lists inform us of the statistical significance of particular verbs as collocates of *law* across all genres, and then within particular genres. Subsequently, traditional manual examination of these collocates helps us to understand which semantic categories of verbs prevail on the frequency lists.

The qualitative part of this study resembles conventional phraseological research (Cowie 1981; Cowie 1994; Howarth 1998), in which collocations are understood as phrase continua with varying degrees of fixedness. High token numbers of particular verb types collocating with *law* demonstrate combinatorial restrictions between such verbs and the key noun (e.g. *break the law* vs. *twist the law*). The absence of certain semantically related verb collocates (e.g. **sprain the law*) signals arbitrary gaps in the semantic system, especially in its metaphorical layer. The vast and diverse statistical middle of the frequency lists is full of apparently free collocations (e.g. *understand the law*, *support the law*, *disregard the law*, etc.). However, even such innocuous-looking collocations may display some sort of semantic fixedness. While *understand* is capacious, in terms of possible objects that can be understood, this verb can collocate with abstracts which can function as targets of this mental process. For Ackermann and Chen (2013, 236), such apparently loose units are "still very much restricted by their semantic and/or syntactic environment". Two lexical items frequently appearing together in a collocation are claimed to be "lexically primed" for each other (Hoey 2005). The lexical priming of some words to be used with other items is the effect of our repeated encounters with them. The issues of "semantic restrictiveness" and "lexical priming" remain largely unrefined, though they are indicative of certain tendencies among words to select their neighbours. In our analysis, we will seek those collocational patterns which cluster semantically related verb collocates.

3. Results and analysis

First, let us present the results of the search of the entire corpus, without distinguishing its individual genres. The results of this search are collected under the ALL-GENRES label.

The frequency list for ALL-GENRES obtained in this search has been limited to the first thousand word types. These word types include 18,408 word tokens. The distribution of the word types according to their token numbers is as follows: 1–400: word types with 5 tokens or more, 401–495: 4 tokens, 496–621: 3 tokens, 622–906: 2 tokens and 907–1,000: 1 token (*hapax legomena*). This means that the word types from the most frequent one (the first one on the list) to the one in the 400th position are word types which have 5 or more tokens. In our analysis, we will be interested in such word types only.

The eight genre-based searches understandably result in lower numbers of word types and tokens. Below is a summary of the basic statistics obtained in each of the eight genre-based searches.

1) COCA ACAD: 606 word types and 1,678 word tokens; 1–67: word types with 5 tokens or more; 68–87: 4 tokens; 88–130: 3 tokens; 131–240: 2 tokens; 241–606: 1 token.
2) COCA BLOG: 602 word types and 2,841 word tokens; 1–90: word types with 5 tokens or more; 91–114: 4 tokens; 115–152: 3 tokens; 153–247: 2 tokens; 248–602: 1 token.
3) COCA FICT: 236 word types and 779 word tokens; 1–29: word types with 5 tokens or more; 30–39: 4 tokens; 40–53: 3 tokens; 54–84: 2 tokens; 85–236: 1 token.
4) COCA MAG: 434 word types and 1,400 word tokens; 1–55: word types with 5 tokens or more; 56–72: 4 tokens; 73–102: 3 tokens; 103–162: 2 tokens; 163–434: 1 token.
5) COCA MOV: 282 word types and 1,967 word tokens; 1–56: word types with 5 tokens or more; 57–64: 4 tokens; 65–86: 3 tokens; 87–116: 2 tokens; 117–282: 1 token.
6) COCA NEWS: 626 word types and 3,229 word tokens; 1–107: word types with 5 tokens or more; 108–136: 4 tokens; 137–177: 3 tokens; 178–266: 2 tokens; 267–619: 1 token.
7) COCA SPOK: 554 word types and 4,226 word tokens; 1–111: word types with 5 tokens or more; 112–136: 4 tokens; 137–171: 3 tokens; 172–250: 2 tokens; 251–554: 1 token.

8) COCA WEB GEN: 602 word types and 2,841 word tokens; 1–90: word types with 5 tokens or more; 91–114: 4 tokens; 115–152: 3 tokens; 153–247: 2 tokens; 248–602: 1 token.

As we are interested in the word types with 5 and more tokens, the genre-based sub-corpora display the following decreasing order in this respect: ALL-GENRES (400), COCA SPOK (111), COCA NEWS (107), COCA BLOG (90), COCA WEB GEN (90), COCA ACAD (67), COCA MOV (56), COCA MAG (55), COCA FICT (29).

These numbers are lowered by removing several word types from all lists which unduly clutter the results, such as the verbs *appear*, *be*, *become*, *have*, *remain* and *seem*. These are typical linking and existential verbs, which do not contribute much semantic content. Subsequently, further reduction of several verb types was conducted, in view of the fact that verbs with very general meanings do not contribute substantially to our analysis. Therefore, the following verb types have been removed from all frequency lists: *assume*, *consider*, *decide*, *get*, *give*, *include*, *know*, *make*, *mention*, *say*, *take*, *think*, *use* and *want*. The remaining verbs have constituted the bulk of our analysis, which is described below.

Let us first consider verb collocates which are directly related to the topic of law. The dictionary definitions (OED) of the following verbs retrieved from the ALL-GENRES list explicitly mark them, in the first or second sense, as related to the area of rules, regulations, principles, etc.: *abolish*, *codify*, *contravene*, *defy*, *enact*, *enforce*, *flout*, *nullify*, (*dis*)*obey*, *observe*, *overturn*, *repeal*, *revoke*, *transgress*, *uphold*, *veto* and *violate*. On the other hand, the noun *law* is attracted to such verbs which expectedly introduce this noun in legal contexts with more refined senses. What may take place here is mutual "lexical priming" between the two items (Hoey 2005). A verb such as *abolish* is somehow prepared to usher in the noun *law*, as the former is semantically geared towards the latter. Conversely, the noun *law* is also conditioned through frequent use to be introduced by a verb such as *abolish* and so on. The repeated use of such primed collocations naturally raises their attraction to each other, as opposed to other potential collocates. The above verb collocates are represented across the genres with the following numbers of tokens:

***Table 1*. Collocates directly related to the topic of law**

	ALL	SPOK	NEWS	BLOG	WEB	ACAD	MOV	MAG	FICT
violate	907	264	198	107	109	100	28	84	9
enforce	843	304	147	97	95	84	42	56	20
(dis)obey	518	112	61	82	90	68	36	41	22
uphold	344	96	46	51	26	20	64	10	10
repeal	179	34	53	27	27	25	–	8	–
defy	63	15	9	9	9	10	–	9	–
observe	33	–	6	–	4	12	–	6	–
enact	29	–	7	–	–	15	–	4	–
abolish	27	5	–	9	9	–	–	–	–
overturn	21	–	11	9	–	–	–	–	–
transgress	16	–	4	2	–	3	–	5	–
veto	7	–	–	–	–	5	–	–	–
flout	6	–	–	–	–	6	–	–	–
codify	5	–	–	–	–	–	–	–	–
contravene	5	–	–	–	–	5	–	–	–
nullify	5	–	–	–	–	–	–	–	–
revoke	5	–	–	–	–	–	–	–	–

The absence of a given collocate (–) across all eight genre-based lists means that there are no tokens of this verb type recorded with frequencies of 5 and above. Numerous occurrences below 5 have been seen on the lists, resulting in tokens recorded on the ALL-GENRES list.

By far, the most frequent verb collocate of *law* is *break*. It appears as number one or two on all the frequency lists. Table 2 summarises the numerical results for the collocate *break* obtained in all searches.

***Table 2*. Frequencies of *break* across all frequency lists (above 4 tokens)**

	ALL	SPOK	NEWS	BLOG	WEB	ACAD	MOV	MAG	FICT
break	3,315	916	327 (2)	544	544	84 (2)	520	223	132

The collocation *break the law* has been lexicalised. Given this, the verb *break* can be argued to be directly related to the topic of law. Without denying its relatedness to the key theme, the verb *break* is not included in Table 1, as its dictionary definitions initially list several senses related to the physical activity of disintegrating the totality or solidity of a fragile object. The "legal" sense appears later in combination with *law*, *rules*, etc. However, the collocation *break the law* is a very strong one, which makes

it an uncertain case. According to COCA (23 July 2020), the noun *law* (5,896) is the second most frequent collocate of *break* (after *heart*—7,292), followed by *news* (5,437), *rule* (3,830), *record* (3,336), *leg* (2,346), *ground* (1,864), *silence* (1,794), *barrier* (1,794), *neck* (1,403), *bone* (1,377), *glass* (1,204) and *promise* (1,097) (to list only the most frequent ones). On the one hand, *break the law* may fit in with "literal" and direct (only) legal collocates (Table 1). On the other, *break the law* is intertwined with non-legal senses, which also display high frequencies of use. Additionally, it is not only the collocational legal/non-legal divide for the verb *break*. There seems to be an important physical/non-physical division of collocates that are primed for *break*. The verb *break* clearly attracts nouns which designate either solid objects (e.g. *bone*, *glass*, *leg*, *neck*, etc.) or abstracts (e.g. *law*, *news*, *record*, *silence*, etc.). The collocation *break one's heart* is an interesting case spanning both kinds of nouns. In the first instance, *heart* designates a solid object. But in the phrase *break one's heart*, the noun re-directs our attention to its other designation of an emotional sphere associated with its physical function. This apparent semantic duality of the verb *break* deserves a closer analysis and a more convincing account.

One explanation is that a collocation such as *break the law* is a case of language convention, where a once-arbitrarily composed phrase becomes solidified through frequent use. Subsequently, it is accepted by language users as a natural way of communicating a given process or event. Another account, without completely rejecting the first one, may be to assume some de-metaphorisation of the metaphorical phrase *break the law*. Before the phrase *break the law* becomes metaphorical, it is essentially literal. In its initial stage, it must designate a physical effect on something solid which is a carrier of the law (e.g. *a slate, board, surface*, etc.) when the right circumstances are met. Later, the non-literal sense, which designates the rejection of the actual legal concept, may be assumed as primary. This non-literal sense seems most appropriate in modern usage, when the actual carrier of legal ideas is less and less physical (i.e. a book > electronic storage). Also, the activity of breaking departs from its original physical designation, which was required of physical carriers of the law. Both, the activity of breaking and its object *law* become non-physical. This, in turn, makes the sense of the phrase *break the law* less tangible or completely non-physical. This is a convenient view for metaphor researchers, and in particular, conceptual metaphor researchers. However, when applied to cases such as *break the law*, the CMT view may be problematic. Nowadays, language users, lawyers or otherwise, do not conceive of the law as a fragile object that can be smashed or disintegrated. Thus, the expression *break the law* is probably better perceived as a dead metaphor, or as a metaphor which

has become de-metaphorised. Insistence on the expression's metaphoricity is far-fetched as it would imply that the collocation should be felt somewhat inconsistent. Yet, the expression sounds perfectly consistent semantically. Indeed, the law can be thought of as something that is occasionally broken without thinking of the actual process as metaphorical.

In what follows, the remaining verb types are categorised into semantic classes under overarching collocational patterns. Capitalised characters will be used for all the patterns established. These collocational patterns are convenient shortcuts for conceptual clusters in semantically related verb types. The verb types in italics enumerated under each pattern appear to instantiate these overarching patterns. The figures given in parentheses are taken from the ALL-GENRES list. The apparently de-metaphorised expression *break the law* fits in with other instantiations that can be handled by the more general concept THE LAW IS SOMETHING TO BE DESTROYED, for example, *weaken* (14), *subvert* (9), *destroy* (8), *eliminate* (8), *scrap* (7). The following patterns have been tentatively established:

THE LAW IS SOMETHING THAT CAN BE CHANGED:
change (681), *amend* (79), *revise* (24), *reform* (20), *extend* (19), *affect* (16), *modify* (16), *bend* (15), *stretch* (14), *alter* (13), *manipulate* (13), *expand* (12), *shape* (10), *twist* (7)

THE LAW IS SOMETHING TO BE DEALT WITH:
(*mis*)*apply* (216), *implement* (107), *keep* (100), *fulfil* (77), *find* (49), *execute* (30), *bring* (29), *leave* (29), *block* (28), *replace* (20), *adopt* (19), *push* (19), *select* (19), *suspend* (15), *discover* (14), *compare* (10), *choose* (9), *control* (9), *flaunt* (9), *receive* (9), *test* (9), *administer* (8), *check* (8), *cover* (8), *move* (6), *retain* (6), *sustain* (6), *turn* (6), *exploit* (5), *show* (5)

THE LAW IS A CONCEPT/IDEA:
understand (132), *challenge* (118), *call* (110), *defend* (68), *believe* (66), *argue* (28), *create* (28), *declare* (21), *reject* (21), *invoke* (20), *learn* (19), *represent* (19), *study* (18), *undermine* (17), *approve* (16), *explain* (16), *remember* (15), *research* (15), *claim* (12), *protest* (12), *criticize* (11), *discuss* (11), *analyse* (10), *suggest* (10), *champion* (6), *favour* (6), *justify* (6), *teach* (6), *define* (5), *identify* (5), *prevent* (5), *realize* (5), *regard* (5)

THE LAW IS A HUMAN BEING:
satisfy (311), *respect* (91), *oppose* (82), *fight* (58), *meet* (20), *abuse* (15), *attack* (14), *fear* (13), *honor* (13), *protect* (11), *fuck* (10), *hate* (10), *love* (9),

serve (9), *beat* (6), *blame* (6), *hear* (6), *hit* (6), *kill* (6), *liberalize* (6), *contact* (5), *reauthorize* (5), *rule* (5)

THE LAW IS SOMETHING TO BE AVOIDED:
ignore (152), *skirt* (49), *circumvent* (43), *disregard* (36), *evade* (31), *escape* (19), *avoid* (19), *dodge* (12), *bypass* (5), *flee* (5)

THE LAW IS SOMETHING THAT IS WRITTEN:
(*mis*)*interpret* (216), (*re*)*write* (176), (*mis*)*read* (120), *sign* (68), *draft* (15), *cite* (12), *quote* (9)

THE LAW IS SOMETHING THAT CAN BE MADE BETTER:
support (91), *clarify* (23), *strengthen* (13), *fix* (8), *improve* (8), *fit* (6), *maintain* (5), *overhaul* (5)

THE LAW IS SOMETHING TO BE REACHED:
follow (686), *pass* (118), *approach* (8), *reach* (5)

THE LAW IS SOMETHING TO BE LOOKED AT:
see (51), (*re*)*view* (22).

Verb types whose semantic category is elusive may be sanctioned by more than one collocational pattern, for example: *determine* (24), *establish* (24), *describe* (21), *join* (21), *stop* (15), *allow* (9), *judge* (8), *elude* (6), *influence* (6), *involve* (6), *undercut* (6). There is an inevitable element of personification, but at the same time, this feature can be superseded by other senses, which makes it hard to compartmentalise some of these verbs.

4. Discussion

Let us now try to accommodate the above observations within the context of metaphor research. The collocational patterns listed above have the form of conceptual metaphors, as proposed in CMT. This notation is tentative; by adopting the CMT notation, we introspectively assume some metaphoricity of *law*. The question is whether the noun's metaphoricity can be also verified independently, and if so, how?

Metaphor has been debatable and may mean different things to different scholars (Twardzisz 2013a, 63). The ubiquity of conceptual metaphor in specialist language (or discourse), as proposed in CMT, is even more debatable. Thus, the proposal that the noun *law* is thoroughly metaphorised due to frequent and versatile use with the above discussed verb types is

tentative. What is beyond doubt is that the English language, when used in legal contexts, employs numerous concepts designating abstract referents. Therefore, it is tempting to argue that legal language increasingly resorts to metaphor as a handy tool for facilitating the comprehension of otherwise incomprehensible intangibles (Twardzisz 2013). Metaphor is believed, among other things, to simplify complex concepts as "[t]he essence of metaphor is understanding and experiencing one kind of thing in terms of another" (Lakoff and Johnson 1980, 5). It would be odd to assume that legal language is somehow immune to metaphor or metaphorical thinking. If metaphor permeates language per se and thinking in general, then it must also pervade legal language and thinking about legal matters.

Different levels of legal discourse need to be distinguished. There are those at which legal matters are discussed by means of concrete terms and concepts. However, there are also levels where legal discourse can become very abstract, and it seems that the noun *law* is exemplary of these. If it is, then the language which surrounds the noun *law* is full of abstract terms, and it makes sense to assume that metaphor reduces excessive abstractness. Metaphor does so by guiding the conceptualiser through the source domain, which provides concrete referents. Concrete elements of the source domain correspond with (are mapped onto) abstract elements of the target domain (Lakoff and Johnson 1980, 52; Lakoff 1993, 203; Kövecses 2002, 4). That is why conceiving of an abstract company as if it were a concrete person decidedly helps one process company discourse. As a result of metaphorical thinking, company discourse is processed as if it were human-like.

In the author's earlier account of legal discourse (Twardzisz 2013), reference was made to the CMT dictum that "most concepts are partially understood in terms of other concepts" (Lakoff and Johnson 1980, 56). As a consequence, several metaphors were proposed based on expressions formulated in commercial contracts, for example: A COMPANY IS A PERSON, AN ENTITY IS A PERSON, A COMPANY IS A TEMPORAL BEING, etc. The reconstruction of these metaphors was carried out inductively, as a result of the identification and analysis of concrete language expressions. However, CMT theorists are not much concerned with linguistic metaphor identification, as most of our conceptual system is believed to be thoroughly metaphorical. Nevertheless, metaphor identification has become a valid research issue (for a summary, see Twardzisz 2013a, 3.4). Lakoff and Johnson's introspective approach has been questioned in favour of data-based metaphor identification procedures (Steen 2009; Steen, Dorst, Herrmann, Kaal et al. 2010; Steen 2011). The counterclaim to CMT is that metaphor is not ubiquitous and needs to be identified using objective criteria. Metaphor, with its varied types, can and should be differentiated

from non-metaphor. Moreover, its frequency in language and/or discourse can be measured. That said, gauging metaphor in thought and other modes of communication (gesture, images, etc.) is problematic, and the question of cross-domain mapping taking place continually during online language processing remains debatable as well.

This and other related issues have been amply discussed in the literature (see, for example, Steen 2011). We share other theorists' concern about the necessity to consciously process expressions like *satisfy the law*, *attack the law*, or *abuse the law* as conceptual metaphors involving cross-domain mapping. A higher degree of conventionality of a given expression rules out the need for constant online mappings between conceptual domains. Hypothetically, at an early stage, the processing of *bend the law* may have involved a cross-domain mapping. When a metaphorical expression becomes entrenched due to frequent activation, it no longer needs that mapping. Every complex expression, when activated with sufficient frequency, becomes entrenched and invoked as a whole without much attention to its individual components as in *follow the law*, *protect the law*, *suspend the law*, etc. (cf. Langacker's 1987, 1991 schemas). In conventional metaphorical expressions, appropriate senses are retrieved without processing conceptual structures (Steen 2011, 34–35). Mappings are essential in the history of an expression, particularly at an early stage of its life. Novel collocations or neologisms (e.g. ?*stab the law*) can be coined analogically to those expressions which are already well-established (e.g. *kill the law*, *beat the law*, *hit the law*, etc.). In this way, online cross-domain mappings may not be triggered, at all.

The choice between deliberate and non-deliberate metaphor is vague and the actual distinction, if possible to maintain, is very subtle (for a discussion, see, for example, Steen 2011, 36–38). The same metaphorical expression may be either type of metaphor to the speaker and the listener, not to mention other potential discourse participants. We take it for granted that for some language users, a given metaphor is an intentional rhetorical device, while for others the same expression is an innocuous collocation. Therefore, the distinction between deliberate and non-deliberate metaphor does not surface in this short analysis.

The data collection undertaken in our research resembles a procedure of linguistic metaphor identification. In this procedure, an inductive approach has been adopted. First, all relevant data are independently retrieved in a collocational analysis. Then, the collocations are categorised under general collocational patterns which cluster semantically related verb collocates. Finally, these collocational patterns serve as representations of potential conceptual metaphors. The question is whether the existence of such conceptual metaphors can be additionally verified.

In this approach, metaphors are not predetermined, but they are teased out of the data as possible conceptualisations. The metaphors proposed above are hypothetical cross-domain mappings, which have been arrived at by clustering semantically related verb collocates. Based on primary dictionary senses, collocational patterns have been established. Their abbreviated content reflects a metaphorical relation in which *law* is viewed as an object, human being, idea, something to be avoided or something that can be improved. Our tentative hypothesis that these patterns are metaphorical in character rests on the premise that "metaphor in language exhibits indirect meaning, producing local semantic incongruity" (Steen 2011, 45). In many of the above expressions, some semantic incongruity can be detected.

5. Conclusions

Whether the above collocational patterns are metaphors or not, we cannot tell with certainty. For proponents of CMT, these are promising candidates for conceptual metaphors. For supporters of systematic procedures of metaphor identification, some of the above templates may be seen as exaggerated proposals of metaphors. The central problem is in recognising the above collocational patterns as currently active conceptual metaphors. These are better understood as metaphors active at an early stage in their development. To the contemporary language user, these patterns may not function as cross-domain mappings which are activated online, but rather as expressions with conventionalised senses. At any rate, this issue cannot be resolved here.

It is hoped that the historically metaphorical patterns proposed above may nowadays serve as handy templates for language users. In particular, these may be of use to practitioners of English for legal purposes, as part of English for specific purposes (ESP) (e.g. Bruthiaux 2001; Charteris-Black and Ennis 2001). Although the key collocations may be de-metaphorised today, they retain pedagogical value which is worth considering. Such de-metaphorised collocations and their overarching patterns attract further verb types, compatible with the conventionalised verb types and their sanctioning patterns. The pedagogical value of collocational patterns, in general, and the above patterns, in particular, is still undervalued.

Both, the collocational patterns and the verb collocates clustered under these templates may aid writing for legal purposes. The collocational patterns are metaphor-like abstractions, necessary where creativity is expected. The patterns have a certain ordering function, holding semantically related collocates together. Novel verb collocates can still be invoked in

order to accompany the noun *law* in appropriate contexts. The lists of verb collocates obtained from COCA cannot be considered exhaustive, by any means. Both the patterns and their instantiations function together to provide slightly different stimuli for practitioners of English for legal purposes.

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CHAPTER 2

ON THE UNIVERSALITY OF RIGHTS THROUGH THEIR METAPHORS

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Abstract

The quest for the universality of rights has been the focus of many scholarly debates in the 'West'. When 'universality' refers to 'rights', it can mean various things, including a universal foundation for rights despite the differences between languages and cultures across the world. In recent years, the study of metaphor has started garnering attention in legal language studies. Some metaphors in different tongues have a common bodily foundation that prevails over the countless differences in the peoples around the world. Do rights metaphors in different languages reveal a universal foundation of rights? Or is there at least a common foundation for the concept of RIGHT in its not strictly legal sense? By studying metaphors in three large linguistic databases for British English and Mandarin Chinese, this study has found that RIGHT has no universal foundation, and that, in this regard, rights are not universal. This study has also highlighted that the conceptual metaphor theory has been subject to some misinterpretation, and caution is needed to avoid reaching conclusions about the universality of legal notions that are supported or rejected by it in appearance only.

Keywords: conceptual metaphor theory (CMT), embodiment and innateness of rights, metaphor and law, corpus linguistics, big data analysis

1. Introduction

There is a long tradition in legal studies that warns against the use of metaphor. Justice Benjamin N Cardozo's opinion is probably the most cited legal source in this sense: "Metaphors in law are to be narrowly watched,

for though starting as devices to liberate thought, they end often by enslaving it." (*Berkey v Third Avenue Railway*, 244 N.Y. 602, 155 N.E. 914, 1927). As has been noted in cognitive linguistics, it is true that metaphors prevent us from thinking in alternative ways (e.g. Semino 2020, 51, among many others), but it is wrong that metaphors can be avoided altogether (e.g. Lakoff and Johnson 1980; Kövecses 2010; 2020). Far from being mere rhetorical or poetic devices, they help us make sense of the world, as it is through metaphors that we create meaningful realities. This also applies to law (Gibbs 2018, 109), in relation to which metaphor has been said to be jurisgenerative (Golder 2019), meaning that "metaphors of law" assist us in creating legal meaning and legal concepts (Makela 2011).

Regardless of cultural specificities and typological and genetic distances between some languages, metaphor is a phenomenon that appears in any tongue at any time, from Ancient Egyptian (e.g. Di Biase-Dyson 2017) to contemporary English (e.g. Semino 2008) and Mandarin Chinese (e.g. Yu 1998). Certain metaphors can be regularly observed in various languages, including very distant ones. When this happens throughout a high number of languages, these metaphors are said to be (near-)*universal*, as they appear irrespective of the countless differences between the people around the world. Metaphor scholars have shown that one factor that accounts for the universality of certain metaphors and cognition in general is their common foundation—the human body (see Johnson 1987; Kövecses 2010, Ch. 8). Thus, language and the mind are said to be embodied. Since the human body is shared by all human beings, many metaphors that emerge from our physical interaction with the world can be observed possibly in every language (e.g. Kövecses 2010, Ch. 13, and p. 197).

The quest for the *universality* of rights has been long imbuing rights talks, particularly in "the West", where the doctrine of natural rights as intrinsic to human nature was borne (e.g. de Groot 1625; Hobbes 1651), and where debate around the ontology of universals has a long tradition dating as far back as Aristotle (384–322 B.C.) (cf. Klima 2017). For some, grasping whether "rights" is a universal or even innate concept can legitimate the transplantation [1] of rights—historically plainly Western in their origin (Goodhart 2003, 943)—especially into non-Western countries and into countries colonialised by Westerners (see e.g. Mooney 2014, 30–32). With regard to human rights, Mooney (2014, 10) explains that universality has two meanings, following Donelly (2007, *ibid*.): it can be *conceptual*

[1] The term 'transplant' with reference to the importation of a legal system and its concepts from one country to another was famously coined by the Scottish legal historian W. Alan J. Watson (1933-2018) in his work *Legal Transplants: An Approach to Comparative Law* (1974).

universality, i.e. rights are attached to anybody for the simple fact of being human, or *substantive universality*, i.e. if there is universal agreement on the content of what human rights are. Such agreement can be in terms of *a universal foundation* for human rights, or of *actual agreements* about what they are, regardless of their foundation (this latter approach is routine, as Mooney notes, and can be linked to the widespread signing and ratification of the Universal Declaration of Human Rights and the related covenants). My focus here is on the universal foundation of rights, although not human rights specifically.

Metaphors and rights have been connected by a few scholars (e.g., Mooney 2014, 141–62; Gordon 2018; Golder 2019; Mannoni 2021). Linguists, philosophers and legal scholars alike have discussed or contended the implications of metaphor in relation to the universality of rights and human rights, using a variety of approaches, but coming to significantly contradictory conclusions.

For instance, in a foundationalist perspective, Mooney argues that since metaphor is omnipresent in every language, and language is embodied, human rights consist in the rights arising from the needs of the human body, that is shared by all human beings, thus conceiving of human rights as having a universal foundation and thus being universal (Mooney 2014, 141–62). Similarly to Mooney, but in a plainly Chomskyan and innatist[2] vein, Jackendoff believes that "[t]he notions of rights and obligations appear to be universal in human societies" (1999, 68) "whether or not a particular language has a word for it" (2007, 414). He believes that both primates and human beings have a 'right genome' that makes us born with the concept. In so arguing, he is "interested in a theory of the 'folk theory' of social relations" and refers to a "rather […] mundane sorts of rights" (2007, 414) that is allegedly abstracted from any culture and language, such as the right

[2] Jackendoff further argues that "one does not understand rights and obligations metaphorically […]. Rather, because of what one understands about rights and obligations, one chooses verbal collocations in a motivated fashion." (1999, 77). He also draws from the study of anthropologists, such as Marc D Hauser et al. (1995, ibid., pp. 90–91), to conclude that, like in macaques, the sense of rights and obligations is "largely if not entirely innate, a specialized 'way of thinking' wired into the brain by the human genome". However, this can be contrasted with a bias that has been noted in ethnography that "perception, judgment of and behaviour toward members of the other culture were strongly influenced by the patterns of perception, valuation and behaviour acquired [by the observer] in their own culture" (Gewecke 1986, 285 in Wolf 2000, 130). In other words, a Western-centred observer may be more inclined to see rights in cultures that do *not* have the concept.

one has to use their objects as they wish[3]. However, Jackendoff dismisses the cognitive view of metaphor, according to which, in his *own* interpretation, rights and obligations would "derive their conceptual properties" from different domains (1999, 77); a suspicious approach, he alleges, that would impede us to see the parallel logic between obligations and them. Jackendoff's view has been strongly contrasted by Wierzbicka (2007) and Cao (2017) on the grounds of cultural variation, although not directly disputing his interpretation of metaphor. Golder (2019) is of a different stance to Jackendoff, as he argues for the creative power of metaphor and insists that metaphors have strong political, legal, ethical, and affective consequences for legal thought and practice. He maintains that some metaphors can help implement the universality of human rights—making us assume that, for him, their notion is not innate, but can be made universal if we use certain metaphors.

Three key terms "innateness", "embodiment", and "universality" that I've been using are distinct terms that cannot be used interchangeably, although they can be connected. Innateness literally means "existing in one from birth"[4]. Our ability for language acquisition may be innate. In cognition, embodiment is a term that captures the phenomenon of "metaphorical language and thought aris[ing] from the basic bodily (sensorimotor) experience of human beings" (Kövecses 2010, xii). Abstract meaning, including legal meaning, is generally embodied. Both innateness and embodiment may imply universality.

Some of the above-mentioned conclusions, namely those to which Jackendoff and Mooney come, put universality of rights in connection with metaphor, but they sound rather speculative to me, as they are poorly grounded in compelling empirical data collected for the purpose, and take an unusual reading of the cognitive view of metaphor.

In what follows I contribute a metaphor perspective on the current debate on the universality of rights, based on naturally occurring linguistic data retrieved in two languages as typologically, genetically, and culturally distant as English and Chinese. I will show that the concept of right is not universally founded in the body, not even if we consider more 'mundane' sorts of rights. In so doing, my study also stresses the importance of

[3] Jackendoff's mundane sorts of rights namely are "those involved in possession (one has the right to use this object as one wishes, within parameters, and the right to give it away), agreements and contracts (one has the right to demand that the other person fulfil his/her side of the deal), authority (one has the right to impose demands on others), and marriage (one has the right to engage in sexual relations with this person)" (Jackendoff 2007, 413).

[4] https://www.dictionary.com/browse/innate (last accessed November 5, 2020).

avoiding any improper use of the cognitive linguistic view of metaphor in relation to the universality of legal notions such as rights.

Specifically, I intend to answer the following questions:

1) Do rights metaphors in different languages reveal a (near-)universal foundation of rights?
2) If not, is there at least a common foundation for the concept of "right" in its not strictly legal sense?
3) Overarchingly, and subsequently, can cognitive studies of metaphor contribute to the debate on the universality of rights, as Mooney and Golder believe, or, reversely, should we dismiss the current view of metaphor, as Jackendoff suggests?

To answer these questions, I will show the following in relation to my data:

1) The mappings, the strength, and the foundation of rights metaphors in two different languages belonging to two different legal systems such as Mandarin Chinese as used in Mainland China[5], a (mostly) Civil Law country, and English as used in the United Kingdom, a Common Law country;
2) The presence or absence of the rights metaphors found in English in the Chinese language as realised by a Chinese word, *heshi* 合适, that may convey a sense of right—an attempt at accessing a more 'mundane' sort of rights than the legal term.

In the following section I provide a short account of the metaphor theory that I have used for this study and illustrate the rights words that I have analysed. In Section 3 I present my data and method of enquiry, and the results, and then move on to Section 4 to discuss the findings in relation to my research question. I will also put them in relation to the current debate on metaphor study and the universality of rights. I finally recap the conclusions of this study in Section 5.

[5] The term "Mainland China" refers to the continental part of China under the direct jurisdiction of the Peking government, and hence excludes Macau, Hong Kong (a Common Law territorial entity), Taiwan (the contested island with its own laws and regulations).

2. Theoretical framework

The birth of what has later come to be called conceptual metaphor theory (CMT) was prompted by Lakoff and Johnson in 1980, in their revolutionary book *Metaphors We Live By*. These scholars comprehensively shifted the traditional view of metaphors as mere ornament or rhetorical devices of language to a foundational structure of thought. The claim they made, which various scholars have welcomed and developed (e.g. Kövecses 2020), but also attacked (e.g. Wierzbicka 1986), is that metaphor, a pervasive and systematic phenomenon of language, is a pervasive and systematic phenomenon of thought through which people conventionally understand abstract ideas. Under CMT, metaphors in language (i.e., linguistic metaphors) are said to realise or instantiate metaphors in thought (i.e. conceptual metaphors). Instances such as "She *attacked* his thesis", "They *shot down* all my good ideas", "His claims are *indefensible*" make us *understand* argument as though it was war. Additionally, experiments have shown that through embodied simulation, we experience metaphors in our body as though we were, say, physically fighting a war (see Wilson and Gibbs 2007).

A conceptual metaphor maps some of the features of a source domain, such as war, onto a target domain, such as argument. Source domains are generally more tangible or perceptible, intersubjectively accessible and image-rich than target domains, which in turn tend to be more abstract, intersubjectively inaccessible or personal, and much more poorly delineated (cf. e.g. Brysbaert et al. 2014: 904 and Dancyger and Sweetser 2014, both discussed in Winter 2019). The relation between a source domain and a target domain is expressed by a formula in the form TARGET DOMAIN IS SOURCE DOMAIN (e.g. ARGUMENT IS WAR).

With an eye to avoiding misusing CMT, we can put in relation the structure of metaphor formulae with Jackendoff's interpretation of CMT, as it seems to me that misreading these would lead us to their misinterpretation and hence improperly dismissing CMT, as Jackendoff does in connection to the universality of rights. Precisely because they are formulae, they merely express in a formalist way that a target domain is conceived of *in terms of* a source domain, that is to say, that a source domain is mapped onto a target domain. Jackendoff argues that "rights and obligations […] [would] *derive their conceptual properties from another domain*, called the 'source domain'" (1999, 77; my emphasis). But this interpretation derives from misreading the verb "IS" in the metaphor formula (if not a misunderstanding of what CMT maintains). In fact, different source domains can be used to map the same target domain, producing different understandings (frames) of a concept, so that each source domain highlights some aspects of a target

but hides others. Additionally, only some parts of the source domain are mapped onto the target domain (Kövecses 2010, Ch. 7). In other words, there is no semantic equivalence between the source and the target domain. For instance, THEORIES ARE BUILDINGS surely does not imply that theories have windows, chimneys, and tenants—neither literally, nor metaphorically (Kövecses 2010, 96). Similarly, LIFE IS A JOURNEY does not imply that "experiences of LIFE and JOURNEYS […] share the same exact features regarding travelers, paths, destinations, and so on." (Gibbs 2017, 18) Then, it should be noted that the verb "IS" in a metaphor formula has *no ontological*[6] value whatsoever. Consequently, I don't think Jackendoff's view of CMT is in line with what CMT scholars maintain today, nor back in 1980:

> *The essence of metaphor is understanding and experiencing one kind of thing in terms of another*. It is not that arguments are a subspecies of war. Arguments and wars are different kinds of things—verbal discourse and armed conflict—and the actions performed are different kinds of actions. But argument is partially structured, understood, performed, and talked about in terms of WAR. (Lakoff and Johnson 1980, 5; original emphasis)

In other words, since argument is not a subspecies of war, there is no ontological derivation between the two conceptual domains. Reversely, Jackendoff's understanding[7] of the source domain in relation to the target domain sounds very ontological to me[8]. Indeed, if we were to interpret metaphor formulae with his view, then HAPPINESS IS UP would mean that happiness *derives its conceptual properties* from up, and I am unsure as to what this means in more concrete terms; e.g. that we are happy if we are standing up? Can't we be happy when lying down on our bed or if we live on the ground floor? And, ultimately, what are the properties of "up"? Metaphor is *not* a transposition of conceptual properties, as Jackendoff argues. Rather, "[i]n the cognitive linguistic view, metaphor is defined as

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[6] Even ontological metaphors, a term for a category of metaphors used by Lakoff and Johnson (1980, 25) and later maintained by other scholars (e.g. Kövecses 2010, 38–39), do not imply that the conceptual ontological properties of the source domain are transferred onto the target domain. In fact, an ontological metaphor is one whose source domain is general and scarcely known, such as objects, substances and containers. An example of ontological metaphor is, for instance, THE MIND IS A CONTAINER, as instantiated by expressions such as "What's *in* your mind?".

[7] At least as it is represented in Jackendoff's 1999 study, unchanged in 2007a, 342.

[8] Indeed, as Evans and Green (2006, 62) noted, "Ray Jackendoff, in his pioneering 1983 book *Semantics and Cognition*, argues that conceptual structure consists of a range of ontological categories, some of which are primitives."

understanding one conceptual domain in terms of another conceptual domain." (Kövecses 2010, 4; consistent with Lakoff and Johnson's definition (1980, 5) to which Jackendoff had access in 1999). Thus, rights do not derive their conceptual properties from the source domains used to understand them. Therefore, a metaphor study on the universality of rights, such as the present one, cannot capture and compare the conceptual properties of rights around the world. With this caveat in mind, we can move further and see the other aspects of metaphor that are relevant for my purpose, i.e. ascertaining whether there is a universal foundation for rights in terms of conceptual understanding.

It has been pointed out that some metaphors, termed primary metaphors, are simpler and fundamental to the creation of more complex metaphors, as they are less subject to the encapsulation of cultural elements that contribute to *cultural variation*, in contrast to *universality*. For our purposes, it is important that we find primary metaphors from which more complex metaphors originate, with an eye to finding a common foundation (termed motivation) of rights metaphors in different languages.

Primary metaphors are motivated by correlation in human experience. For instance, MORE IS UP is motivated by our repetitive experience that when we increase the quantity of a substance, its level goes *up*. A complex metaphor such as ARGUMENT (THEORY) IS A BUILDING can be decomposed into two primary metaphors, LOGICAL STRUCTURE IS PHYSICAL STRUCTURE and PERSISTING IS REMAINING ERECT (Kövecses 2010, 95), or PERSISTING IS REMAINING ERECT and STRUCTURE IS PHYSICAL STRUCTURE (Gibbs 2017, 30). [9] Consequently, for the purpose of this study, I haven't merely compared the metaphor mappings as expressed by metaphor formulae, but I have made an attempt at identifying the primary metaphors from which they originate.

Correlation in human experience is not the sole experiential basis that motivates metaphors. Metaphors other than primary ones may be motivated by other bases. Other motivations include the non-objective perceived structural similarity between two events (as for LIFE IS A GAMBLING GAME), whether or not induced by ontological metaphors (as for ACCEPTING IS SWALLOWING, with THE MIND IS A CONTAINER being its ontological metaphor), and by circumstances in which the source (biological or cultural) serves as the root of the target (as for LIFE IS A BOND or SPORT IS WAR) (Kövecses 2010, Ch. 6). In the observation of my data I have also considered these other bases.

[9] As has been noted, the identification of conceptual metaphors and their decomposition can be rather arbitrary (e.g. Gibbs 2017, Ch. 3).

Finally, one further way to get at the *foundation* of certain metaphors is to look at the way the basic human experience that motivates them is organised. This can be done by showing the patterns grounded in our body that organise human experience. In cognitive sciences, these patterns are termed *embodied schemas* (or "image schemas or schemata", or simply "schemas"). They have been defined as

> patterns [that] emerge as meaningful structures for us chiefly at the level of our bodily movements through space, our manipulation of objects, and our perceptual interactions. (Johnson 1987, 29)

Consequently, since image schemas directly emerge from the interaction of our body with the physical world around us, they are extremely simple and very few in number. Evans and Green (2006, 190) elaborated a partial list of image schemas, following the work of various influential metaphor scholars. These schemas include SPACE (UP-DOWN, FRONT-BACK, LEFT-RIGHT, …), BALANCE (TWIN-PAN BALANCE, EQUILIBRIUM, …), EXISTENCE (REMOVAL, BOUNDED SPACE, …). For instance, in the expression "Cheer up!", the embodied schema that activates the metaphor is UP-DOWN; "You need to move on" is activated by the SOURCE-PATH-GOAL schema.

By identifying not just metaphors, but the experiential basis of the rights metaphors in my data, I believe I have obtained a more precise picture of whether the foundation for rights is universal or not.

I will now pass on to illustrate the rights words that I have analysed in relation to my research question.

As for English, the words are "right" and its plural form "rights". These words are not only legal terms, as they occur in legal and ordinary language alike. According to *Merriam-Webster Dictionary*[10], being right means "being in accordance with what is just, good, or proper", and also "conforming to facts or truth", so the word has a moral acceptation from which the modern English legal meanings have originated. An illustration of the legal meanings of rights in the United Kingdom falls out of the scope of this study and cannot be done here, due to space constraints. For our purposes, suffice it to note that, as Wierzbicka (2007, 404) illustrates in her response to Jackendoff, both the legal and ordinary meanings attached to rights in English are unique and culture specific—surely not universal—being connected to the history of English liberty, the Magna Carta (1215) and the Bill of Rights (1689), and with Hobbes' conception of right as linked to liberty. In this regard, it is important to remember that my concern here is

[10] https://www.merriam-webster.com/dictionary/right.

not the *semantic legal equivalence* of rights throughout all languages, but the *equivalence of their cognitive foundation as revealed by their metaphors*.

As for Chinese, at present there are two legal words for "rights", i.e. *quanli* 权利 and its shortened form *quan* 权. As scholars have repeatedly noted (e.g. Svarverud 2001), both are ambiguous, although the latter is especially so, both inter-lingually and cross-lingually, given that it can be interpreted as "right(s)", but also "faculty", "power" and "authority". I have thus limited my analysis to the metaphorical instantiations of *quanli* rather than of *quan*, which is the least ambiguous of the two. It should be noted that *quanli* is a modern creation with no trace in traditional China—certainly not in the legal acceptation that the word has today. It dates back to the end of the 19th century and early 20th century when the Chinese began a modernization process in various fields, including law. This has been used by Cao (2017) in her response to Jackendoff to argue for the cultural specificity of "rights" as opposed to semantic universality, similarly to what we have just said of Wierzbicka for English rights. Indeed, prior to the modern invention of the word[11], the Chinese did not have a word for "rights" and had difficulties in understanding the concept, as shown by the earliest attempts at translating it into Chinese. Some of these renderings of "rights" included "in case of" (*dang ... zhi li* 当…之例), "wishing to" (*yu* 欲) (Svarverud 2001: 129), and also "right, straight" (直 *zhi*), a translation proposed by the prolific translator Yan Fu 严复 (1853-1921) (*ibid*., p. 136) that I will discuss later on. Remember that Jackendoff maintains that "rights" is innate whether or not there is a word for it. Locating "rights" in the innateness of human beings forces us to believe in them, regardless of any data—which is not what metaphor scholars do. Therefore, I have made an attempt at comparing the metaphors that rights instantiate in English with those of another word that can be compared to right in Chinese. This attempt is admittedly rather extreme, and I am aware it will not encounter the favour of many. However, in my view this is just one possible way to challenge the universality of rights regardless of the words that are currently used for the legal concept. I'm not alone in such an enterprise. In a similar nuance, way more influential and more prominent scholars Jackendoff (2007, 414) and Wierzbicka (2007, Note 1) have debated on whether the modal operator "can" "properly captures the semantics of rights" (Jackendoff, ibid.). As anticipated, the Chinese word I have chosen for the comparison of English rights metaphors is *heshi* (/χəʂ ʂɯ/, in IPA), meaning "suitable, proper,

[11] The missionary W. A. P. Martin (1827-1916) is the one credited with inventing the modern word *quanli* in order to translate the Western word for legal rights in his Chinese translation of H. Wheaton's *Elements of International Law*.

appropriate". *Heshi* is not a legal term but has a moral acceptation that may somehow overlap with the Western sense of "right" especially in its adjectival, non-nominal non-strictly legal form that I have mentioned earlier. For instance, as the following examples retrieved from a large Chinese corpus show,

1. a proper (i.e., right) conduct may be described as *heshi*:
   … 这样子的行为合适吗，你自己好意思吗。
   … is this conduct *heshi*? Do you have the nerve [to do it]?

2. an illegitimate (i.e., non-right, wrong) legal decision can be said to be *not heshi*:
   不合适的判决
   a not *heshi* judgment

3. lack of right of jurisdiction of the Arbitral Tribunal can be referred to as arbitration *not being heshi* (i.e. not appropriate, suitable):
   要求当事人在起诉前进行仲裁，除非他们能证明仲裁是不合适的
   the parties are required to submit their dispute to arbitration before they start a lawsuit in court, unless they can prove that arbitration is not *heshi*;

4. not conforming to morality is described as being *not heshi*:
   这可能符合日本当时的道德，但是现在出现在中国，是不合适的，不符合中国的传统道德
   This may comply to the Japanese morality of the time, but now it is in China, and is not *heshi*, [as] it does not comply to Chinese traditional morality
   (examples from the zhTenTen17 corpus; my own translation)

As can be seen, there is a connection between the sense of something being "just, good or proper", and hence right, and that of being *heshi*. This similarity has been exploited in the research I present here.

To recap, so far I have illustrated the theoretical framework that I have used to study and compare the foundation of rights metaphors in the two languages, English and Chinese, and the actual words that may instantiate them. I will now move on to describe my data and the method of searching metaphors in them.

3. Linguistic data, method of analysis and results

The data belong to two different languages, British English and Mandarin Chinese. The results on universality will be down-sized accordingly, although, notably, while a similarity of foundation of rights metaphors would imply *potential* universality, lack of similarity would be compelling evidence of absence thereof. As to why I have chosen to observe data in these languages, the first reason has been mentioned earlier and consists in the fact that these, as spoken in the UK and in Mainland China, belong to two different legal systems—Common Law and Civil Law, respectively. This choice enables us to assume that there is scarce relation between the two languages and legal systems under analysis, and thus rights metaphors are not entirely the result of borrowing and legal transplantation (and translation) from the UK to China, or from continental Europe to China via British English. The other reason is that these languages are genetically distant, as they belong to two distant linguistic groups such as the Proto-Indo-European and the Sino-Tibetan. This, too, contributes to reducing the risk of a noise from linguistic borrowing.

For the purpose of this study, I have used three separate sets of data, one for English and two for Chinese. These datasets are available in linguistic corpora that can be accessed through software tools specifically designed for the purpose. The advantage of using corpus linguistics in metaphor research has been pointed out by different scholars and will not be further justified here (e.g., Deignan 2005; Stefanowitsch and Gries 2006; Gibbs 2017, 77–83). The corpora I have accessed are the following:

1) British Law Report Corpus (BLaRC): An 8-million-word British English corpus of judicial decisions issued by British courts and tribunals published between 2008 and 2010 (Rizzo and Pérez 2012). I accessed the corpus through SketchEngine (Kilgariff et al. 2014), an online corpus manager.[12] It is noted that Common Law is case law, so accessing judicial decisions can be largely compared to accessing the statutes of a Civil Law country, although it can be posited that metaphoricity may be higher in legal decisions than in statutes owing to the narrative nature of the first. I have used this corpus to search for the metaphors of "right(s)".
2) Chinese Law Corpus (ChinLaC): A 1.5-million-word Chinese corpus, in expansion, containing the laws and regulations in force in

[12] Access to SketchEngine has been provided to me by my university.

both Mainland China and Taiwan until December 2019[13]. The Taiwanese texts were excluded for this analysis, since, as explained, I am not concerned with Taiwan Chinese here. As of the time of writing, the corpus cannot be accessed online *yet*, so I accessed it off-line through LancsBox, a software utility for personal computers developed at the University of Lancaster by Brezina and colleagues (2020). In this corpus I have searched for the metaphors of *quanli*.

3) Chinese Web 2017 Simplified (zhTenTen17): A 13.5-billion-word corpus made up of texts collected from the Internet. The word "Simplified" in the name of the corpus indicates that it only contains texts from Mainland China, as the Chinese characters used there are conventionally termed "simplified" (in contrast to those used in Taiwan, Hong Kong, Macau, termed "complex", where different laws apply). I have used this corpus to find the metaphors of *heshi*.

As is evident, the three corpora are significantly different in size, and this will be my next consideration.

Informatics and statistics have designed various ways of assisting researchers with big data analysis. Some of these ways have been proved useful to metaphor research. One method of finding linguistic metaphors is through the words (termed *collocates* in corpus linguistics) that are especially bound to the word on which we focus our analysis (termed *node*) (see Deignan 2005, 83; Semino 2008, 194). There are various association measures that can be used to evaluate the bond between two variables such as the collocate and the node. Each association measure highlights some aspects but hides others (Gablasova, Brezina, and McEnery 2017, 161–62). I have decided to use logDice, as it "has a reasonable interpretation, scales well on a *different corpus size*, is stable on subcorpora, and the values are in reasonable [pre-set] range" (Rychlý 2008, 7; my emphasis). It is a good association measure for cross-lingual lexical comparison across different corpora. Its maximum value is 14, when two words always and symmetrically attract each other (e.g., *zig zag*), but general values are below 10 (Rychlý 2008, 9). Collocates were sought five words right and left of the nodes. Clearly, my nodes were "right" and "rights" in English, and *quanli* and *heshi* in Chinese.

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[13] The ChinLaC (provisional acronym) was created at the University of Verona with a fund granted to the Department of Foreign Languages and Literature under the Project of Excellence plan "Digital Humanities Applied to Foreign Languages and Literature" (2018-2022) of the former Italian Ministry of Education, University, and Research (MIUR).

To decide whether an expression is metaphorical or not I have used the key principle of semantic tension (Charteris-Black 2004, 21): if a lexical unit has a contemporary basic meaning that is more concrete, more bodily-related, more precise, and historically older than the one in context, the word is to be marked as metaphorical. This principle has also been incorporated in the two famous procedures MIP and MIPVU (Steen et al. 2010; Nacey et al. 2019). In the expression "He's without *direction in* life", both "direction" and "in" are metaphorical, in that their meanings in context contrast with their basic ones (Kövecses 2010, 5; original emphases). As instructed by MIP and MIPVU, I have used dictionaries to check whether the nodes and the collocates had any basic meanings that contrast with their meaning in context. For English, I have used the corpus-based *Macmillan Dictionary*[14] and the *Collins Dictionary*[15]; for Chinese, I have used *Xiandai Hanyu Cidian*.

There is one final last issue to be addressed before coming to the results. There is no noun for *heshi* in Chinese, that is to say, there is no word for *heshi*-ness. *Heshi* is an adjective, not a noun as "rights" and "*quanli*" are. Thus, its metaphorical meanings depend on the noun it modifies. For instance, "deep" is metaphorical when it modifies "heart" (e.g., "deep in my heart"), but it may not be when it modifies "sea" (e.g., "this bacterium lives in deep sea"). Not all the nouns it can modify are relevant for our research. For instance, we are not interested in the collocates of *heshi* where it describes "shoes that fit *perfectly* (*heshi*)" or "choosing the *right* (*heshi*) anaesthetic" (two examples from zhTenTen17). Indeed, *heshi* is a more generic and less specialised word than the legal neologism *quanli*, and also less specialised than the term "right(s)" as used in a legal corpus such as BLaRC. Thus, I have set a condition that eliminates from my analysis any noise deriving from the use of *heshi* in contexts where it may not have the acceptation of morally suitable. Such condition consists in not considering all the collocates of *heshi* for the purpose of metaphor identification, but restricting the analysis to the sole collocates of *heshi* when the nouns it modifies paraphrase *heshi* as right, just, fair, correct, morally good, *vel sim*. In so doing, instances such as "*heshi* anaesthetic" could be quickly discarded, as "a just, fair, morally good anaesthetic" makes no sense, while phrases such as "a *heshi* choice" or a "*heshi* person" were considered for collocate search.

In short, the procedure I have established for the analysis can be recapitulated thus:

[14] https://www.macmillandictionary.com/
[15] https://www.collinsdictionary.com/it/

1) Ascertaining whether the terms under analysis, per se, display any semantic tension that makes them metaphorical;
2) Searching for the nodes in my corpora, and then searching for their collocates. The search for the two forms of the node *right*/*rights* in English was done in a single search by using the Lemma function of SketchEngine. The collocates of *heshi* were sought only where[16] the adjective modified a word satisfying the condition illustrated above. In every search, only the first hundred collocates were considered;
3) Concordancing the collocates to see if there was sufficient semantic tension to mark any of them as metaphorical. The Shuffle Line function of SketchEngine enables the reader to see the concordances in a random order differing from the way texts are sorted in the corpus. The first 50 randomized concordances were observed;
4) Identifying the conceptual metaphors and their foundations.

What follows are the results of the search carried out in the way illustrated above.

As to the English word "right", it primarily indicates the right side of our body, and also straight, in the sense of not bent, and being perpendicular to another line. It is quite common for these basic meanings to serve as the source domains for metaphors relating to goodness and morality. In fact,

[16] Specifically, I used the following procedure for *heshi*: I first accessed zhTenTen17 through SketchEngine and searched for the collocates of *heshi* three tokens right of it, so that the results were most likely to include instances where *heshi* modifies a noun (in Chinese, modifiers come ahead of the modified). I then identified and kept trace of the collocates that actually satisfied the condition illustrated in the earlier paragraph of the body text. The nouns I retrieved are: 人选 (candidate), 岗位 (job position), 对象 (partner), 机会 (occasion), 方法 (method), 方案 (project), 方式 (method), 伙伴 (partner), 工具 (tool), 答 (answer), 理由 (reason), 成年人 (adult), 渠道 (channel, way), 职位 (job position), 选择 (choice), 候选人 (candidate), 策略 (policy), 标的 (objective), 条件 (condition), 距离 (distance), 路线 (route, way), 路径 (route, way), 答案 (answer), 土壤 (soil). I then went back to the homepage of zhTenTen17 to set *heshi* as a node and then selected the "Word context" facility in the "Filter context" menu to prompt SketchEngine to retrieve the collocates of *heshi* when it modifies the nouns so selected. For the purpose, I selected "any" and inserted these words in the "Only keep lines with" box, and then selected "3" and "right" in the "Tokens" menu to prompt the software to search the instances in which these nouns come three words right of *heshi*. Finally, by clicking on "Go", I prompted the software to show the concordances. I then proceeded with collocate extractions in the same way I have done for "right(s)" and *quanli*, i.e. five words right and left of the node, sorting them by logDice.

GOOD IS RIGHT (i.e. not left) and GOOD IS STRAIGHT are universal metaphors. These metaphorical meanings are strongly embodied. For instance, Casasanto (2009) has carried out experiments that show that right-handers tend to associate rightward space with positive ideas. Given that the vast majority of the world's population is right-handed, these metaphors are widespread worldwide (*ibid*., p. 353).

Table 1 is an illustration of the other metaphors obtained for "right" and "rights" as nodes in BLaRC.

***Table 1*. Rights metaphors in legal English (as represented in BLaRC)**

Log Dice	collocate	examples	conceptual metaphors	foundation
8.72	in	statutory rights *in* "olympic"; rights the Complainant has *in* the trademark LEGO	A RIGHT IS AN OBJECT IN A CONTAINER	ontological metaphor: A RIGHT IS AN OBJECT schema: CONTAINMENT
8.66	for	a right *for* the occupier of each flat to park; no right *for* any person to adopt a child	ENJOYING A RIGHT IS RECEIVING IT	perceived structural similarity induced by ontological metaphor BENEFITTING FROM SOMETHING IS RECEIVING AN OBJECT (induced by A RIGHT IS AN OBJECT)
8.47	interference	potentially dangerous *interference* with the right to respect for private life; a disproportionate *interference* with exercise of the right to marry; serious *interference* with a basic human right	RIGHTS ARE RADIO WAVES	non-objective perceived similarity
8.27	breach	his continued detention was in *breach* of his rights; *breach* of his human rights; *breach* of their right to a fair trial	RIGHTS ARE BARRIERS PROTECTING A SPACE	perceived structural similarity induced by basic metaphor VIOLATING A CONCEPT IS BREAKING INTO SOMETHING

8.25	on	*on* the basis of those rights; relied *on* its contractual right to possession; an appeal to the AIT *on* human rights grounds	RIGHTS ARE GROUND	perceived structural similarity induced by basic metaphor RELYING IS STANDING ON SOMETHING
7.99	over	the grant of a right *over* land; rights of access *over* the car park; rights *over* the common parts; enjoyed a right of veto *over* the decision of the Parole Board	RIGHTS ARE OBJECTS COVERING OTHER OBJECTS	correlation in experience PROTECTING SOMETHING IS COVERING AN OBJECT
7.94; 7.92	protection; protected	*protection* of fundamental rights; *protection* of the rights and freedoms of others; *protection* of the right to property; Everyone's right to life shall be *protected* by law	PROTECTING RIGHT IS PROTECTING AN OBJECT FROM BEING DAMAGED	ontological metaphor: A RIGHT IS AN OBJECT so that PROTECTING A RIGHT IS PROTECTING AN OBJECT
7.93	conferred	the rights *conferred* upon him by the Treaty; *conferred* statutory rights upon persons; The right *conferred* by paragraph (1)	CONVEYING A RIGHT IS TRANSFERRING AN OBJECT	ontological metaphor: A RIGHT IS AN OBJECT
7.86	exercised	had *exercised* his right not to give oral evidence; The Complainant *exercised* its right to submit a Reply; *exercised* his right of possession	A RIGHT IS A MUSCLE OF THE HUMAN BODY	source as the root of the target

As to the Chinese word for "rights" *quanli*, since it is a neologism that has been created specifically to translate the legal term "right", it has no primary meaning that contrasts with its contextual legal meaning.

The following Table 2 shows the conceptual metaphors found in the Chinese data for *quanli*.

Table 2. **Rights metaphors in legal Chinese (as represented in ChinLaC)**

Log Dice	collocate	examples	conceptual metaphors	foundation
9.17	*baohu* 保护 'protect'	baohu *nashuiren* 、*koujiao yiwuren de quanli* (*'protect* the rights of the taxpayers and withholding agents'); baohu *huaqiao de zhengdang de quanli* ('protect the legitimate rights of the Chinese expats')	PROTECTING RIGHT IS PROTECTING AN OBJECT FROM BEING DAMAGED	ontological metaphor: A RIGHT IS AN OBJECT so that PROTECTING A RIGHT IS PROTECTING AN OBJECT
8.63	*qinhai* 侵害'invade and harm' (i.e., breach)	*qi quanli shoudao* qinhai ('their rights were *invaded and harmed'*); *zhidao quanli bei* qinhai ('know that rights have been *invaded and harmed'*)	RIGHTS ARE BARRIERS PROTECTING A SPACE + DAMAGING A RIGHT IS DAMAGING AN OBJECT	perceived structural similarity induced by basic metaphor VIOLATING A CONCEPT IS BREAKING INTO SOMETHING + ontological metaphor: A RIGHT IS AN OBJECT

Finally, as to *heshi*, it has no basic meaning, as all its meanings, i.e. "suitable, proper, appropriate", are abstract. Table 3 below shows the metaphors of *heshi* in the contexts as selected in the way I have illustrated above.

***Table 3. Heshi* metaphors in ordinary Chinese (as represented in zhTenTen17)**

Log Dice	collocate	examples	conceptual metaphors	foundation
7.36; 6.86 6.49/5.15	*zhaobu-dao* 找不到 'not find [toward]' *zhao-dao* 找到 'find [toward]' *xunzhao* 寻找/*xunmi* 寻觅 'to look for'	*bawo zhu dashidafei de yuanze, ...* zhaobudao heshi *de da'an* ('*not finding* [toward] a *heshi* answer when evaluating cardinal questions of good and bad'); *ruguo* zhaobudao heshi *liyou, zai daode shang yiding hui bei pingji* ('if we *don't find* a *heshi* reason, we'll be attacked on the moral plan'); xunzhao heshi *de jihui kaizhan hezuo* ('*looking for a heshi* occasion to develop collaboration'); xunmi *liang nian reng meiyou* heshi *renxuan* ('[we've] been searching for two years and yet we've *found no heshi* candidate')	A PROPER ENTITY IS AN OBJECT TO FIND (BY REACHING FOR IT)	perceived structural similarity induced by ontological metaphor: A PROPER ENTITY IS AN OBJECT embodied schema: SOURCE-PATH-GOAL
6.94	*wuse* 物色 '(to look for) the colour of an object'	wuse heshi *de laoshi renxuan* ('looking for (the colour of) a *heshi* candidate teacher); wuse *dao* heshi *de duixiang* ('to look for (the colour of) a *heshi* partner')	A PROPER PERSON IS A COLOURED OBJECT/PERSON[17]	embodied schema: OBJECT

[17] Needless to say, this has nothing to do with people's skin colour. Most likely, colour is a metonymy by which COLOUR STANDS FOR APPEARANCE.

6.06	*kuyu* 苦于 'bitter due to' (i.e., 'to suffer from')	*gongsi jixu weihui zishen hefa quani, dan you* kuyu *queshao* heshi *fasheng qudao de zhuangtai* ('the company needs to protect its lawful rights and interests, but *suffers from* (is bitter due to) not finding a *heshi* way to voice its status'); kuyu *zhaobudao* heshi *de fangfa* ('suffer from (bitter due to) not finding a *heshi* method')	NOT FINDING PROPERNESS IS SOUR	non-objective perceived similarity
5.46	*gongju* 工具 'tool'	*rang heshi de renyuan shiyong* heshi *de* gongju ('allow *heshi* people to use *heshi* tools'); *yao xuanze zui* heshi *de* gongju ('[we] need to use the most *heshi* tool')	A PROPER METHOD IS A TOOL	embodied schema: OBJECT
5.36	*qudao* 渠道 'channel'	*tamen quefa hefa* heshi *de* qudao *qu wei zishen liyi kangzheng* ('they lack a lawful and *hefa* channel to resist and protect their own interests')	A PROPER BEHAVIOUR IS A CHANNEL	correlation in experience LIFE IS A JOURNEY
5.27	*lujing* 路径 'road'	*xiang xuesheng jianyi xiayibu zui heshi de lujing* ('suggest the most *heshi* road to students'); *xuanze heshi lujing* ('choosing the *heshi* road')	A PROPER BEHAVIOUR IS A ROAD	correlation in experience LIFE IS A JOURNEY

4.98	*turang* 土壤 'soil'	*mei ge ren xin zhong you ... zhongzi, jiu kan you mei you* heshi *de* turang ... ('we all have a seed of … in our hearts, but we need to see if there's *heshi* soil ...'); *you le* heshi *de fangfa he* turang ('[it] now has a *heshi* method and *soil*')	A PROPER ATTITUDE IS FERTILE SOIL	source (culture) as the root of the target MORAL QUALITY IS PLANTS TO BE CULTIVATED
4.73	*zhao-chu* 找出 'search-exit' (i.e., 'to look for')	zhaochu heshi *fangshi* ('look for (search-exit) a *heshi* method'); *bixu yao* zhaochu heshi *de liyou* ('need to look for (search-exit) a *heshi* reason')	PROPERNESS IS A CONTAINED OBJECT	embodied schema: IN-OUT
4.30	*fang-dao* 放到 'put-toward' (i.e., 'to put')	*fang-dao heshi de gangwei* ('put the *heshi* person in (-toward) the *heshi* place'); *fang-dao heshi de qudao* ('put in (-toward) the *heshi* channel')	PROPERNESS IS A PLACE TO ARRIVE AT	embodied schema: SOURCE-PATH-GOAL
4.23	*pipei* 匹配 ('match')	heshi *de* pipei *celüe* ('a *heshi* strategy that *matches*'); *heshi de gangwei pipei heshi de ren* ('a *heshi* job matches a *heshi* person')	PROPERNESS IS THINGS THAT MATCH	embodied schema: MATCH (IDENTITY)

4. Discussion

We can now start making sense of these results to answer our research question.

The first question was *Do rights metaphors in different languages reveal a (near-)universal foundation of rights?* By comparing Table 1 with Table 2, it is clear that there is no overall similarity in the way rights are

cognitively understood and founded. The two metaphors that *quanli* instantiates in Chinese legal language are also instantiated by "right(s)", and their experiential foundation is the same; however, the other foundations from which rights metaphors in English arise are not found in Chinese. In numerical terms, the rate of similarity is 2/9, i.e. around 22%. If we further consider that RIGHT IS GOOD in English is not instantiated by *quanli*, then the rate of similarity becomes even lower at 2/10, i.e. 20%. These rates make it difficult to argue for full equivalence of foundations in cognitive terms. Additionally, the results that I have just illustrated show that the responses in the bodies of their respective speakers in the two cultures under analysis differ considerably. In other words, rights in the United Kingdom and Mainland China are embodied in a different fashion.

The second question of this paper, *is there at least a common foundation for the concept of "right" in its not strictly legal sense?*, aimed at foreseeing this eventuality and testing whether a word, *heshi*, displayed similar foundations to those of English rights. It did not. As we can see by comparing Table 1 with Table 3, the experiential basis and the embodied schemas serving as the foundations of rights and *heshi* are largely different. The one basis that is shared by rights, *quanli* and *heshi* is the OBJECT schema. It should be noted that in ontological metaphors this schema is common, as we need to conceive of abstract concepts as tangible objects so that we can imagine them, manipulate them and interact with them (for instance, ideas can be said to be *transferred* from one person to another, and then found *in* our minds, *where* they *swirl* and *clash*—just like objects do). The presence of such schema between the three words under analysis is, in a sense, less noteworthy than the lack of similarity between the other conceptual metaphors and foundations. Due to space constraints, I had not analysed the metaphors of other key words of the Chinese philosophical tradition that may potentially include a sense of "being right, just", such as those of the Confucian tradition *li* 礼 ("rite, order"), *yi* 义 "righteousness, justice", *ren* 仁 "benevolence". This can be explored in future studies and compared to the metaphorical systems of other languages, not just English.

It is no surprise that the results show that the degree of metaphoricity is so palpably different for the three words, being higher for "right(s)" and "*heshi*", and lower for "*quanli*". Indeed, while "rights" and "*heshi*" are words that have both legal and non-legal meanings with a long and, in a sense, old tradition, *quanli* has a more recent history and is an artificial word belonging to an artificial language variety—the Chinese legal language. It is a fact that when the Chinese imported Western legal notions and terms from the Occident between the beginning of the 19th century and the early 20th century, they had difficulties in understanding and, hence, translating

concepts that did not belong to their cultural and legal tradition. In the transplantation process, they found it useful to use the words that the Japanese had used earlier when translating Western laws into Japanese—a language partly using the Chinese script. In the process, many words that had no history in China—and hence no meaning—entered the country. The modern Chinese word for rights *quanli* is such a case. Similarly, other words used to talk about law and, specifically, rights, such as "exercise" (*xingshi* 行使) and "transfer" (*zhuanrang* 转让), are other cases in point. These artificial words have no basic meaning, and thus they can have no semantic tension, and there can be no metaphor. It is believed that not only are there fewer rights metaphors in Chinese than in English, but metaphoricity in the Chinese legal language in general is lower than in legal languages with a longer tradition.

In connection to Mooney's argumentation illustrated at the outset, the empirical findings to which this study has come challenge her proposition. Indeed, although many—not all—metaphors are grounded in the body, those that we have seen here for rights and *quanli* (and even for *heshi*) do *not* express physical needs, such as the needs of water, food, and shelter to which Mooney refers. Thus, while Mooney (2014, 141–62) considers the ubiquitous presence of metaphors and embodiment in all languages as evidence showing that human rights are founded in the body and that they consist in the protection of physical needs, this study shows otherwise, and, additionally, not all metaphors that I have found are grounded in the body (e.g., RIGHTS ARE WAVES in English is not). While it is acknowledged that human rights, Mooney's focus, are not the same as "rights", it should be acknowledged that human rights are rights nonetheless, and the results to which this study has come do not confirm Mooney's hypothesis.

This leads us to the third question, one that prompts us to challenge the legitimacy of the use of CMT in the quest for the universality of legal notions such as rights: *Overarchingly, and subsequently, can cognitive studies of metaphor contribute to the debate on the universality of rights, as Mooney and Golder believe, or, reversely, should we dismiss the current view of metaphor, as Jackendoff suggests?* In light of the earlier discussion, the answer should be clear by now: the cognitive linguistic view of metaphor can answer questions relating to universality and cultural variation only if these are asked within its theoretical framework. In other words, we cannot use or reject CMT when asking questions about, say, the innateness of rights, simply because CMT does not deal with innateness. Quite the opposite, CMT scholars do not believe in innateness: reversely, they show that thought is body-dependant and that the foundations of metaphors, such as primary metaphors and image schemas, are experiential

and gestalt—surely not innate. Indeed, that variation in the body implies variation in thought (e.g. Littlemore 2019).

Since CMT is grounded in empirical data, it cannot argue about innateness, which, as such, is invisible to the naked eye and hardly falsifiable. As I have pointed out in the foregoing analysis, such a formulation prompts us to regard the innateness of rights as a religious belief, abstracting it from falsifiability and empirical testability. In a similar vein, CMT does not provide an insight into the conceptual properties of words, as, reversely, Jackendoff suggests. Indeed, being a theory of metaphor, CMT does not account for any other forms of meaning beside metaphorical meaning. It would be short-sighted to believe that all legal meaning is metaphorical. Additionally, "conceptual properties" are not derived from the source domain, as I have pointed out above. If one were, say, to compare the legal meanings of legal terms cross-linguistically and cross-culturally, then CMT is simply not the right theoretical framework to use.

Many metaphor scholars are illustrating the way metaphors influence the way we think and act, with an eye to raising awareness among different social actors, such as physicians and politicians. In this vein, Semino et al. (2018) have prepared a metaphor menu for cancer patients. When a metaphor does not work, not only it can—but it *must*—be changed. Similarly, there is an ongoing project undertaken by various metaphor scholars, the #ReframeCovid initiative (first proposed by Inés Olza and Paula Sobrino[18]), which aims to show the tangible and sometimes dangerous implications of certain metaphors. In this connection, although *quanli* does not have a history grounded in philosophical tradition and is a very recent legal term, if compared to many Western notions dating back to Roman law, it has been noted that the Chinese word for rights has retained the old meanings of its two components, *quan* and *li*, and that this may affect its alienability (Mannoni 2018; Cao and Mannoni 2017; Mannoni and Cao 2016). "Right" is inherently good (RIGHT and STRAIGHT IS GOOD) and instantiates various metaphors (nine, in my results). Thus, it is suggested that a different word for rights in Chinese that instantiates positive metaphors may reduce its alienability and produce a different response in the body of the Chinese users via embodied simulation. In this connection, Yan Fu's translation of "right(s)" as *zhi* meaning "right, straight", mentioned earlier, may be one possibility. It should be appreciated that *zhi* has a long history in China, being associated with positive meanings, and similarly realising STRAIGHT/RIGHT IS GOOD, in contrast to BENT IS BAD that is instantiated by the Chinese traditional words for unjust, crooked (*qu* 曲/

[18] https://sites.google.com/view/reframecovid/home

屈) and injustice (*yuan* 冤) (Mannoni 2020). In this regard, Golder's view that certain metaphors may make rights more universal may be accepted—although how good and how much Western-centred this possibility is should be questioned.

5. Conclusion

This study has shown that, as far as the cognitive view of metaphor is concerned, rights have no universal foundation, or at least this should exclude two languages such as British English and Mandarin Chinese as used in Mainland China. It has also highlighted that the contemporary view of metaphors has been subject to some misinterpretation, and caution is needed to avoid reaching conclusions about the universality of legal notions (e.g. rights) that are supported or rejected by it in appearance only.

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Chapter 3

Metaphorical Terms Denoting Intellectual Disability in Lithuanian Official Documents: Social Implications

Dalia Gedzevičienė

Abstract

This paper discusses the use of terms (two of which are metaphorical) denoting intellectual disability as they appear in official Lithuanian documents relating to education, healthcare and legislation. Until now, three terms have been synonymously used to denote intellectual disability: *intelekto sutrikimas* 'intellectual disorder', *intelekto negalia* 'intellectual disability', and the metaphorical term *protinis atsilikimas* 'mental backwardness'. As recently as 2016, the article of the Civil Code of the Republic of Lithuania governing the determination of a person's incapacity was still using another metaphorical term *silpnaprotystė* 'feeble-mindedness'. This is still used in the sense of intellectual disability and dementia, in both civil and criminal court decisions. The visual, persuasive associations of a person's condition with that of one who is left behind, is of poor quality in the two metaphorical terms mentioned above, form and establish negative social attitudes towards people with intellectual disability and induce their stigmatisation and exclusion far more than do direct (non-metaphorical) terms.

Key words: metaphorical term, legislation, intellectual disability, mental backwardness, mental retardation, feeble-mindedness

1. Introduction

Persons with intellectual disabilities in Lithuania[1] are included in the category of disabled people within the social care system. According to several studies conducted in Lithuania over the past decade, people with disabilities remain one of the social categories still experiencing social exclusion and poverty, despite the State's official policy of social inclusion (DSVS, 8–9; SSAL, 12). According to Eurostat data, in Lithuania in 2018 the risk of poverty and social exclusion for people with disabilities was the highest in the European Union (43%) after Bulgaria (49.4%) and Latvia (43.6%). The EU average was 28.7% (Eurostat 2018).

Social exclusion is a complex concept, which can be defined as "a process and condition in which individuals do not have access to a minimal standard of quality of life or a good life and which increases their feelings of insecurity and shame, psychological discomfort, lack of self-confidence, lack of respect" (Tereškinas 2015, 10). Poverty, problematic employment, and limited social life are features common to all socially excluded groups. However, each group also suffers from its own problems and has its own characteristics of exclusion. Persons with intellectual disabilities in Soviet Lithuania, and for at least another decade after regaining independence, experienced exclusion not only in social terms (as social exclusion) but also in physical terms (as actual exclusion, isolation outside of society: indefinite housing in closed in-patient care institutions, education of children with disabilities in special schools, boarding schools, etc.).

The decades-long policy of isolating of people with disabilities has established itself in the public consciousness as a common way of dealing with people with disabilities without alternatives. This is currently one of the reasons why the policy of reducing exclusion faces significant implementation challenges, especially as regards its two main directions: (1) integration of children with disabilities or special needs into general education schools (mainstreaming), and (2) deinstitutionalisation, i.e. abandonment of the institutional social care system and the return of

[1] Approximately 2 to 3 per cent of the global population has an intellectual disability, either as an isolated finding or as part of a syndrome or broader disorder (Daily, Ardinger, and Holmes 2000, 1059). However, it is not known exactly what percentage of people in Lithuania currently have an intellectual disability. According to a report published by the Institute of Hygiene, in 2019, 4.4% of Lithuanian children have been diagnosed with intellectual disability or psychological developmental disorder (LVSB, 66). However, this source does not further subdivide the group into those with intellectual disabilities and those with psychological developmental disorders, so the exact percentage remains unknown.

disabled people to local communities, for instance, by setting up small independent group-living homes for people with intellectual disabilities in city or town centres (rather than away from them, as has been the case so far). Incidents in local communities in Lithuania in 2019–2020 proved that the biggest problem in relation to social inclusion and deinstitutionalisation, in this case, is not a lack of finances, but rather negative, even hostile, attitudes of the community towards disabled people, and fear of the "other" and those who are "different". In some cases, locals expressed great dissatisfaction with the idea of such "dangerous" neighbourhood.[2]

For a long time, poor social adaptation of the disabled was considered to be caused by one or another disorder of an individual, and the precondition for social integration was the corrective education or treatment of the disabled. After the restoration of independence in Lithuania (1990), modern ideas about social integration began to spread in society and among specialists. It is now generally accepted that the main cause of the poor social adaptation of people with disabilities is the negative attitude and resulting behaviour of healthy members of society towards them, and the precondition for social integration is the ability of the social environment to tolerate people with disabilities (Ruškus 2002, 17). Thus, according to recent studies, a problematic integration of disabled people and barriers to their adaptation are not caused by the disabled people and the disabilities caused by certain disorders, but rather by the attitudes of all "abled" people around them and their actions vis-à-vis people with disabilities based on these attitudes. Therefore, for people with disabilities to become an integral, full-fledged part of our society, it is first necessary to change the established attitude towards the disabled, especially towards those with intellectual disability.

Social attitudes can be treated as a structural part of a well-established approach within society. A social attitude is a state of consciousness, a person's position in relation to a subject (person, group, situation, value). It manifests itself in various symptoms or indicators: words, tones, gestures or their absence. The attitude models human behaviour in advance (Ruškus 2001, 20).

This paper hypothesises that one of the many factors shaping social attitudes towards a particular object or subject is the predominant naming of that subject or object in the respective linguistic community, and

[2] Locals openly expressed their resentment, stating that that people with intellectual disabilities would steal fruit and vegetables from their gardens, could be dangerous to children, and so on. These protests by locals have been widely reported in the Lithuanian media. For more information, see Šileikis 2019; Adomavičienė 2019; Lankininkaitė 2020.

primarily in its official public discourse. Therefore, by changing the vocabulary and terminology, it is possible to make an impact on attitude, because the new term is not just an empty verbal envelope—it also denotes a new concept, a different content. Based on the results of many psycholinguistic experiments (Thibodeau and Boroditsky 2011; Thibodeau, McClelland, and Boroditsky 2009), the assumption is made in this paper that a change of name or term may result in, or accelerate, a change in social attitudes, public opinion, and even a pattern of behaviour towards the target persons.

As regards people with intellectual disabilities, considered not only from the Lithuanian, but also from a broader global perspective, there is a long history of their exclusion and stigmatisation. The changes in the terminology denoting their disabilities and disorders as well as the names applied to the disabled people themselves, are evidence of this history. According to child development experts, much of the history of the science of intellectual disability is covered by the search for the least-stigmatising term defining this condition (Prasauskienė 2003, 208). In the author's opinion, research on the definition and terminology applied to exclusion groups and the concept of socially vulnerable persons is both significant and necessary because neutral, ethical, non-offensive, and non-assessing naming of a person's condition is one of the initial factors for successful integration, or, ideally, a factor which may prevent exclusion in those cases where efforts to return a person to the community are not necessary because he or she has not been expelled from it.

At this point, I should briefly present what is meant by the terms investigated in this paper, first of all, to define the concept of intellectual disability. From the point of view of medical representatives, "disorders of intellectual development are a group of etiologically diverse conditions originating during the developmental period characterised by significantly below average intellectual functioning and adaptive behaviour that are approximately two or more standard deviations below the mean, based on appropriately normed, individually administered standardised tests" (ICD-11). Attitudes about what intellect is and what it should be as well as the distinction between IQ points between norm and disorder, have historically changed. At the end of last century, authors of disability studies began to question the objective existence of the construct of *mental retardation* (then it was referred to as "intellectual disability"). According to Steve Taylor, intellectual ability differs among people, but this does not prove the objective existence of the construct of mental retardation. Mental retardation is a social and cultural fact. Who is or is not considered "mentally retarded" hinges on arbitrary and professionally controlled definitions and classification

procedures. The construct of mental retardation exists in the minds of those who label other persons, and not of those so labelled (Taylor 1996, 4–5). The importance, even the necessity, and in general the decisive role, of the ethical term in human life, became clear when, in the 1970s, disability scholars distinguished between the medical model of disability and the social or minority-group model of disability. From the clinical perspective, mental retardation was a pathological condition existing within the individual that could be objectively diagnosed by professionals using standardised instruments (Taylor 2008, XV). From the social perspective, the term *mental retardate* does not describe an individual pathology but rather refers to the label applied to a person because he occupies the position of mental retardate in some social system (Mercer 1973, 27–28).

However, it must be emphasised that in real human life, both the clinical approach to intellectual disability (as a person's disease or brain damage) and the social (as to the social role) are closely related, determining each other. The term used by professional clinicians to denote a person's disorder has the effect of determining his social role, becoming a label for the rest of his life; it is like a name with preliminary social consequences. At present, the clinical approach and classification procedures of professionals (doctors or education specialists) in Lithuania are basically the first and inevitable reaction to a child's suspected intellectual disability. From the moment the disorder is identified, and the child is "certified" as a pupil with special needs or a person with intellectual disability (in order to be able to obtain additional specialised or financial support from the State), those around him, watching the person through the prism of social disability attitudes, shape a certain future social role for this person, which might be a lifelong role. How the rest of society will look at such a person, how they will treat him, whether as retarded or as a full member of society, also depends on how the person and his disorder *will be named* after the period of classification procedures, i.e. what term will be used for that purpose.

In Lithuania, lawyers (Benkunskas 2012), psychiatrists (Pūras 2015, 69), and communication specialists (Jurčiukonytė 2007, 11–14) emphasise the social harm of outdated, offensive terms and their connection with stigma and exclusion, and disability scholars (Ruškus 2019) write about the importance and significance of using ethical, non-discriminatory words to talk about people with disabilities. In many cases, these insights were instigated by the results of research during the last three decades. As early as the second half of the 20th century, especially in the 1970s, psychiatrists, disability scholars and other experts began to study the usage of unethical, inaccurate terminology that did not correspond to the modern concept of intellectual disability and emphasised the need to change it (Mercer 1973,

27–28; Taylor 1996, 4–13; Shalock, Luckasson, Shogren, Borthwick-Duffy et al. 2007, 116–124; Taylor 2008, XV; Salvador-Carulla and Bertelli 2008, 10–16; Wehmeyer, Buntinx, Lachapelle, and Luckasson 2008, 311–318; Salvador-Carulla, Reed, Vaez-Azizi, Cooper et al. 2011, 175–180; Nash, Hawkins, Kawchuk, and Shea 2012, 71; Harris 2013, 260–262, etc.). The results of such studies have been applied in practice. A few successful examples are discussed below. In 2018, the General Secretariat of the Council of the European Union developed guidelines for inclusive communication and published them in all the official languages of the European Union. This document presents recommendations relating to administrative language: how to use neutral language, to avoid stereotypes related to people of all genders and sexual orientations, people with disabilities, people of all ages, and from all backgrounds, and thus how to refer to different groups in a non-discriminatory way (ICGS; ĮKTGS). In Finland in 2017, an illustrated disability dictionary for children *A Person with a Disability is Able Too* was published. This publication introduces 120 disability-related concepts and provides appropriate modern terms for naming them (Saraste, Könkkölä, and Heinonen 2017). In 2020, this dictionary was also translated into Lithuanian (Saraste, Könkkölä, and Heinonen 2020).

After a more detailed presentation of the field and the issues arising within it, I will briefly define the aim, methods and materials of this paper.

In Lithuania, the terminology describing various forms of disability, especially its ethical aspects, has not yet received the attention of linguists. Therefore, the goals of this paper are to: 1) indicate which terms are currently used to denote intellectual disability in Lithuanian institutional documents, limited to the fields of law, healthcare, and education; 2) present a semantic and etymological analysis of these terms; 3) determine which of them are metaphorical; and 4) investigate the potential influence metaphorical terms have on social attitudes. Descriptive, semantic and etymological analysis methods are employed and, in order to illustrate the influence of metaphorical terms on social attitudes, research on cognitive linguistics and psycholinguistics is included. The research materials used for this paper are the following Lithuanian institutional documents: the Civil Code of the Republic of Lithuania (three versions), the Code of Civil Procedure of the Republic of Lithuania, the Criminal Code of the Republic of Lithuania, Lithuanian court decisions from the courts decisions database *eteismai.lt* (court decisions have been published in this database since 2005), various certificates issued by officials of healthcare and educational institutions to persons with intellectual disabilities and legal acts regulating the issuing of

these certificates.[3] In addition, in order to compare Lithuanian terminology regarding intellectual disability with corresponding terms in other languages, various versions of the ICD and the DSM were used.

2. Who, from whom, and how far is *behind*?

This subsection analyses the synonymous use of three terms (*intelekto sutrikimas,* the most accurate literal English equivalent of which is 'intellectual disorder', [4] *intelekto negalia* 'intellectual disability' and *protinis atsilikimas* 'mental backwardness') in Lithuanian legal, educational and healthcare documents. Although this paper aims to study only the current terms used in this field since 1990, when Lithuania became an independent state, we must take a brief look at its origins to be able to understand the present situation.

At the beginning of the 19th century, the French psychiatrist Jean-Étienne Esquirol proposed *imbecility* and *idiocy* as official medical terms to denote individual cases of intellectual disability (Binet and Simon 1904, 168–172). In the long run, these terms started to be used not to refer to individual cases of intellectual disability, but rather to indicate the degree of severity of intellectual disability: *imbecility* moderate, *idiocy* the most severe degree, and intellectual disability in general came to be called the term *oligophrenia* proposed by the German psychiatrist Emil Kraepelin in 1915 (Kriščiūnas 2002, 138). Accordingly, people with a certain degree of intellectual disability have come to be called "morons," "idiots," and "imbeciles" in medical literature. However, in the first half of the 20th century, these medical terms started to be used not only in medicine, but in general public discourse with a completely different meaning (Pūras 2015, 68). Morons (Lith. *debilai*), idiots (Lith. *idiotai*) and imbeciles (Lith. *imbecilai*) have become metaphors for foolish, inappropriate, illogical thinking and behaving people, used in an exceptionally negative context to humiliate the person denoted in this way. Thus, the terms used in a narrow professional field expanded beyond their original concept and started to be used with another, additional lexical meaning and an extremely negative connotation. Shortly afterwards, the offensive, insulting, devaluing

[3] It is necessary to specify that these certificates are not publicly available because personal data are provided therein. They are issued to parents/legal guardians and must be passed on to doctors, educators or social workers. It was possible to include these documents in our research materials only because the author of this paper is the legal representative of a child with intellectual disability.

[4] The literal translation of a Lithuanian term into English is indicated in this text by single quotation marks.

connotation of the second meaning became associated with the first terminological meaning and, of course, in linguistic terms, with the denotation of that designatum: a group of persons with certain peculiarities of intelligence. In other words, when we use some words (*idiot, retard, backward, feeble-minded*) as slang terms, they keep the connotation that persons with low intellectual and adaptive skills are inept, unable, dumb, etc. (Tassé and Mehling 2015, 4–5). Such additional shade of meaning for terms designating a group that has historically been persistently socially vulnerable, has been an obstacle to the development of a different, more humanistic and coexistence-oriented, approach to all and different members of society; therefore, approximately from the middle of last century conscious effort has been made to abandon the offensive names for the disorder and the person suffering from it and to find the least stigmatising term.

In 1961, the American Association on Mental Retardation introduced a new term *mental retardation* and soon afterwards this term was adopted by the American Psychiatric Association in its Diagnostic and Statistical Manual for Mental Disorders (Harris 2013, 260). *Mental retardation* was introduced to replace the existing terminology (*feeble-mindedness, idiocy*, *mental deficiency*) because they had acquired a strong pejorative baggage (Tassé and Mehling 2015, 3). This change of terms has proven once again that, over time, any term selected by nosologists for this population eventually assumes a stigmatic connotation that stimulates requests for an alternative (McCreary and Rischke 2013, 1).

In case of Lithuania, which at that time was part of the Soviet Union, it should be emphasised that of course nobody had a possibility or right to follow Western methodologies and classifications in their work, especially those of the United States. Nonetheless the Soviet Union was a member of the World Health Organization (WHO) and certain changes in terminology did take place based on the International Classification of Diseases (ICD) prepared by the WHO and revised almost every decade. In ICD-6, which entered into force in 1949, Code 325 designated the disorder *mental deficiency,* and its degrees were indicated: *idiocy, imbecility, moron, borderline intelligence, and other unspecified types* (ICD-6 1948). In ICD-7, which entered into force in 1955, the name of the disorder *mental deficiency* remains, and, in addition to the former, one more degree of disorder has been distinguished: *mongolism* (ICD-7 1955). In the ICD-8 version, which entered into force in 1965, the term *mental deficiency* was generally abandoned, and the term *mental retardation* proposed by American psychiatrists in 1961 is established. Six degrees of the disorder are indicated: *borderline, mild, moderate, severe, profound, unspecified*

(ICD-8 1965). Thus, in the 1960s in the USA and Europe, psychiatrists began to abandon terms which had become pejorative: *oligophrenia, feeble-mindedness* as well as the names of their degrees: *idiocy, moronity (debility),* and *imbecility*, and started to use the term *mental retardation* to designate intellectual disability. The term is also used in the ICD-10, which is still in use today.

In Lithuania, the main import of this term-changing period was that the new official term chosen was not a direct translation of the English term *mental retardation*, which in Lithuanian would be *protinio vystymosi sulėtėjimas* (Eng. *retard* 'to make something slower' (CDE); Lith. *sulėtėti, lėtinti*), but rather the term *protinis atsilikimas* (the first direct meaning of the Lithuanian verb *atsilikti* is 'not to keep up with others, lag behind, stay behind, be backward', e.g. *He stayed far behind his friends. To lag behind the train,* and the second figurative meaning based on the first is 'not to reach a certain level', e.g. *To lag behind in science, Backward technique* (DLKŽ)). Translating directly *protinis atsilikimas* into English, the most accurate literal term would be *mental backwardness*. However, in the ICD the term *mental retardation* highlights the slowdown or delay, whereas in Lithuanian the term *protinis atsilikimas* emphasises the "result" of the slowdown and delay, i.e. lag, backwardness, staying behind. This is the same semantic difference as between *retard* and *go behind.* Given the historical political circumstances, it becomes clear that in Soviet Lithuania this term emerged via translations, not from the ICD original language (English), but rather from an intermediate language (Russian), which uses the broadly established term *umstvennoje otstalost'* (*umstvennoje* Lith. *protinis*, Eng. *mental*; *otstalost'* Lith. *atsilikimas*, Eng. *backwardness, lag*), and this exact term is also used in the Russian version of ICD-10 (MKB-10 2019). Thus, the Lithuanian term *protinis atsilikimas* is a direct translation from Russian. Apparently, the literal translation of the term is from Russian rather than from English, a much more visual metaphor was obtained essentially identifying the final "diagnosis": not retardation or slowing down, but backwardness and staying behind.

Going back to the term *mental retardation,* which in the 1960s replaced such outdated terms as *feeble-mindedness, mental deficiency,* and *oligophrenia* in the world, attention should be paid to the negative connotations acquired over time by *mental retardation.* Around 1990 it became evident that this term too had moved from a sterile medical label to judgement-laden slang used in society to insult or offend (Tassé and Mehling 2015, 4). As attitudes towards a person with such a disorder changed and the society evolved, new terms were once again needed.

In the first decade of this century in America specialists and advocates for individuals with intellectual disabilities began to emphasise social harm done by the term *mental retardation*. As a result of this campaign, the term *intellectual disability* was increasingly used in public discourse and official documents replacing *mental retardation* (Shalock, Luckasson, Shogren, Borthwick-Duffy et al. 2007, 117). In 2007, the American Association on Mental Retardation became the American Association on Intellectual and Developmental Disabilities, and changed the name of its affiliated journal (Nash, Hawkins, Kawchuk, and Shea 2012, 71). In 2010, the USA president Barack Obama signed a legal act known as Rosa's Law (Public Law 2010). This law made it mandatory that references to mental retardation in all the federal education, health, and employment laws should be changed to references to an intellectual disability, and references to a mentally retarded individual replaced by references to a person with intellectual disability. In 2013, in the 5th edition of *Diagnostic and Statistical Manual of Mental Disorders*[5] (DSM-5), the term *intellectual disability* was also adopted. Thus, in the USA, the term *intellectual disability*[6] was chosen to designate a disorder discussed in this paper.

The DSM is an authoritative American publication but is not acknowledged as such in Lithuania. The American example presented only reflects global tendencies, struggles to find a more suitable match for the term *mental retardation*. As mentioned before, presently, Lithuanian doctors follow TLK-10-AM, the Lithuanian version of ICD-10.

Around the same time as the "End the Word" Movement, in which activists in the United States were raising awareness around the pejorative nature of the words *retard* and *retarded* (Tassé and Mehling 2015, 4), the WHO was in the process of revising ICD-10. The WHO ICD Working Group on the Classification of Intellectual Disabilities was working on the issue of whether mental retardation should be conceptualised as a health

[5] The *Diagnostic and Statistical Manual of Mental Disorders* (DSM), published by the American Psychiatric Association, is a compendium of mental disorders, a listing of diagnostic criteria used to diagnose them, and a detailed system for their definition, organisation and classification. The DSM functions as one of the most comprehensive and thorough manuals used to classify and diagnose mental disorders. The only major competitor in the developed world is the World Health Organization's *International Classification of Diseases* (ICD) (Marty and Segal 2015, 965–966).

[6] It should be noted that in America the debate on the name and concept of mental retardation/intellectual disability lasted many years, e.g. some researchers argued that intellectual disability may be regarded not as a disease or as a disability but as a metasyndrome similar to the construct of dementia and proposed to name it *developmental cognitive impairment* (Salvador-Carulla and Bertelli 2008, 10).

condition or as a disability.[7] The Working Group proposed replacing *mental retardation* with *intellectual developmental disorder* and defined it as "a group of developmental conditions characterised by significant impairment of cognitive functions, which are associated with limitations of learning, adaptive behaviour and skills" (Salvador-Carulla, Reed, Vaez-Azizi, Cooper et al. 2011). On 18 June 2018, the WHO published the International Classification of Diseases 11th Revision (ICD-11). There, in counter-distinction to ICD-10, intellectual disability was not designated by the term *mental retardation*, but rather by the term *disorder of intellectual development*, for which the Lithuanian equivalent term would be *intelekto raidos sutrikimas*. ICD-11 enters into force on 1 January 2022. In the final ICD-11 version, therefore, a slightly corrected option proposed by the Working Group is adopted: as already mentioned, the Working Group proposed the term *intellectual developmental disorder*, and ICD-11 includes *disorder of intellectual development*.

The present situation in Lithuania may be characterised by pointing out that eight years ago researchers described the situation as similar to that in the USA, but even though the term *mental retardation* was treated as scientifically worthless and socially harmful, it continues to be used clinically, and commonly appears in textbooks and publications (Nash, Hawkins, Kawchuk, and Shea 2012, 71). The first question that may arise is whether the term *mental retardation* should be abandoned and another new term, with no negative semantic charge, should be adopted, simply because the old term is insulting and offensive. However, the terms denote fundamentally different concepts and constitute completely different approaches towards the object they designate: *mental retardation* is imagined as residing within the person: to have mental retardation was to be defective. The locus of that defect was the mind, whereas the latter concept (*intellectual disability*) viewed the disability as the fit between the person's capacities (implied in that is limited capacity as a function of neural impairment) and the context in which the person functioned (Wehmeyer, Buntinx, Lachapelle, and Luckasson 2008, 312–314), thus emphasising the meaning of context and surroundings in the ability of a person having certain neurological peculiarities to function in society. Therefore the term change signifies firstly a change in the concept and its description, where

[7] An extreme position in this debate suggests that if intellectual developmental disorders (IDD) are defined solely as disabilities and not as a health condition, they should be deleted from the ICD. Therefore, removing IDD from the list of health conditions would have a major impact on the visibility of IDD, on national and global health statistics, on health policy, and on the services available to this vulnerable population (Salvador-Carulla, Reed, Vaez-Azizi, Cooper et al. 2011).

the disorder starts to be conceived not as a disease which is exceptionally "inside" the person, but rather as a disorder of certain functions and abilities of a person in a respective social area, and secondly, the change in the concept of the term and its "content" leads to a change in the attitude of the surrounding people towards the person with intellectual disability and thus a change in their relationship with them.

In Lithuania, to name the intellectual disability, four terms are still used officially: *protinis atsilikimas* 'mental backwardness', *intelekto sutrikimas* 'intellectual disorder', *intelekto negalia* 'intellectual disability', and *silpnaprotystė* 'feeble-mindedness'. The question arises as to why there is such a variety and when uniform terminology will be used. Apparently, educational, social care, and treatment institutions comply with different legal acts, in which different terms are used to refer to the same disorder.

In the documents of all educational institutions and administrations under the authority of the Ministry of Education, Science and Sport of the Republic of Lithuania, the term *intelekto sutrikimas* 'intellectual disorder' has been in use for over a decade. This term was adopted by the Order of the Minister (Order 2011).

At the same time, specialists in Lithuanian medical institutions must comply with the currently in force Lithuanian version of ICD-10 when diagnosing intellectual disability. This classification was translated into Lithuanian and started to be used around 1997. The terminology used in ICD-10 and TLK-10-AM is slightly different from that of ICD-8, which entered into force in 1965 and which started to use the term *mental retardation*. In ICD-10 and TLK-10-AM, *mental retardation* and *protinis atsilikimas* are described as "a condition of arrested or incomplete development of the mind, which is especially characterised by impairment of skills manifested during the developmental period, skills which contribute to the overall level of intelligence, i.e. cognitive, language, motor, and social abilities" (ICD-10; TLK-10-AM). In the classification, this disorder is further divided into six subcategories: *lengvas* (mild), *vidutinis* (moderate), *sunkus* (severe), *gilus* (profound), *kitas* (other), and *nepatikslintas* (unspecified).

In Lithuania, psychologists can currently diagnose a child as having an intellectual disability by performing IQ tests and examining adaptive skills. The term used in the diagnosis received by a child depends upon where the psychologist works, i.e. an educational or medical institution and which of the above mentioned two documents is used: Order 2011 or TLK-10-AM. Therefore, for about a decade in Lithuania a paradoxical situation has existed: school-age children with the same disorder may be designated by two different terms: *protinis atsilikimas* 'mental backwardness' for some,

and *intelekto sutrikimas* 'intellectual disorder' for the others. But most often the same disorder of the same person is named by two different terms in various certificates describing a person. This is not a theoretical construct, but real situations that often arise for Lithuanian children: the school sends a pupil to the Psychological-Pedagogical Service (PPS) in order to give him additional or specialised educational support; there the degree of his special needs is identified. During the identification, IQ tests are performed, adaptation skills are investigated, and an intellectual disability is diagnosed (or not). Afterwards the Certificate of Special Education and/or Educational Assistance (Annex 8) is issued to the school which sent the pupil (recommendations on education and what support should be given for the pupil at school are identified in the Certificate). In this Certificate, PPS specialists diagnose *intelekto sutrikimas* 'intellectual disorder'. But before the beginning of each school year, every pupil in Lithuania, as well as pupils with special educational needs, must bring to their schools a Child Medical Certificate (Form No. 027-1/a), which is issued by the child's paediatrician. In this certificate, the paediatrician must mention any disorders and diagnoses the pupil may have. According to the intelligence test performed by PPS and the resulting certificate, in which *intelekto sutrikimas* 'intellectual disorder' is diagnosed, the child's doctor obligatorily renames this disorder and records in the child's certificate *protinis atsilikimas* 'mental backwardness'. This reclassification is obligatory since the doctor is not an education specialist and therefore must follow TLK-10-AM and the names of diseases and disorders as well as the code system presented in it.

Thus, at the beginning of each school year, this pupil comes to school carrying two documents with him issued by different institutions: a PPS certificate (Annex 8) and a certificate issued by his paediatrician (Form No. 027-1/a) for teachers, school administration and other professionals who will work with him. These official documents use two different terms to describe the same disorder, essentially denoting two different concepts shaping different attitudes towards the pupil, the relations and the nature of work with him.

It is probable that in the near future this ambiguous situation, repeated every year over the past decade for many Lithuanian children and which is stuck in a maze of two terms and concepts, will end, because, as already mentioned, on 18 June 2018 the WHO published ICD-11, where, unlike ICD-10, intellectual disability is no longer designated by the term *mental retardation,* but rather by the term *disorder of intellectual development*. ICD-11 will enter into force on 1 January 2022. Although the document has not yet been translated into Lithuanian, the author would like to believe that translators and professionals will translate the document directly from the

original, paying attention to the fundamentally changed English terminology in the field and choosing the appropriate and accurate Lithuanian equivalent: *intelekto raidos sutrikimas* 'disorder of intellectual development' or its short form *intelekto sutrikimas* 'intellectual disorder'.

I have now discussed the use of two terms: *protinis atsilikimas* 'mental backwardness' and *intelekto sutrikimas* 'intellectual disorder' in documents of the Lithuanian healthcare and education system. Still, it should be noted that in lower-ranking documents which regulate social care and rehabilitation of disabled people as well as in media and in public discourse in general, the term *intelekto negalia* is used quite often, which in literal translation is an equivalent of the term 'intellectual disability'. When ICD-11 has entered into force and the term *protinis atsilikimas* 'mental backwardness' has finally disappeared from official documents due to the general use of the terms *intelekto raidos sutrikimas* or *intelekto sutrikimas*, it may be considered that as an alternative option, the term *intelekto negalia* 'intellectual disability' could be used as well, especially in those fields where emphasis is placed on a person's disability. Although so far *intelekto negalia* 'intellectual disability' and *intelekto sutrikimas* 'intellectual disorder' have been used synonymously in Lithuania, it is nevertheless possible to show some difference between the concepts denoted by these terms: due to certain intellectual peculiarities, a person may be classified by professionals as having a disorder, but at the same time he may not, either because of the mild degree of disorder (as happens now), or due to the fact that this disorder is not an obstacle limiting his possibilities to live a full life in a friendly, non-repulsive society (intended to be so).

3. *Silpnaprotystė* 'feeble-mindedness' in Lithuanian legal acts and court decisions

This section analyses the use of the fourth term, *silpnaprotystė* 'feeble-mindedness', which is intended to denote an intellectual disability, in the Civil Code of the Republic of Lithuania, in the Criminal Code of the Republic of Lithuania, and in Lithuanian court decisions.

With regard to the semantics of the term discussed above, *protinis atsilikimas* 'mental backwardness' and the term *silpnaprotystė* 'feeble-mindedness', it should be noted that in the Lithuanian language the term *protinis atsilikimas* 'mental backwardness' usually refers to an inborn intellectual disorder, or one acquired up to the age of three, and the term *silpnaprotystė* is used in two senses: (1) as a synonym for *protinis atsilikimas* 'mental backwardness', and (2) as a synonym for *demencija* 'dementia'.

The Lithuanian term *silpnaprotystė* (Eng. *feeble-mindedness*) was built from the word *silpnaprotis* (Eng. *feeble-minded*) by attaching to it the suffix *-ystė*. The Lithuanian compound word *silpnaprotis* was built from two root words: *silpnas* 'feeble' and *protas* 'mind'. But it must be noted that the semantic (meaning) structure differs when speaking about the English word *feeble* and the Lithuanian word *silpnas*. The first direct meaning of the word *silpnas* in Lithuanian is 1. low strength, low endurance, e.g. *Silpnas žmogus. Silpnas arklys. Silpnas variklis* 'Weak man. Weak horse. Weak engine' (DLKŽ). The first direct meaning describes the amount of physical strength and is equivalent to the English *weak*. But the term *silpnaprotystė* is based on another, figurative, meaning of the word *silpnas* (in DLKŽ it is identified as No. 4): feeble, poor, insufficient, e.g. *Silpnas mokinys. Silpnas protas. Silpna priežiūra* 'Poor pupil. Feeble mind. Insufficient maintenance' (DLKŽ) and is equivalent to the English *feeble*. Thus, for the Lithuanian term, the figurative, metaphoric meaning of the word *silpnas* with a negative connotation and clear evaluative aspect was chosen. This is significant for further context when *silpnaprotis* 'feeble-minded', the root word of the term *silpnaprotystė* 'feeble-mindedness', started to be used to define a non-perceptive, illogically thinking person. Equivalents of this word are used in the same sense in other languages. For this reason, *feeble-mindedness,* as well as *silpnaprotystė* and their equivalents in other languages, such as the Russian *slaboumije,* have long been recognised as incorrect, discriminatory terms in the language of medicine and other fields and are no longer used.

At this point, a description of where and for how long the word *silpnaprotystė* has been used in Lithuania as a term to denote intellectual disability can be useful. It should be emphasised that neither in the ILCD nor in the ICD list was *feeble-mindedness* used as a nosological term. However, although ILCD-1 was issued in 1900 and new versions were published approximately every ten years thereafter, for a long time the list of diseases and disorders they contained was used by countries around the world for statistical purposes only, and in medical theory and practice, countries followed their own national classifications. In 1959, the ICD was in use only in Finland, New Zealand, Peru, Thailand, and the United Kingdom (Stengel 1959, 604). In Lithuania until 1997, when the entire ICD-10 was translated into Lithuanian and gradually began to be applied in medical practice, the national classification of intellectual disabilities was the standard in both medicine and special pedagogy. Some of the key terms in this classification were *silpnaprotystė* 'feeble-mindedness' and *oligofrenija* 'oligophrenia'. In the first psychiatric textbook published in Lithuanian, intellectual disability is referred to by two synonymous terms: again, *silpnaprotybė* and *oligofrenija* (Blažys 1935, 160). From the end of WW2

until the beginning of the 21st century, Lithuania was guided by the following classification: intellectual disability was treated as one of the forms of feeble-mindedness, so feeble-mindedness was divided into *įgimta silpnaprotystė* 'congenital feeble-mindedness', synonymously called *oligofrenija* 'oligophrenia', and *įgyta silpnaprotystė* 'acquired feeble-mindedness', synonymously called *demencija* 'dementia'. Congenital feeble-mindedness, or oligophrenia, was divided into varying degrees: *idiotija* 'idiocy', *imbecilumas* 'imbecility', and *debilumas* 'debility' [8] (Grigas, Jocevičienė, Lapytė, and Ostrauskas 1966, 112–113; Grigas, Jocevičienė, Lapytė, and Ostrauskas 1972, 128; 172–174; Astrauskas, Biziulevičius, Pavilonis, Vaitilavičius et al. 1980, 135, 139, 265, 266, 389; Dembinskas and Eglytis 1985, 133–137; Grabauskas 1993, 101; Kriščiūnas 1993, 166–169; Lapytė and Šurkus 1996, 19, 38–39, 60; Kriščiūnas 2002, 138–143). Since 1997, the Lithuanian healthcare system has been gradually adopting the classification and terminology of diseases and disorders used in ICD-10, which, as already mentioned, refers to intellectual disability as *mental retardation,* or *protinis atsilikimas* (lit. 'mental backwardness'), and there is no such term as *feeble-mindedness,* or *silpnaprotystė*.

Despite this situation, even as recently as 2016 the term *silpnaprotystė* was still officially used to designate intellectual disability in the Civil Code of the Republic of Lithuania (CCRL), specifically, in Article 1.84, Para 2, and in Article 2.10, Para 1, which regulate the recognition of a natural person as being incapacitated or having limited capacity. Until 1 January 2016, the above-mentioned Article included the phrase: (...) *dėl psichinės ligos arba silpnaprotystės negali suprasti* (...) 'due to the mental illness of feeble-mindedness can't understand'. In 2012, lawyer Benkunskas, who studied mental health-care term usage in Lithuanian legal regulations, attempted to draw lawmakers' attention to the use of the outdated, unethical term *silpnaprotystė* in CCRL, and wrote that legislation often lags behind

[8] Interestingly, the key nosological terms for denoting intellectual disability differed in both the ICD and national classification (in the 1938-1965 ICD, this term was *mental deficiency* and, since 1965, *mental retardation,* while in Lithuania at that time the terms *įgimta silpnaprotystė* 'congenital feeble-mindedness' or *oligofrenija* 'oligophrenia' were used), yet varying degrees of intellectual disability are identified by the same three main terms: *idiocy, imbecility* and *debility*; in both the ICD and in the Lithuanian national classification. It should be noted here that the English version of the ICD uses the term *moron* for a mild degree of intellectual disability (Manual 1957, 123), while the French version, the other official language of the WHO, refers to this degree as *débilité mentale* (Manuel 1950, 114). Thus, the terminology used to describe varying degrees of intellectual disability in the French version of the ICD was established in the national Lithuanian classification.

in changing terminology, leading to terms being used in legal regulations not only inaccurately, but sometimes at the risk of violating ethical requirements (Benkunskas 2012, 164). Finally, on 3 December 2015, the changes to this Article were adopted (entering into force on 1 January 2016), by which the terms *silpnaprotystė* 'feeble-mindedness' and *psichikos liga* 'mental illness' were definitively abandoned, and replaced by a single term *psichikos sutrikimai* 'mental disorders'. The term was most probably borrowed from the Code of Civil Procedure of the Republic of Lithuania, where it has been used until now in Articles 465, 466, 472 and 473 describing the same civil relations as in the legal norms of CCRL (regulated cases of the recognition of a person as incapacitated or with limited capacity). After another change on 11 January 2019, the CCRL Article is now formulated as follows: (...) *dėl psichikos ir elgesio sutrikimo negali suprasti savo veiksmų* (...) 'due to mental and behavioural disorders is unable to understand his/her actions'. Thus, the term *mental and behavioural disorders* replaced the previous terms *mental illness* and *feeble-mindedness* as well as the later term *mental disorders*. This term for the disorders, which may have legal consequences, was transferred from TLK-10-AM (ICD-10). *Mental and Behavioural Disorders* is the title of Chapter V in ICD-10, which encompasses mental diseases and intellectual disabilities with codes in the scale F00-F99. It is possible that this wording will have to be changed again because in ICD-11, which has entered into force in 2022, this chapter is titled *Mental, Behavioural and Neurodevelopmental Disorders*.

The Criminal Code of the Republic of Lithuania (CrCRL) abandoned the term *silpnaprotystė* 'feeble-mindedness' 20 years ago, much earlier than did CCRL. In the CrCRL, in Article 17, which regulates the capacity of a person, instead of the three terms *silpnaprotystė* 'feeble-mindedness', *chroninė psichinė liga* 'chronic mental illness', and *laikinas psichinės veiklos sutrikimas* 'temporary mental disorder', one broader concept of *psichikos sutrikimas* 'mental disorder' was introduced and is still used today.

Notwithstanding that TLK-10-AM (ICD-10) used in Lithuania since 1997 adopts the term *protinis atsilikimas* 'mental backwardness' in reference to intellectual disability, and the term *demencija* referring to dementia, the confusion of the terms is still identifiable in Lithuanian court decisions. In the *eteismai.lt* database, where anonymised decisions issued by Lithuanian courts have been published since 2005, from 2005 to 2020, the term *protinis atsilikimas* 'mental backwardness' was used in 2,916 court decisions to denote intellectual disability, *silpnaprotystė* 'feeble-mindedness' (sometimes in decisions this term denotes an intellectual disability, sometimes

dementia) was used in 825 decisions, *demencija* 'dementia' was used in 1,642 decisions, and *intelekto sutrikimas* 'intellectual disorder' was used only in 64 decisions.[9] Neither ICD-10 nor its Lithuanian version TLK-10-AM uses the terms *feeble-mindedness* and *silpnaprotystė*, but up until 1 January 2016, it was still used in the Civil Code of the Republic of Lithuania. However, even after 1 January 2016 (when this term was no longer in the Civil Code), it was and continues to be used in both civil and criminal Lithuanian court decisions. For comparison, from 1 January 2016 to 1 May 2021, *protinis atsilikimas* 'mental backwardness' was used in 1,563 Lithuanian court decisions, *demencija* 'dementia' in 880 decisions, *silpnaprotystė* 'feeble-mindedness' in 553 decisions, and *intelekto sutrikimas* 'intellectual disorder' in 16 decisions. In court decisions, the latter term usually comes from forensic psychiatric reports written by medical psychiatrists, even though TLK-10-AM (ICD-10) does not use *silpnaprotystė* 'feeble-mindedness' to refer to any disorder at all.

4. The power of the metaphors *atsilikimas* 'backwardness' and *silpnas protas* 'feeble mind'

As previously mentioned, the equivalents of the terms *protinis atsilikimas* 'mental backwardness' (mental retardation) and *silpnaprotystė* 'feeble-mindedness' were abandoned or are abandoned in other languages for the following reasons: firstly, they denote scientifically denied and socially harmful concepts, when disorder was perceived as a defect existing inside a person by eliminating the role of the social environment and social attitudes which form a *disability*; secondly, as these terms started to be used colloquially with another negative meaning, becoming pejorative, their further use became unethical and discriminatory. In this subsection, I will examine more thoroughly to what extent the term itself contributed to the formation of this negative concept and precisely to such a perception of disorder in society, i.e. the primary choice to designate this disorder by such a phrase.

The most significant aspect is that the components of both the term *protinis atsilikimas* 'mental backwardness' and the terms denoting its degrees (*lengvas, sunkus, gilus*) as well as *silpnaprotystė* 'feeble-mindedness' are metaphors in the Lithuanian language, i.e. in these terms, the words *atsilikimas* 'backwardness', *lengvas* 'light' (ICD-10: *mild*), *sunkus* 'heavy'

[9] It should be added at this point that the outdated and offensive term *intelekto defektas* 'intellectual defect' was used in 153 cases.

(ICD-10: *severe*), *gilus* ‘profound’, and *silpnas* ‘weak, feeble’ are used in figurative meanings.

Metaphor in general is not a rare terminological phenomenon in Lithuania and other countries; for example, metaphorical terms make up about 8.8 percent of all Lithuanian legal terms (Gedzevičienė 2018). However, works dealing with Lithuanian terminology are dominated by an ambiguous, rather cautious approach to metaphorical terms. On the one hand, it is accepted that metaphorical transfer of meaning is one of the ways to create new terms (Gaivenis 2002, 45–52; Jakaitienė 2009, 192), but on the other hand, there is still a tendency to avoid metaphorical terms for two reasons: 1) because metaphor gives a term an emotionally expressive connotation and the term therefore loses its stylistic neutrality, and 2) translating metaphorical terms from other languages into Lithuanian metaphors results in the semantic field of the respective foreign word having a huge impact.[10] Although there are no separate scientific theoretical works in Lithuanian linguistics studying the relationship between terms and ethics, terminologists have constantly emphasised that one of the requirements for terms should be stylistic neutrality. The terminologist Gaivenis even indicated certain areas of social life and activities where emotionally expressive connotation and imagery attached to the term would be highly undesirable. The fields he mentions include the one studied in this article: “The names of specialties, diseases, patients, etc. have to be emotionally neutral. (...) [inappropriate] terms may insult patients. Emotionally neutral terminology in the fields of pedagogy, politics, and law is required as well” (Gaivenis 2002, 47).

Conceptual metaphor theory developed in cognitive linguistics can explain the mechanism through which metaphor gives an emotionally expressive connotation to a term. The metaphor can be understood as a mapping from a *source domain* to a *target domain* (Lakoff 1993, 245), thus

[10] In this case, it is not a metaphor at the level of the sentence, text or discourse in general, but a matter of terms as separate words or phrases that need to be translated from one language to another that does not yet have that term. The tendency of Lithuanian terminology to avoid metaphorical terms is confirmed by the statistics relating to translation procedures used in the translation of European Union legal acts into Lithuanian provided by Egidijus Zaikauskas. He identified 12 terminology translation procedures, one of which (4.5%) was demetaphorisation, i.e. when an English metaphorical term is translated into Lithuanian by removing its metaphorical references [e.g.: peak temperature: *didžiausia temperatūra* (lit. ‘maximum temperature’)]. Moreover, the researcher did not find any cases of metaphorisation when non-metaphorical English terms were translated into Lithuanian by words with figurative meaning (Zaikauskas 2014, 81–83).

metaphors allow us to understand one thing in terms of another. Source domains tend to be relatively concrete areas of experience and target more abstract domains (Lee 2015, 6). Lakoff and Johnson define metaphor as not merely thinking about something in terms of something else, but actually experiencing something as something else (Ritchie 2013, 7). Embodiment is one of the key ideas in cognitive linguistics: image schemas are based on our most basic physical experiences and are inevitable in making sense of the world around us (Kövecses 2008, 177). Some metaphorical mappings arise due to embodied experiences, others are more culturally determined. In the case analysed in this article, the target domain is the abstract concept of some disorder, and the source domain is constituted by actions characteristic of a person's daily physical activity, e.g. *atsilikimas* 'backwardness, lagging behind', and physical characteristics, e.g. *sunkus* 'heavy', *lengvas* 'light', *silpnas* 'feeble, weak'.

Two main functions of metaphorical terms are presented in theoretical literature: nominal, or denoting new things, processes or phenomena, and cognitive (gnoseological) which, through motivating a semantic feature, helps to recognise a new phenomenon (Stunžinas 2018, 62). When creating a term, the choice of a feature from the source domain to describe the target domain is especially important: the chosen metaphorical parallel may be imagined as stained glass, and we will see reality in a certain way while looking through it. Therefore, the metaphorical term may not only perform a naming function, but also fundamentally change our perception of reality (Stunžinas 2018, 62).

The metaphorical process invokes connotations of the source domain; therefore, it is difficult to completely avoid certain connotations when choosing a metaphorical way to create terms. However, it should be noted that the connotations can have two aspects: positive and negative. For instance, *atsilikimas, silpnas* are lexemes more often associated with negative connotations, whereas *lengvas, sunkus,* and *gilus* (adjectives indicating the level of intellectual disability), in the absence of context, are fairly neutral adjectives which may show the intensity of the main feature (e.g. retardation). The first direct meaning of the verb *atsilikti* 'fall behind' indicated in DLKŽ (from which the noun *atsilikimas* is derived) is 'not to keep up with others', 'lag behind', 'stay behind', e.g. *Jis toli atsiliko nuo draugų* 'He was far behind his friends'; *Atsilikti nuo traukinio* 'To lag behind the train'. The second figurative meaning based on the first is 'not to reach a certain level', e.g. *atsilikti moksle* 'Lag behind in studies'; *atsilikusi technika* 'lagging technique' (DLKŽ). The examples presented for both meanings presuppose a certain visual association of *the separation of two groups of persons*: the leading group at the front, and the other behind

the "leaders," the group which was "left behind". Metaphor in general is one of the most influential and effective means of creating imagery, so it can be assumed that this image of the separation of two groups, where one is behind the other at a certain distance, can be projected from the linguistic and conceptual space into the social-behavioural space of activities and relationships with a metaphorically-named group of persons.

Metaphors used in language shape the thinking of those who use them and their attitude to the metaphorically-named phenomenon, and at the same time even determine how they behave and act towards it. The fact that this thesis is not a purely theoretical assumption has been confirmed by psycholinguistic experiments conducted by researchers employing metaphorical discourse about criminals, another group of social exclusion. Specialists in cognitive psychology, Thibodeau, McClelland, and Boroditsky have examined the effects of two different metaphorical frameworks in American public discourse: crime as *a predator* and crime as *a virus* (Thibodeau, McClelland, and Boroditsky 2009; Thibodeau and Boroditsky 2011). In one experiment, participants' suggestions for solving a crime problem were systematically influenced by the metaphorical framework. When crime was compared to a virus, participants were more likely to suggest reforming the social environment of the infected community, but when the crime was compared to a predator, participants were more likely to suggest attacking the problem head-on by hiring more police officers and building jails. The results of the experiment showed that the metaphors we use to discuss important issues shape how we think about the issues and even how we solve them (Thibodeau, McClelland, and Boroditsky 2009, 814).

According to experimental results, one can assume that certain perceptions, social images and certain behaviour may be caused by naming persons with intellectual disability as being *protiškai atsilikęs* 'backward' or having diagnoses of *protinis atsilikimas* 'mental backwardness', *silpnaprotystė* 'feeble-mindedness'. The author of this paper only raises rhetorical questions: "What kind of educational and therapeutic methods do teachers apply when they receive documentation for a pupil with *protinis atsilikimas* 'mental backwardness' and documentation for a pupil with *intelekto sutrikimas* 'intellectual disorder'?" or "When a judge has to decide whether to recognise a person as incapacitated or active, what is the impact of forensic psychiatric experts' conclusion about a person's *feeble-mindedness* and their conclusion about a person's *mental* or *behavioural disorder*?" Even without any experimental data, merely by seeing the primary literal meaning of *atsilikti* in DLKŽ 1. *nesuspėti su kitais, likti užpakalyje* 'not keep up with the others, stay behind', one can understand

how our linguistic community envisions living together with this group of people and why to this day it remains one of the reasons of these groups' exclusion. The primary literal meaning of the word, or denotatum, in this case, the one residing in the source domain, does not disappear without a trace when used in a metaphor, it stays there and is always activated in our sub-consciousness, even if we hear the same word used in a figurative sense. The concept of secondary figurative meaning is usually associated with the concept of a primary literal meaning, which is like a prism through which we look at the phenomenon denoted by that word.

The fact that the term *protinis atsilikimas* 'mental backwardness' satisfies neither scholars nor the relatives of people with intellectual disability was confirmed by a survey which the author conducted in a private group on the social network Facebook bringing together Lithuanian parents raising children with various developmental disorders, including intellectual disability. Parents were asked to choose one of three proposed terms: *protinis atsilikimas* 'mental backwardness', *intelekto sutrikimas* 'intellectual disorder', and *intelekto negalia* 'intellectual disability' as, in their opinion, the most acceptable and suitable to name the disorder of their child. It was also possible to tick two columns: "All terms seem appropriate" and "Your proposed option". The survey results are as follows: 79 persons chose *intelekto sutrikimas* 'intellectual disorder' as an acceptable and suitable term, whereas the terms *protinis atsilikimas* 'mental backwardness' and *intelekto negalia* 'intellectual disability' received no choices, as did the option "All terms seem appropriate"; two persons as their proposed option wrote *neurodiversitetas* 'neurodiversity.' This survey clearly shows which terms are a priority for people with the closest and strongest emotional connection to those with intellectual disability.[11]

5. Conclusions

Currently, four terms are officially used synonymously to denote intellectual disability in Lithuania: *intelekto sutrikimas* 'intellectual disorder', *intelekto negalia* 'intellectual disability', metaphorical *protinis atsilikimas* 'mental backwardness' and *silpnaprotystė* 'feeble-mindedness'.

The relatively neutral terms *intelekto sutrikimas* 'intellectual disorder' and *intelekto negalia* 'intellectual disability' are used in the fields of

[11] For the time being, we can name people with intellectual disability in Lithuania as a silent or simply inaudible group, which, without the help and mediation of relatives and public figures, cannot express an opinion on the ethical naming of its intellectual peculiarities.

education and social care, where the treatment of disability as a social phenomenon is gradually taking root. The metaphorical term *protinis atsilikimas* 'mental backwardness' is still used in the healthcare system, where the biomedical perception of intellectual disability prevails, adopting the ICD terminology. However, *protinis atsilikimas* is not equivalent to the English term *mental retardation* as used in the ICD. Instead, it is a literal translation of the Russian term *umstvennoje otstalost'* and corresponds to the English term *mental backwardness*. From the very start, the visual metaphor of *atsilikimas* has emphasised negative connotations and stigma associated with the concept: both the direct (*lagging behind*) and figurative (*backwardness*) meanings of the word *atsilikimas* in Lithuanian bring up images of separation and exclusion between two groups: one group in the lead and the other that is late, lagging behind, backward, in short. Finally, the adoption of this term in official terminology became problematic when its derivatives *atsilikėlis* 'backward' and *protiškai atsilikęs* 'mentally backward' were started to be used in colloquial language and slang to describe those behaving stupidly and thinking illogically, thereby humiliating them.

Even up to 2016, the CCRL used another metaphorical term with strong negative associations to designate intellectual disability and dementia: *silpnaprotystė* 'feeble-mindedness'. It is still used to this day in civil and criminal court decisions. In the Lithuanian version of the term, the figurative meaning of the word *silpnas* was used, i.e. feeble (the first direct meaning of *silpnas* is 'weak'). Its negative connotations were even further highlighted in the term. Later, as is the case with the previously analysed term *protinis atsilikimas*, a pejorative meaning derived from this term was started to be used in colloquial language: *silpnaprotis* 'feeble-minded', designating a person who behaves extremely stupidly or inappropriately.

All four terms are used synonymously in Lithuanian institutional documents, but as this etymological and semantic analysis has revealed, they are not synonyms because they denote different concepts and constitute different attitudes towards the subject they designate. The conceptual differences are due to the negative connotations of the metaphorical terms. The formation of these connotations was determined by the metaphorical meanings of the words used to create the terms. Psycholinguistic experiments conducted by many scholars (Thibodeau, McClelland, and Boroditsky 2009; Thibodeau and Boroditsky 2011) have proved that verbal metaphors affect and shape the thinking of the people who use them, their attitude to the metaphorically-named phenomenon and, at the same time, even determine their behaviour and action towards it. I can safely assume that perceptions, collective imagination and certain behaviour may also be

dictated by calling people with intellectual disability as *protiškai atsilikę* 'backward' or having diagnoses of *protinis atsilikimas* 'mental backwardness', or *silpnaprotystė* 'feeble-mindedness'. The term *protinis atsilikimas* 'mental backwardness' emphasises the image of one person or group lagging behind the other(s), which may have resulted in even greater social exclusion of those with intellectual disability, especially in relation to certain conscious actions, behaviour, even programmes for healthy people. Meanwhile, the term *silpnaprotystė* 'feeble-mindedness' employs the metaphorical meaning of *silpnas* 'weak', clearly expressing negative evaluation of the phenomenon and emphasising the poor quality of that person's mind.

In conclusion, it is clear that metaphorical meanings of words should be used responsibly and very thoughtfully in terms designating individuals and groups and their states, diseases, disabilities, and other physical and mental peculiarities, principally because metaphor is deeply connected to visualisation and imagery; also because it is difficult to then avoid judgement due to the association of figurative meanings with their already-established connotations and stigmas. Thus, this paper proposes the term *intelekto raidos sutrikimas* 'disorder of intellectual development' or its short version *intelekto sutrikimas* 'intellectual disorder' when referring to intellectual disabilities in Lithuanian official documents. In contexts where difficulties faced by a person with disability are emphasised, the term *intelekto negalia* 'intellectual disability' may be used. Meanwhile, metaphorical terms such as *silpnaprotystė* 'feeble-mindedness' and *protinis atsilikimas* 'mental backwardness' should be abandoned entirely as they are obsolete, offensive and socially harmful. *Silpnaprotystė* 'feeble-mindedness', in particular, should not be used in the sense of either *intellectual disability* or *dementia*. This would be one step forward in finding a neutral and respectful way to name this vulnerable group of people and, at the same time, increase their degree of social inclusion.

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CHAPTER 4

DIRECT METAPHOR IN SELECTED TED TALKS ON CRIME AND CRIMINAL JUSTICE

JUSTINA URBONAITĖ

Abstract

Drawing on a small corpus of speeches on crime and criminal justice in English, this paper examines the use of direct metaphor in communicating legal knowledge to public audiences. The main focus is given to the investigation of the functions of direct metaphors employed by TED speakers for a variety of communicative goals. The study relies on the three-dimensional model of metaphor and metaphor identification procedure MIPVU. The analysis reveals that legal professionals tend to employ direct metaphors to explain legal notions, express criticism towards existing legal practices and develop arguments in support of the positions and ideas they propose in their speeches. In addition to the aforementioned functions, metaphors may simultaneously be utilised as a rhetorical technique of audience engagement and amusement.

Key words: metaphor, direct metaphor, legal discourse, criminal justice, MIPVU, TED Talks.

1. Introduction

The cognitive turn of metaphor research in the 1980s (Lakoff and Johnson 1980) led to a substantial increase in the studies of metaphor and their intrinsically conceptual nature. Numerous linguistic works focusing on metaphor have adopted the cognitive approach, including research into metaphoricity of legal discourse. Scholarly literature has shown that metaphor permeates legal discourse (see Johnson 2002; 2007; Winter 1989; 2001; 2007; 2008). Metaphor studies in legal discourse have revealed that

one of the most prominent ways to metaphorically conceptualise law is via its personification and reification. This has been attested by substantial linguistic evidence from a variety of languages (e.g. Arms 1999; Chiu and Chiang 2011; Ebbesson 2008; Gedzevičienė 2015; Hibbits 1994; Imamović 2013; Larsson 2011; 2013; 2013a; Loughlan 2006; Makela 2011; Maley 1994; Mark 2006; Morra, Rossi, and Bazzanella 2006; Richard 2014; Šeškauskienė and Stepančuk 2014; Šeškauskienė, Talačka and Niunka 2016; Twardzisz 2013; 2013a; Urbonaitė 2017; Wang and Tu 2018; Wood 2005). Some studies suggest that the dominant metaphors in the law may be grouped into four major categories: (1) metaphors which render legal phenomena in terms of natural elements; (2) metaphors of military conflicts; (3) metaphors that objectify legal concepts; and (4) anthropomorphic metaphors (Richard 2014, 4). However, different fields of law tend to prefer some metaphor systems to others and utilise specific source domains in the metaphorical construal of legal concepts specific to a concrete field. For instance, intellectual property law relies heavily on metaphors of pirates, predators and parasites as well as agrarian and horticultural metaphors (Frye 2015; Larsson 2011; Lietzan 2019; Loughlan 2006). Personification-based metaphors are fundamental to corporate law (Berger 2004; Biel 2012; Mark 1987, 2006), whereas metaphors of weight, balance and proportionality are particularly prominent in conceptualising criminal law and criminal justice, especially in relation to crime and punishment (Lacey 2016; Šeškauskienė and Stepančuk 2014; Urbonaitė 2017). In addition, both public and specialist criminal justice discourse makes frequent use of metaphors of illness and medicine as well as animalistic metaphors (Armstrong 2009; Gedzevičienė 2016; Potter 2018; Thibodeau and Boroditsky 2011; Urbonaitė 2017). The majority of the aforementioned studies have examined metaphors by discussing their conceptual structure and linguistic expression and have concluded that they are fundamental to conceptualising, speaking and writing about legal matters.

With regard to the communicative dimension of metaphor, a large body of research from legal scholarship has looked into the rhetorical function of metaphor in legal discourse (e.g. Berger 2004, 2007, 2009, 2011, 2013; Rideout 2010; Smith 2007). Most studies have examined the use of metaphor in legal argumentation and the rhetorical function of metaphor in law. Extensive research on the persuasive power of metaphor comes from legal scholars who appreciate the implications of the cognitive dimension of metaphor but nevertheless highlight its communicative function. Smith (2007, 921), for example, claims that "the more the legal profession learns about metaphors, the more opportunities exist for legal advocates to develop rhetorical strategies around them." Legal professionals utilise metaphors to

achieve specific communicative and rhetorical goals by employing different strategies and different forms of metaphor, including narrative, analogy, simile, etc. Research reveals the considerable potential of metaphor to be employed as an effective strategy in communicating complex legal ideas and developing persuasive legal arguments. For example, Smith (2007, 2018) explores metaphor in persuasive legal writing, Berger (2013) focusses on metaphor and analogy in legal persuasion, Rideout (2010) explores metaphors in legal argumentation, and Gibbs (2018) examines embodied metaphors in persuasive legal discourse.

Studies focussing on the communicative role of metaphor in legal discourse have mostly examined texts that are aimed at legal professionals and discussed metaphors used in expert-to-expert communication. However, the role of metaphor in communicating legal knowledge to audiences that include non-specialists is still rather scarce. The aim of this study is to examine metaphor by discussing its role in communicating legal ideas to non-specialist and mixed audiences. More specifically, it analyses the use of direct metaphor in a selected sample of TED Talks on crime and criminal justice in English. Since direct metaphors are typically used in discourse intentionally (see Beger 2011; 2019; Reijnierse, Burgers, Krennmayr, and Steen 2018; Steen 2008; 2008a; 2011; 2011a; 2015), they are particularly suitable objects for investigations into the function of metaphors in the communication of legal knowledge to a largely non-specialist audience[1]. In addition, examining metaphors in the genre of a public speech by considering the (extra)linguistic context in which they occur may shed light on their linguistic and discursive properties as well as any rhetorical effects they may produce.

2. Theoretical considerations: the three-dimensional model of metaphor

Over the last decade metaphor research has shown a growing tendency towards the communicative dimensions of metaphor in naturally-occurring discourse, alongside the discussion of its conceptual and linguistic properties. This is largely due to contemporary developments in metaphor

[1] TED conferences attract large numbers of attendees and reach extensive audiences via the availability of videos of the speeches on the online platforms www.ted.com and www.youtube.com. While TED organisers assume the presence of both expert and non-expert listeners, the majority of audience members are expected to be non-specialists, especially when the presentations are made available in the video format online.

studies which emphasise the significance of examining the communicative role of metaphors in specific contexts. Although communicative and rhetorical functions of metaphors have been acknowledged and discussed in previous metaphor research (e.g. Cameron 2003; Goatly 1997), the three-dimensional model has lately gained prominence, based on the work of Steen (2008; 2011; 2015; 2017) and his research associates (e.g. Reijnierse, Burgers, Krennmayr, and Steen 2018) who propose the so-called deliberate metaphor theory. This model relies on an understanding of metaphor as a matter of thought, language and communication (Steen 2017, 3–4), hence its labelling as a three-dimensional model. The dimension of communication is emphasised by the proponents based on their argument that metaphor may be employed *as* metaphor to achieve specific communicative goals in discourse (Reijnierse, Burgers, Krennmayr, and Steen 2018, 132).

In the proposed theoretical model, metaphor is discussed in relation to the three dimensions of its functioning. At the linguistic level, the primary distinction is that between *indirect*, *direct*, and *implicit metaphors*. When an indirect metaphor occurs in language, the metaphorically used lexical unit instantiates a cross-domain mapping, which derives from the contrast between the contextual and the more concrete meaning used in other contexts. For instance, in the sentence *In the last election Biden* ***defeated*** *Trump*, the verb *defeat* instantiates a cross-domain mapping in which a competition between two presidential candidates is conceptualised in terms of a military battle. While the cross-domain mapping is present, the underlying comparison is expressed indirectly via the incongruity between the contextual sense, i.e. presidential election, and another more concrete sense of the verb used in other contexts, namely a military battle. By contrast, in *direct metaphors* the cross-domain mapping is expressed directly, typically through the use of phrases that signal figurativeness of expression such as *like*, *as*, *as if*, *metaphorically speaking*, *so to speak*, etc. For instance, the headline of an article on US presidential election published by *The Daily Sentinel* on November 10, 2020[2] reads: *This election is* <u>*like*</u> *a* ***battle in the trenches***. While the bolded words in the example are used directly to refer to a literal battle and, in this regard, there is no contrast between the contextual and potential other meanings of these words, the addressee is nonetheless invited to set up a cross-domain mapping that compares an election to a military event based on a certain similarity between the two distinct domains. As a result of such a view, direct metaphors in this model may subsume such phenomena as similes, analogies, extended comparisons, parables, etc. It is

[2] Source: https://www.dailysentinel.com/opinion/article_07819cc8-483f-5572-a718-14621f44c2dc.htm.

this kind of metaphor that the present paper identifies and explores in the TED presentations delivered by legal professionals.

Finally, in the linguistic dimension of their functioning, metaphors may also be *implicit*: they occur in language when a metaphor-related word in the development of discourse is substituted by a different lexeme which instantiates a cross-domain mapping realised previously by a metaphor-related word (Steen 2011, 51–52). For instance, in discussing the future of a relationship with their partner, a person may utter the following: *We have to figure out what our next **step** is and then take **it***. The word *step* is a case of indirect metaphor that instantiates the cross-domain mapping RELATIONSHIP IS A JOURNEY. The pronoun *it* in the subsequent fragment substitutes the metaphorically used noun *step* and is therefore an instance of implicit metaphor, since it refers to an entity previously used in a metaphorical sense.

In the conceptual dimension, Steen and his followers make a distinction between *conventional* and *novel* metaphors (Steen 2011, 32ff). As the name suggests, conventional metaphors are metaphors that are commonly used in discourse and are ingrained in the conceptual system of the speakers using them. The metaphorical meanings of words used as instantiations of such conventional cross-domain mappings are typically documented in contemporary dictionaries of a given language. According to Steen (2008, 215), if metaphors in language instantiate conventional cross-domain mappings, such as describing time in terms of money, they can be considered to be conventional. By contrast, a metaphor is considered to be novel if it establishes a new cross-domain mapping or if a conventional cross-domain mapping is provided with a new or a creative application in a way that makes the addressee compare the two domains that are connected by metaphor. Relying on previous metaphor research, Steen states that while conventional metaphors may be processed either by categorisation or by comparison, novel metaphors are only processed by comparison (ibid.).

Finally, at the level of communication, Steen distinguishes between *deliberate* and *non-deliberate* metaphors (Steen 2011a, 84–85). According to the scholar, a metaphor is used deliberately "when it is expressly meant to change the addressee's perspective on the referent or topic that is the target of the metaphor, by making the addressee look at it from a different conceptual domain or space, which functions as a conceptual source" (Steen 2008, 222). In other words, deliberate metaphors require that the addressee shift their attention to the source domain evoked by metaphorical language used in discourse (Steen 2015, 68), which is typically done for a specific purpose or communicative goal. Non-deliberate metaphors do not share the above property. According to Steen (2011a, 84), deliberate metaphors are

distinct from non-deliberate since they involve the mandatory attention of the addressee to the source domain as a distinct domain, which the addressee is invited or instructed to use in conceptualising the target domain.

3. Corpus, materials and methods

The corpus compiled for the analysis consisted of 30 speeches delivered by native speakers of English on the topics of crime and criminal justice, as categorised on the official website of TED Talks (www.ted.com). Some transcripts of the speeches were obtained from the TED Talks website, while others for which no transcripts were available were transcribed by the author of this paper. The transcripts retrieved from the website of TED Talks were manually checked for accuracy by closely reading the text and simultaneously listening to the speeches. As a next step, the transcripts of the speeches were cleared of irrelevant information such as time stamps and paratextual elements. In total, the corpus compiled for the study amounted to nearly 61,000 words while the video footage covered over 392 minutes which converts to approximately six and a half hours. Detailed information about the corpus compiled for the present study is provided in the Appendix.

The first step in examining the transcripts of the speeches was close reading in order to find segments that directly relate to legal issues. Next, those fragments of the text that discuss legal matters were analysed manually for linguistic metaphor identification and all instances of direct metaphor were identified. Linguistic metaphors were identified following the metaphor identification procedure MIPVU (Steen, Dorst, Herrmann, Kaal et al. 2010a). This procedure instructs the analyst to examine lexical units in discourse and determine metaphorically used words on the basis of semantic disambiguation. According to MIPVU, a lexical unit is considered to be used metaphorically when its contextual meaning contrasts with but can be understood by comparison to the more concrete 'basic' meaning of the same lexical unit. MIPVU, a refined version of MIP (Pragglejaz Group 2007), was particularly useful for the identification of metaphor in the present study since it differentiates between direct and indirect metaphor and allows the analyst to determine whether a metaphor-related word (MRW) is a case of direct metaphor. This additional step is explained in the following way: "when a word is used directly and its use may potentially be explained by some form of cross-domain mapping to a more basic referent or topic in the text, mark the word as direct metaphor (MRW, direct)" (Steen, Dorst, Herrmann, Kaal et al. 2010a, 26). In addition, MIPVU also instructs analysts to identify lexemes that function in discourse as metaphor signalling devices or *metaphor flags*: "[w]hen a word functions as a signal

that a cross-domain mapping may be at play, mark it as a metaphor flag (MFlag)" (ibid.). Following MIPVU recommendations, the meanings of words in the procedure of applying MIPVU were determined by consulting two monolingual dictionaries, namely, the online versions of the *Macmillan Dictionary of English* (MDE) and the *Longman Dictionary of Contemporary English* (LDCE).

As could be anticipated, the initial stage of the analysis revealed that direct metaphor is used in the speeches rarely[3]. Out of 30 speeches examined, only four contained more than five instances of direct metaphor; however, on closer inspection of the metaphor's role in the specific contexts of those speeches, it became apparent that the speakers who resorted to direct metaphor in their presentations, did it in an interesting and creative manner to fulfil numerous communicative strategies. Therefore, a decision was made to focus on the identified direct metaphors in the four selected speeches by closely considering the co(n)text of an entire speech in which specific direct metaphors were found. As a result, the analysis of metaphors presented in the following section of the paper draws on direct metaphors detected in the four speeches listed below:

Table 1. **Final corpus of TED speeches selected for the study**

Speaker's name	Speech title	Year	Word count	Length
Brandon W. Mathews	*The surprising reason our correctional system doesn't work*	2017	2,053	15m18s
David R. Dow	*Lessons from death row inmates*	2012	2,901	18m16s
Thomas Abt	*Why violence clusters in cities—and how to reduce it*	2020	2,152	14m51s
Dick M. Carpenter II	*The injustice of "policing for profit"—and how to end it*	2019	1,632	12m54s
		Total	**8,738**	**60m39s**

The next section of the paper discusses the use of direct metaphors by considering their linguistic, conceptual and communicative roles in discourse. Examining metaphors from a discourse perspective provides a considerably fuller picture of the direct metaphors' development, forms and functions,

[3] A study on metaphor in English based on corpus data found that 99% of metaphor in natural language use accounts for indirect metaphors (Steen, Dorst, Herrmann, Kaal et al. 2010, 786–787). Since metaphors in the present study were identified only in relation to legal concepts, the frequency of direct metaphors in the entire corpus was impossible to determine.

which may be determined by the topic and genre specificity, communicative goals of the speakers and other features of discourse development.

4. Direct metaphor in selected TED Talks on legal issues

This section examines the use of direct metaphors in four selected speeches on crime and criminal justice in which this type of metaphor was found to be used most extensively. Since this paper holds that metaphors are most efficiently examined in close consideration of the context in which they appear, most attention in the discussion is given to the communicative functions and rhetorical effects of metaphors as well as their linguistic properties such as metaphor extendedness, clustering, variation of metaphor-signalling devices and other relevant aspects of metaphor use in a specific discourse event.

4.1. Metaphor in David R. Dow's speech "Lessons from death row inmates"

One strategy TED speakers implement when explaining complex legal concepts and procedures is the use of metaphors, which help listeners to apply the knowledge of more familiar source domains for the conceptualisation of more complex and abstract target domains. Metaphors are employed by speakers purposefully by inviting the audience to draw an analogy between relevant aspects of the source domain and those of the target domain. Metaphors used for educational and explanatory purposes often occur in the form of a direct metaphor, which is linguistically marked by metaphor signalling devices. To exemplify, in his presentation David R. Dow employs a specific metaphor to explain a typical course of the development of a death penalty case. This is an excerpt in which Dow introduces the metaphorical description:

(1) *You can think of a death penalty case as a **story** that has four **chapters**. The first **chapter** of every case is exactly the same, and it is tragic. It begins with the murder of an innocent human being, and it's followed by a trial where the murderer is convicted and sent to death row, and that death sentence is ultimately upheld by the state appellate court. The second **chapter** consists of a complicated legal proceeding known as a state habeas corpus appeal. The third **chapter** is an even more complicated legal proceeding known as a federal habeas corpus proceeding. And the*

> *fourth **chapter** is one where a variety of things can happen. […] But that fourth **chapter** always ends with an execution.*[4]

To explain the complex process of how a typical death penalty case unfolds, Dow makes use of a metaphor which directly compares a death penalty case to a story stretching over four chapters. The explicit comparison is introduced through the use of a metaphor-signalling phrase: *you can think of (A) as (B)*. Since the legal events at the different stages of a typical death penalty case are likely to be unfamiliar to non-specialist members in the audience, the source domain of a STORY is deployed to structure the conceptualisation of the series of legal proceedings that typically take place before a prisoner is executed, and thus serves an explanatory function. A simpler concept of a story extending over a number of chapters facilitates the listeners' understanding of a highly specific and complex series of legal proceedings that a typical death penalty case incorporates. As observed in previous metaphor research (Beger 2011, 2019; Bogetić 2017), Example (1) illustrates a typical use of direct metaphor employed for educational and explanatory purposes.

To inform the audience about the specific legal proceedings that each of the four 'chapters' of a death penalty case includes, Dow shows a visual aid exemplifying the sequence of specific events and legal procedures. Below is the presentation slide exhibited by Dow simultaneously with his utterance, which introduces the 'story-with-four-chapters' metaphor:

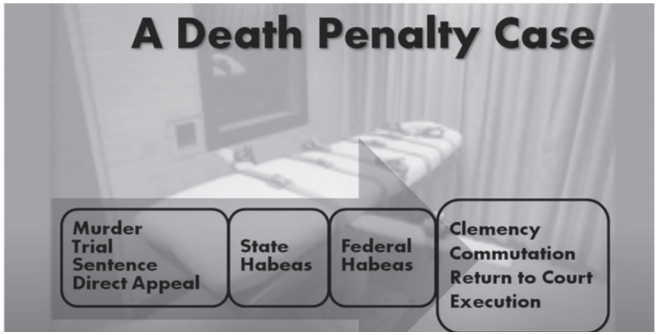

Figure 1. Four stages of a death penalty case. Screen capture extracted from the speech recording at 14:47. Source: www.ted.com.

[4] In the examples provided to illustrate the use of direct metaphors throughout the paper, bold typeface marks metaphor-related words (MRW), whereas underlining is used to mark metaphor flags (MFlag).

Having first invited the audience to view the series of events in a typical death penalty case as a 'story', Dow is now ready to proceed with some elaboration of what usually happens in each 'chapter' by briefly explaining the legal proceedings that take place in each stage of a death penalty case. In combination with the verbally expressed 'story' metaphor, the visual representation of the four 'chapters' as separate blocks, each of which encompasses different legal proceedings, facilitates the speaker's clarification and illustration of the sequence of complex legal procedures and the 'content' of each 'chapter.'

Once Dow has explained the development of a death penalty case by using the 'story' metaphor, he further relies on the same cross-domain mapping which is now linguistically expressed via indirect metaphor:

(2) *What's happened is that lawyers who represent death row inmates have shifted their focus to earlier and earlier* ***chapters*** *of the death penalty* ***story****. So 25 years ago, they focused on* ***chapter*** *four. And they went from* ***chapter*** *four 25 years ago to* ***chapter*** *three in the late 1980s. And they went from* ***chapter*** *three in the late 1980s to* ***chapter*** *two in the mid-1990s. And beginning in the mid- to late 1990s, they began to focus on* ***chapter*** *one of the* ***story****.*

In the fragment above, all the metaphorical expressions found to instantiate the STORY source domain are used indirectly to refer to the different stages in the legal case of a criminal punished by the death penalty. Once novel and direct, now the metaphor is familiar and clear to the addressee and at this point it serves a referential function to indicate the stages in the death penalty case that the audience was introduced to in the earlier segment of the presentation.

However, Dow does not abandon the strategy of utilising the same metaphor for his communicative goals. In fact, he develops the rest of the speech around the STORY metaphor, yet he slightly transforms it to fit his rhetorical purposes. More specifically, Dow further employs the same metaphor to present and develop his argument that there are even earlier 'chapters' in a typical murderer's life that need to be considered because it has important implications for the potential prevention of crimes that may lead to punishment by the death penalty. Drawing on his expertise as an attorney representing death row inmates, Dow shares an insight that the vast majority of death row prisoners he has represented had very similar childhood experiences of living in dysfunctional families and becoming involved in the juvenile justice system at a very early age. Interestingly, Dow uses the same source domain (STORY) but now employs it in order to

structure the target domain of the juvenile years of a typical murderer. Below is the fragment from Dow's speech in which he expands the application of the STORY metaphor:

(3) *We have these four **chapters** of a death penalty **story**, but what happens before that **story** begins? How can we intervene in the life of a murderer before he's a murderer? […] My client Will and 80 percent of the people on death row had five **chapters** in their lives that came before the four **chapters** of the death penalty **story**. I think of these five **chapters** as **points** of intervention, places in their lives when our society could've intervened in their lives and nudged them off of the path that they were on that created a consequence that we all -- death penalty supporters or death penalty opponents -- say was a bad result.*

In order to show the correlation between a person's childhood experience of living in unstable and abusive households that might have exposed them to the severe conditions of poverty, abuse, and neglect and the consequence of becoming involved in crimes leading to death penalty, Dow utilises the STORY metaphor to demonstrate the significance of considering the five prior 'chapters' of a typical murderer's life where the society could have intervened and provided the necessary assistance to the young individuals so that they would not have committed the murders. To explain what he means by the additional five 'chapters' of a (potential) murderer's life, Dow uses another direct metaphor in the form of a simile (*I think of these five chapters as **points** of intervention*), which informs the listeners that he refers to five pivotal moments in the lives of young individuals where the society could have stepped in and contributed to precluding prospective crimes from being committed. At this point of speech development, the FIVE-CHAPTER-STORY metaphor becomes instrumental in elaborating the main argument Dow is sharing with the TED community: a society has the ability to intervene in the earlier stages of the lives of prospective criminals and thereby contribute to preventing these individuals' involvement in horrible crimes leading to death penalty cases.

The STORY metaphor, with its first use to structure the audience's understanding of a death penalty case and then in the process of discourse development transformed to refer to the stages of a potential offender's life prior to the tragic murder, governs Dow's argumentation and explanation throughout the whole speech. In fact, the entire transcript contains 43 lexemes that instantiate the STORY metaphor at different points of speech development. The dispersion plot analysis illustrated below in Figure 2

shows the distribution of the lexemes instantiating the STORY metaphor throughout the entire presentation:

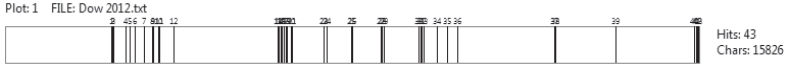

Figure 2. Text dispersion plot of MRWs signalling the source domain STORY in Dow's speech. Screen capture from AntConc (Anthony 2019).

Having introduced and explained the DEATH PENALTY CASE IS A FOUR-CHAPTER STORY metaphor and then developed the metaphor EARLIER STAGES OF A POTENTIAL CRIMINAL'S LIFE ARE A FIVE-CHAPTER-STORY, Dow employs the two closely related metaphors in order to develop the main argument of his entire speech. The STORY metaphor is thus an integral element of the speech utilised by the speaker for the communicative goals of explaining legal proceedings and developing his argumentation. The significance of the metaphor is also reflected in the speaker's choice to employ it in the closing of the presentation:

(4) *If we make the picture bigger, and devote our attention to the earlier **chapters**, then we are never going to **write** the first **sentence** that begins the death penalty **story**.*

Clearly, the STORY metaphor is very convenient in pursuing Dow's communicative goals. The way the speaker employs this device helps him to convey a crucial idea that the metaphor highlights, i.e., that a person's life should be viewed as one 'story' with numerous chapters which may affect the way the next 'chapters' develop. More specifically, Dow argues that the events that occur in the earlier 'chapters' closely correlate with the possibility for a neglected young individual to become a delinquent and, unfortunately, commit such tragic crimes as murder. At the same time, the metaphor provides clear implications for effective ways of preventing young troubled individuals from their prospective involvement in criminal activities.

The analysis of the STORY metaphor employed in Dow's speech has confirmed that even if the lexis used metaphorically might seem to be conventional (the nouns *chapter* and *story* have well-established metaphorical meanings listed in dictionaries), such metaphors can still be applied in discourse in a novel and creative fashion to pursue the speaker's communicative goals and rhetorical strategies. In this regard, the specific application of the STORY metaphor serves different but interrelated

communicative functions. It is first employed to explain the complex series of events and legal proceedings. In the unfolding of the discourse, the same metaphor is slightly transformed in order for its source domain to be mapped onto the target domain of the earlier stages of the life of an individual. At this point and in the remainder of the speech the metaphor becomes an integral part of Dow's argument for the need to pay more attention to those earlier stages of a potential criminal's life and provide necessary help in order to prevent the prospective horrible crimes from happening. The fact that the same metaphor largely governs the entire process of discourse development also suggests that it has been selected by the speaker purposefully to attain the pragmatic goals in communicating his ideas persuasively.

4.2. Metaphor in Brandon W. Mathews' speech "The surprising reason our correctional system doesn't work"

Before delving into the analysis of direct metaphors detected in the speech, a brief introduction to its context is warranted. Brandon W. Mathews is a criminal justice professional and scholar with substantial expertise in the field of institutional and community corrections. In his speech Mathews argues for the need to reform the US prison system so that it could better serve its function of prisoner correction and rehabilitation. Throughout the speech, the speaker resorts to direct metaphor on numerous occasions to actualise different communicative goals. Interestingly and rather unexpectedly, Mathews opens his speech with a metaphor; however, as a rhetorical strategy, he temporarily hides the fact that his opening words are used metaphorically. Consider the introductory passage from Mathews' speech:

(5) *I'm here to talk to you about **divorce**. I have to admit: I'm absolutely, positively, one hundred percent in favor of **divorce**. What else is there to do when the **marriage** is dysfunctional, ineffective, creating poor outcomes for everyone involved? I say, nothing. Just get over with, and **divorce** already. Now, the type of **divorce** I'm talking about, it's probably a bit different than what you were thinking. What I'm referring to is a **divorce** within our correctional and prison system*.

When metaphorical language is used in a stretch of naturally-occurring discourse, the target domain of the metaphor is typically familiar to readers or listeners. Mathews, however, digresses from such a convention and

introduces the source domain but leaves the discourse referent or target domain temporarily hidden thereby attracting the audience's attention to the source domain. In addition to keeping the target domain temporarily undisclosed, Mathews proceeds with the somewhat surprising claim that he, in fact, is *in favour of* ***divorce*** which, most probably, is also used strategically to intrigue the audience. As he proceeds with the speech, Mathews finally resolves the tension and clarifies that through the metaphorical use of the nouns *marriage* and *divorce* he refers to the interrelation of punitive and rehabilitative practices in the current US criminal justice system and presents his conviction that the two have to be separated.

Mathews employs the MARRIAGE metaphor strategically to rationalise his support for a 'divorce' of rehabilitation and punishment in the US corrections system. He does this by posing the following question: *What else is there to do when the* ***marriage*** *is dysfunctional, ineffective, creating poor outcomes for everyone involved?* Because the speaker believes the unity between the practices of punishment and rehabilitation is largely ineffective, the 'divorce' metaphor becomes instrumental in arguing for the need to reform the system. To develop his claim that rehabilitation and punishment should function independently of each other, Mathews enhances the argument that the current prison system is ineffective by comparing it to a 'dysfunctional' and 'ineffective' 'marriage', which *creates poor outcomes for everybody involved*. The passage in which Mathews metaphorically describes the problem is followed by a one-sentence explanation as to why the US corrections system is in need of change: *the underlying reason our system does not work today is because the practices of punishment are too interconnected with our goal of rehabilitation*. Having introduced the problem via the use of direct metaphor, Mathews paraphrases and sums it up clearly and directly, possibly for reasons of maintaining clarity and avoiding misinterpretations of the previous metaphorical description. A similar discursive property of the use of direct metaphor has also been noted in other studies (Bogetić 2017; Roncero, Kennedy, and Smyth 2006), which find that descriptions involving direct metaphors are often followed by non-metaphorical explication by way of summarising a passage of exposition or a line of argumentation.

The direct metaphor of 'marriage' and 'divorce' employed by Mathews is a clear case of deliberate metaphor in the sense proposed by Steen because it requires the audience members to pay attention to the source domain and invites them to view the target domain from the perspective of the source domain. The direct metaphor utilised by Mathews conveniently serves several communicative functions. Primarily, the metaphor is strategically

employed to express criticism of the existing system of corrections and argue in favour of a systemic change or reform. In addition, this metaphor plays a crucial role in the speech as an attention-grabbing technique, through the temporary withholding of the discourse referent thereby fulfilling an additional rhetorical function. Remarkably, the use of metaphor by first introducing the source domain concept before the audience is aware of the target domain is an unexpected yet effective way of employing metaphor to simultaneously serve multiple communicative functions in the genre of a public speech.

Mathews employs the DIVORCE metaphor throughout the speech, sometimes combining it with other metaphors that contribute to validating his argumentation. Consider the following example, which incorporates another direct metaphor alongside several other indirectly expressed metaphors:

(6) *This points to a fundamental problem with our prison philosophy in the United States. Punishment is the* ***foundation*** *of your prison experience and the priority throughout. Rehabilitation is an afterthought and is only* ***lightly sprinkled****,* *like* ***seasoning on a steak****, on top of a system whose core purpose is to punish. And that is why I'm proposing a* ***divorce****. A* ***divorce*** *that would once and for all separate the practices of punishment from rehabilitation, creating two separate* ***tracks****: one for those requiring retribution and one for those requiring recovery before they reenter society.*

In the above excerpt, Mathews uses the DIVORCE metaphor again twice, but now it is expressed indirectly. The switch from a direct expression to an indirect one is determined by the fact that the audience is already familiar with its meaning and implications. At this point, the metaphor plays a referential function to indicate the reformed system proposed by Mathews. The speaker proceeds with his further argumentation by resorting to a new direct metaphor employed to demonstrate the ineffectiveness of the system of corrections, which is fundamentally based on punishment. More precisely, by using the simile *like* ***seasoning on a steak*** with reference to insufficient rehabilitation, Mathews persuasively voices his criticism with regard to the current practices of correction, which primarily resort to punishment without providing enough rehabilitation. Via the use of the seasoning-on-steak metaphor, the speaker emphasises the disproportion between punitive and rehabilitative measures in the system of corrections. In addition, the insufficiency of rehabilitative practices is underscored by the use of a modifying phrase in describing rehabilitation as 'seasoning' that

is only 'lightly sprinkled' on the 'steak'. The novel seasoning-on-steak metaphor employed by Mathews effectively fulfils the role of explanation as well as argumentation: not only is the audience likely to better understand how the US system of corrections operates at the moment, but they are also expected to make inferences about the flaws of such a system and support Mathews' arguments in favour of a reform. The metaphor plays an integral role in providing logical reasoning to the speaker's argumentation. In addition to the use of food-based simile, Mathews utilises another indirect metaphor to give a clearer picture of the reformed system that he envisions and proposes. To facilitate the understanding of the separate functioning of punishment and rehabilitation Mathews describes the two types of practices as 'tracks.' Arguably, this metaphorical reference also enhances the speaker's delivery of specialist knowledge by giving a more structured view of a 'divorced' system with rehabilitation and punishment functioning independently of one another.

Further in his speech, Mathews deploys another food metaphor to strengthen his argumentation in favour of the proposed reform of the prison system in the USA. To refute a common counter-argument that the US corrections system already provides enough rehabilitation, Mathews presents a particularly vivid simile likening the current US system of corrections to an improperly made sandwich:

(7) *How is it we expect any rehabilitative effort to be successful when punishment was and still is the core of the system? Look, it would be like* ***taking a taco*** *and* ***jamming it in between a couple of pieces of bread*** *and then calling it* ***a sandwich****. Technically, it has the elements of* ***a sandwich****, but at its core, it's still a* ***delicious taco****.*

The essence of the sandwich analogy presented above lies in the similarity between the lack of proper elements that are expected to be present in both, a certain type of food and a certain aspect of the correctional system. The implication of the direct comparison is rather straightforward: just as a sandwich is not proper if it does not contain typical ingredients placed in between two pieces of bread such as meat, fish, eggs, cheese, vegetables, etc., and instead contains another grain product such as a taco, a system of corrections predominantly focused on punishment and lacking sufficient rehabilitative practices, according to Mathews, cannot be described as functioning properly. This direct metaphor can therefore also be considered an integral part of Mathews' argumentation.

There is an additional aspect to the above-cited direct metaphor that has to do with its rhetorical effect. Once the audience members hear the

sandwich analogy, they instantly react by laughing. Presumably, the humorous effect that the metaphor exerts can be explained by such properties of the metaphor as its novelty, unexpectedness and creativity. In addition, the amusing quality of the metaphor might be a result of the substantial semantic distance and incongruity between the two concepts that are directly compared (cf. Attardo 2015; Dynel 2009). Since the target domain of a prison system and the source domain of a sandwich and its ingredients are remarkably different and unrelated, the analogy in which the two are compared produces a humorous effect.

In sum, the metaphors employed by Mathews in his speech fulfil multiple functions such as explanation, expression of negative evaluation/criticism and argumentation. In addition, the specific employment of the divorce metaphor in the opening by temporarily hiding the discourse referent from the audience at the same time serves a rhetorical function of grabbing the audience's attention and instigating their curiosity. Finally, the novel and vivid analogies based on the source domain of food not only facilitate the speaker's communication of his criticism of the existing prison system and argumentation in favour of a reform but also simultaneously produce a humorous effect on the audience.

4.3. Metaphor in Thomas Abt's speech "Why violence clusters in cities—and how to reduce it"

Thomas Abt is an American scholar, writer and policymaker who is best known for developing a novel evidence-based model of reducing urban violence. In his speech, Abt addresses the problem of urban violence by first explaining why it tends to be most densely concentrated in cities and then proposing a specific solution to reduce violence in cities. The key argument Abt puts forward is that the most effective way to reduce urban violence is to focus exclusively on the violence itself (rather than other violence-related problems such as poverty, drugs, guns, or gangs) by first dealing with the people and places where violence is most heavily concentrated. For the purposes of attention-grabbing and arousing the audience's curiosity, Abt uses a technique similar to the one by Mathews described in Example (5) of the previous section: Abt opens his speech with an extended description of the source domain without the audience's awareness that the opening words are used metaphorically. By temporarily concealing the discourse referent, Abt invites the audience to view the problem of urban violence from the perspective of the source domain, which is the crucial aspect of deliberate use of metaphor. Consider the opening passage of Abt's speech:

(8) *You are a **trauma surgeon**, working in the midnight **shift** in an inner city **emergency room**. A **young man** is **wheeled in** before you, **lying unconscious on a gurney**. He's been **shot in the leg and is bleeding profusely**. Judging from the **entry and exit wounds**, as well as the **amount of haemorrhaging**, the **bullet most probably clipped the femoral artery, one of the largest blood vessels in the body**. As the **young man's doctor**, what should you do? Or more precisely, what should you do first? You look at the **young man's clothes, which seem old and worn. He may be jobless, homeless, lacking a decent education**. Do you start **treatment** by finding him a job, getting him an apartment or helping him earn his GED? On the other hand**, this young man has been involved in some sort of conflict and may be dangerous**. **Before he wakes up,** do you place him in restraints, alert hospital security or call 911? Most of us wouldn't do any of these things. And instead, we would take the only sensible and humane course of action available at the time. First, we would **stop the bleeding**. Because **unless we stop the bleeding**, nothing else matters. What's true in the **emergency room** is true for cities all around the country. When it comes to urban violence, the first priority is to save lives. **Treating** that violence with the same urgency that we would **treat a gunshot wound in the ER**.*

Clearly, Abt presents a scenario for the audience to consider by developing a vivid extended description of a metaphorical source domain, but the fact that the scenario is meant to establish an analogy is only revealed to the listeners after a relatively long stretch of speech. In this way, the metaphor fulfils at least two discourse functions. On the one hand, since the extended description is presented as a scenario the audience is invited to consider (*you are a trauma surgeon*), the metaphor attracts the listeners' attention and serves a rhetorical function. On the other hand, Abt explicitly instructs the audience to develop a vivid mental image of the source domain thereby making them pay attention to it and view the problem of urban violence from the source domain's perspective. The analogy highlights the immediacy of attending to the most affected areas, which is a logical inference made on the basis of the metaphorical reasoning.

To argue for the model of urban violence reduction by first attending to the areas and people directly involved in such violence, Abt makes a direct comparison between the target domain concept, i.e. a CRIME-RIDDEN URBAN AREA and the source domain, i.e. A SEVERELY INJURED PATIENT. The metaphor Abt resorts to for the purpose of argumentation provides grounds for certain inferences to be made about the way the problem of urban

violence should be approached in solving it. That is, the analogy becomes an essential element that underpins Abt's argumentation in favour of his innovative model of managing the problem of violence in cities.

Relying on the source domain of A SEVERELY INJURED PATIENT to conceptually organise the target domain of CRIME-RIDDEN AREA advances the communicative goal of the speaker to persuade the audience that his proposed model is the most efficient in addressing city violence. The metaphor facilitates Abt's argumentation because of the underlying similarity between the way a gunshot wound needs to be treated medically to save the life of a patient and the speaker's conviction of the need to act with similar urgency in attending to the areas and people that are involved in urban violence. Clearly, this is a topic-triggered metaphor (see Koller 2003) which is well-suited to emphasising both the severity of the problem of urban violence and the need for immediacy in addressing it. The metaphor is grounded in the following systematic correspondences between the target and the source domains:

Table 2. **Systematic correspondences between target and source domains of the topic-triggered metaphor in Abt's speech**

Source domain AN INJURED PERSON	**Target domain** AN AREA AFFECTED BY VIOLENCE
A human body	A city
Human body parts	Different areas in a city
An injured body part [leg]	An area affected by high-level violence
A gunshot wound	The most crime-ridden area
Bleeding	Signs of violence [shootings, murders, etc.]
Surgeon	Institutions and people involved in solving urban violence
Stopping the bleeding	Immediate actions taken to tackle urban violence

Referencing numerous studies and presenting statistical evidence, Abt substantiates his argument that the best solution to solve the problem of city violence is trying to eliminate it directly via provision of necessary policing and assistance services in those areas where violence has seeped in and spread the most. In this regard, the salient feature of the proposed analogy, namely the 'stopping the bleeding' as an inevitable solution is strategically employed to support Abt's claim that the urban areas densest with violence should be tackled first.

In his attempts to argue for the effectiveness of his model, Abt relies on a strategy of contrasting the solutions offered by proponents of different approaches with the solution he proposes. The metaphor he has introduced

earlier fits perfectly for the argumentative purpose of validating his approach and making the solutions adopted by proponents of other models seem unreasonable in the light of the metaphorical severely-injured-patient scenario:

(9) *Do you start **treatment** by finding him a job, getting him an apartment or helping him earn his GED? On the other hand, **this young man has been involved in some sort of conflict and may be dangerous**. **Before he wakes up,** do you place him in restraints, alert hospital security or call 911?*

Having set up an analogy between a medical emergency required to rescue a severely wounded man and an urban area mostly affected by violence, the speaker makes the solution he proposes seem the most logical and even inevitable. As a result, the metaphorical scenario provides the context in which the proposed solution to address the problem of urban violence should be viewed as the most valid and natural. In this way, the medical metaphor facilitates Abt in communicating his idea to the audience with conviction and persuasion.

The gunshot wound metaphor recurs in Abt's speech several times, especially when he reinforces his position that 'stopping the bleeding' is the right approach in tackling urban violence. Abt makes use of the same metaphor in the conclusion of his speech, which is where TED speakers typically encapsulate the main idea they wish to convey. As did some other speakers, Abt closes his speech by reinforcing his position and strategically using the metaphor as the integral element of the main argument developed in the entire presentation:

(10) *Metaphorically, the **treatment** is the same, whether it's a young **man suffering from a gunshot wound**, a community riddled with such **wounds**, or a nation filled with such communities. In each case, the **treatment**, first and foremost, is to **stop the bleeding**.*

Clearly, by incorporating the metaphor into the two most important sections of the speech—the introduction and the conclusion—Abt clearly employs it to validate and rationalise his position in order to convince his audience that urgency in dealing with 'first things first' is the key to reducing violence in those urban areas that have been affected most severely.

To sum up, the examination of direct metaphor in Abt's TED Talk has disclosed a tendency for this type of metaphor to be used skilfully in order to realise different communicative functions and produce certain rhetorical

effects. The analysis shows that Abt has purposefully selected a very specific metaphor which underpins the main line of his argumentation developed throughout the entire speech. Evidently, speakers carefully consider such linguistic and discursive properties of metaphor use as the vividness of the source domain, temporary suspension of the target domain, and metaphor extendedness, which ensure that the audience pays attention to the source domain. Another rhetorical strategy is incorporating metaphors in the crucial sections of the speech such as the opening and the closing and exploiting metaphors for the purpose of developing compelling arguments. Thereby, a wisely selected and aptly employed metaphor can be an essential element in facilitating the speakers' communicative and rhetorical goals such as conveying ideas in a clear, convincing and audience-engaging manner.

4.4. Metaphor in the speech "The injustice of "policing for profit"—and how to end it" by Dick R. Carpenter II

The speech delivered by Dick M. Carpenter II deals with civil forfeiture and is aimed at shedding light on a common exploitation of this legal instrument by law enforcement in the USA. As the listeners discover, civil forfeiture is routinely abused in the USA as a means of gaining monetary profit rather than being rightfully used for its original purpose of prosecuting criminals and tackling organised crime. Before the speaker is ready to expresses his criticism of the law enforcement's abuse of power by using civil forfeiture to obtain property as a way of making profit, he has to make sure the audience understands this specific legal notion. To explain the concept of civil forfeiture, the presenter makes use of what could be considered a conventional metaphor based on personification. However, the speaker's application of the conventional cross-domain mapping is novel and can be deemed to be deliberate since the metaphorical mapping requires the listeners to pay attention to the aspects of the source domain that are not conventionally mapped onto the target domain. Below is the fragment from the speech in which the speaker describes PROPERTY as a target domain in terms of the source domain of A CRIMINAL:

(11) *But in civil forfeiture, no person is charged with a crime—the property is* ***charged*** *and* ***convicted*** *of a crime.* [Laughter] *You heard that correctly: the government actually* ***convicts*** *an inanimate object with a crime. It's as if that thing itself* ***committed the crime****.*

Although personification is a very conventional type of metaphor that permeates legal discourse (see Berger 2004, 2007; Ebbesson 2008; Mark 2006; Šeškauskienė and Stepančuk 2014; Urbonaitė 2017; Winter 1989; Wang and Tu 2018) and often goes unnoticed, the personification-based metaphor used by Carpenter above is used deliberately and serves an explanatory function in communicating legal knowledge to non-specialist listeners. In order to explain the legal notion, Carpenter chooses to compare two legal concepts, namely, he describes property in terms of a suspect or a criminal. While the non-specialist listeners in the audience are likely not familiar with the specific legal concept, they are probably much more acquainted with the procedure of a criminal conviction of a suspect, largely due to the extensive popularisation of crime in the media and crime fiction. As a consequence, the audience's prior knowledge of the procedure of criminal conviction facilitates their understanding of a similar proceeding conducted against the property confiscated permanently from a person under suspicion that the object may be linked to an unlawful act.

In addition to the explanatory function of the metaphor comparing the act of confiscating property to someone's criminal conviction, such metaphorical description exerts a rhetorical effect. This is evident from the audience's reaction when they hear the speech fragment quoted in Example (11). Namely, the audience's laughter suggests that the metaphorical expression through the use of which the speaker explains the notion of civil forfeiture is amusing to the audience, perhaps also as a result of their surprise to discover that an object may actually become a 'suspect' and, ultimately, be 'convicted,' which might seem not only illogical but also absurd. Thus, while the main function of the metaphor employed by Carpenter is explanation, it simultaneously brings about a rhetorical effect on the listeners upon learning the unexpected legal reality.

Interestingly, another linguistic expression of the PROPERTY IS A SUSPECT/CRIMINAL metaphor occurs in the way civil forfeiture cases are conventionally named by legal professionals. This naming peculiarity is highlighted by Carpenter in his speech in the following extract:

(12) *That's why civil forfeiture cases have these really peculiar names, like, "The United States of America v.* ***One 1990 Ford Thunderbird****."* [Laughter] *Or "The State of Oklahoma v.* ***53,234 Dollars in Cash****."* [Laughter] *Or my personal favorite: "The United States of America v.* ***One Solid Gold Object in the Form of a Rooster****."* [Laughter, clapping]

Titles of legal cases conventionally indicate the names of the parties involved in a case. Typically, the parties include physical persons, legal persons or states the governments of which bring legal actions against somebody, e.g., United States v. Facebook, Inc., United States v. Francesco Guerra (The United States Department of Justice 2020). The name following the "v." refers to the defendant, which is typically a person or a corporation. However, in civil forfeiture cases the defendant is not a person but an object that is seized by law enforcement officials. As a result, case names specify the object which is seized and taken permanently by the officials representing law enforcement, e.g., an automobile, a sum of money or a decorative object made of gold as exemplified in (12) above. Notably, when Carpenter presents this naming convention to the audience, the metaphorical reference to objects as if they were human beings is also found to be funny by the listeners. Clearly, the unexpected metaphorical description, which helps the speaker explain the specificity of civil forfeiture, simultaneously produces a rhetorical effect on the listeners as a result of unexpectedness or perceived absurdity of the legal fact discovered in listening to the presentation.

The metaphor PROPERTY IS A SUSPECT/CRIMINAL occurs in another segment of Carpenter's speech. This time the speaker uses the metaphorical phrase in a passage in which he exemplifies a typical case of the abuse of civil forfeiture by confiscating property from a completely innocent person. Consider the excerpt:

(13) *Carol didn't commit any crime, so law enforcement couldn't convict her and take the car, but they could—and did—use civil forfeiture to* ***convict*** *the car and take it. Carol was completely innocent, but she lost her car nonetheless. In other words, she was punished for a crime she did not commit.*

At first sight it may seem that Carpenter uses the verb *to convict* as an indirect metaphor since there are no verbal cues alerting the addressee to the use of figurative language. However, the examination of the speaker's body language in the video episode reveals that Carpenter is using the metaphor directly since the utterance of the metaphorical expression is accompanied with a gestural metaphor flag used to mimic inverted commas, also known as 'air quotes' (Cirillo 2019). Below is a screenshot of the episode discussed here:

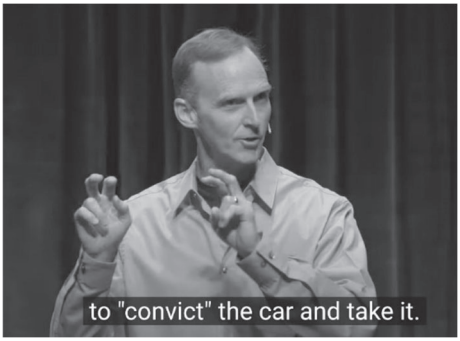

Figure 3. Gestural signalling of the PROPERTY IS A SUSPECT/CRIMINAL metaphor in Carpenter's speech. Screen capture extracted from the speech recording at 4:05. Source: www.youtube.com.

In written language, metaphors may be signalled orthographically by italicising metaphorically used words or writing them in between inverted commas which "mark off a metaphor from the literal language around it" (Goatly 1997, 191). This orthographic device has been imported to spoken language whereby speakers use air quotes gesturally in coordination with the verbal segment, which is marked for its non-literal usage. This multimodal signal shows the speaker's awareness of the use of metaphorical language and their wish to explicitly indicate figurativeness of language use to the addressee. However, metaphor signalling by way of (air) quotes may be indicative of other pragmatic functions such as the speaker's or writer's wish to express irony or dissociate from the content conveyed in inverted commas. More specifically, such marking tends to "indicate a propositional (referential) attitude of something weaker than belief or acceptance" (ibid.). Given that the main goal of Carpenter's speech is to shed light on the far-reaching extent of the abuse of civil forfeiture for profit, it may be assumed that the direct metaphor shows the speaker's critical stance towards treatment of objects as if they committed a crime, especially when the rightful owners of the seized property have not been in any way involved in the criminal activities linked to the seized objects. The gestural marking of the verb *to convict* helps Carpenter to emphasise the figurativeness of the expression and, paradoxically, its rather literal application by law enforcement officials in their attempts to illegally profit by collecting the seized property. In the segment exemplified in (13), the metaphorical phrasing is immediately followed by the sentences in which Carpenter expresses his criticism in non-metaphorical terms by way of paraphrasing it in a direct way: *Carol was*

completely innocent, but she lost her car nonetheless. In other words, she was punished for a crime she did not commit.

Despite being the only direct metaphor employed by Carpenter in his speech, the PROPERTY IS A SUSPECT/CRIMINAL metaphor plays an important role in facilitating the speaker's expression of his criticism of the widespread abuse of civil forfeiture by confiscating property from completely innocent owners who do not even need to be proven guilty of any crime. The metaphorically described reality (and proposed absurdity) of treating an 'innocent' object as if it was a criminal helps Carpenter shed light on the unfairness of the exploitation of civil forfeiture as a legal instrument realised by confiscating objects from innocent owners for the sole purpose of gaining profits.

5. Concluding remarks

The goal of this study was to explore the use of direct metaphors in selected TED Talks on crime and criminal justice. The study found that direct metaphors are typically employed by legal experts for the purposes of explaining complex legal concepts and procedures, expressing criticism towards existing legal practices and policies, and developing arguments in support of the speakers' positions. The study also discovered that (direct) metaphors may be employed in the introduction of a speech for the rhetorical purpose of attention-grabbing, which is realised by opening a speech with an extended description of the source domain without the audience's awareness that the language is being used metaphorically and by temporarily concealing the discourse referent. In the context of deliberate metaphor use, introducing the audience to the source domain while temporarily suppressing their knowledge of the target domain is an effective strategy of making the addressee pay attention to the source domain and view the target domain (revealed later in the speech) from the perspective of the source domain. Finally, some metaphors employed by TED speakers were also found to exert a humorous effect on the audience. The study thus shows that a single (direct) metaphor may simultaneously realise several communicative and rhetorical functions in discourse. In relation to metaphor signalling, the present study has found that in addition to verbal cues that alert listeners to the use of metaphors, in oral communication metaphors may be signalled multimodally via the use of gestural metaphor signals such as air quotes, which are used in coordination with verbal speech. This finding also points at the value of examining metaphors in natural communicative situations in order to account for the variation in metaphor expression including metaphor signalling.

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Appendix

Corpus data: TED Talks on crime and criminal justice examined for direct metaphor identification

	The speaker's name	Title of the speech	Year	Word count	Duration
1	Thomas Abt	*Why violence clusters in cities—and how to reduce it*	2020	2,152	14m51s
2	Caleb Barlow	*Where is cybercrime really coming from?*	2017	1,822	14m2s
3	Dick M. Carpenter II	*The injustice of "policing for profit"—and how to end it*	2019	1,632	12m46s
4	Darieth Chisolm	*How revenge porn turns lives upside down*	2018	1,400	9m53s
5	Jarrell Daniels	*What prosecutors and incarcerated people can learn from each other*	2019	1,683	11m56s
6	David R. Dow	*Lessons from death row inmates*	2012	2,906	18m1s
7	Salid Dudani	*How jails extort the poor*	2016	2,482	12m35s
8	Adam Foss	*A prosecutor's vision for a better justice system*	2016	2,534	15m49s
9	Phillip Atiba Goff	*How we can make racism a solvable problem—and improve policing*	2019	1,987	12m5s
10	Alice Goffman	*How we're priming some kids for college—and others for prison*	2015	2,445	15m57s
11	Marc Goodman	*A vision of crimes in the future*	2012	2,835	19m1s
12	Kim Gorgens	*The surprising connection between brain injuries and crime*	2018	1,518	11m35s
13	Lindy Lou Isonhood	*A juror's reflections on the death penalty*	2018	1,724	15m53s
14	Raj Jayadev	*Community-powered criminal justice reform*	2018	1,864	12m47s
15	Jessica Ladd	*The reporting system that sexual assault survivors want*	2016	889	5m39s

16	James Lyne	*Everyday cybercrime—and what you can do about it*	2013	2,673	17m14s
17	Brandon Mathews	*The surprising reason our correctional system doesn't work*	2017	2,053	15m18s
18	Anne Milgram	*Why smart statistics are the key to fighting crime*	2013	2,311	12m3s
19	Martha Minow	*How forgiveness can create a more just legal system*	2019	1,805	12m
20	Peter Ouko	*From death row to law graduate*	2018	1,245	8m43s
21	Dan Pacholke	*How prisons can help inmates live meaningful lives*	2014	1,911	10m24s
22	Marlon Peterson	*Am I not human? A call for criminal justice reform*	2016	1,127	7m24s
23	Will Potter	*The secret US prisons you've never heard of before*	2015	1,862	14m48s
24	Victoria Pratt	*How judges can show respect*	2016	2,562	11m12s
25	Laura Rovner	*What happens to people in solitary confinement*	2018	1,753	12m
26	Melvin Russel	*I love being a police officer, but we need reform*	2015	2,237	12m39s
27	Shaka Senghor	*Why your worst deeds don't define you*	2014	1,687	11m49s
28	Robin Steinberg	*What if we ended the injustice of bail?*	2018	2,093	14m17s
29	Bryan Stevenson	*We need to talk about an injustice*	2012	4,056	23m26s
30	Ronald Sullivan	*How I help free innocent people from prison*	2016	1,612	11m46s
			Total	**60,860**	**392m47s**

CHAPTER 5

METAPHOR IN LEGAL TRANSLATION: SPACE AS A SOURCE DOMAIN IN ENGLISH AND LITHUANIAN

INESA ŠEŠKAUSKIENĖ

Abstract

The paper focuses on EU legal discourse and sets out to examine the metaphoricity of spatial expressions concerned with vertical and horizontal dimension, e.g. *under the law, beyond specific reasons,* and their translation into Lithuanian. Based on the data of 18 opinions of advocates general of the Court of Justice of the European Union, the investigation relies on embodiment and other key principles of cognitive semantics, also such methodological principles as Metaphor Identification Procedure (MIP, see Steen, Dorst, Herrmann, Kaal et al. 2010a) and metaphorical patterns (Stefanowitch 2006). The results have demonstrated that verticality, the main prerequisite for the metaphor POWER/ CONTROL IS UP, is much more deeply entrenched in English than in Lithuanian, which in many cases gives preference to horizontal conceptualisation, not linked to the metaphor of control and hierarchy. Horizontality identifiable in English in the metaphors LEGAL ARGUMENT/DISPUTE IS SPATIAL OPPOSITION and UNACCEPTABLE IS CROSSING THE BOUNDARIES are rendered in Lithuanian non-metaphorically or as metaphors relying on the vertical dimension.

Keywords: metaphor translation, legal discourse, space, English, Lithuanian

1. Introduction: metaphor, embodiment, and space

Metaphoricity, understood as a mechanism of reasoning rather than embellishment of a text, is not only a feature of fictional texts but also of different specialised discourses, such as science writing, mass media texts,

football commentary and the like (Hermann and Sardinha 2015). Metaphor scholars have identified tendencies in metaphor usage across different types of texts. At least some discourses apparently have an inclination towards discourse-specific metaphors and higher density of metaphors in general. Political discourse, for example, seems to strongly adhere to metaphors related to war and competition (e.g. Charteris-Black 2017); legal discourse, especially some of its branches, favours personification and object metaphors (Twardzisz 2013; Urbonaitė 2017). Academic discourse demonstrates a higher density of metaphors than, for example, fiction or conversation (Hermann 2015), with no clear preference given to one specific metaphor, which may be due to the fact that academic discourse includes a large number of subfields with each of them prioritising their own metaphors.

Contemporary research into metaphor and metaphoricity adheres to the view that metaphor is a phenomenon of reasoning; the view has been motivated to a large extent by the Theory of Embodiment with its major claim being that the human body and human experience is paramount in conceptualisation (Lakoff and Johnson 1980/2003; Johnson 2007); embodiment is a prerequisite and a tool of reasoning. As claimed by Winter (2001, 15), "metaphors are neither arbitrary nor mere products of chance and history, but are grounded in our most basic embodied experience." The upright posture of humans, bodies conceived of as containers conceptualising justice as balance are key to our understanding, perception, and reasoning. These and other aspects of embodiment have been covered in numerous publications (Gibbs et al. 2004; Johnson 2007; Gibbs 2011; 2015, among others) focusing on the role of the human body in reasoning about love relationships, politics, economics, morality, careers, etc. Winter (2001) discusses embodiment in reference to legal reasoning where metaphoricity and embodiment are indispensable. For example, the metaphor POWER/CONTROL IS UP is motivated by the upright posture of a human exemplified in such expressions as *to have an upper hand*, *high position,* etc. But humans are not only physical bodies but also social beings, experiencing emotions and interacting with other people as members of society; in a number of cases the interaction may be of legal nature. Winter (2001, 166–185) gives an interesting account of possible interpretations of the expression *under the colour of law* in American English. In one of the senses it is used in reference to a "guise of authority that animates the reasoning in the most important American cases dealing with official misconduct" (ibid., p. 174). The law refers to the police and the colour to their uniforms. Another metaphorical implication is the "dual character of the officer who is both a person and the provisional embodiment of the state" (ibid., p. 178). In

British English, a similar expression exists; it is *the colour of Office* and includes not only policemen but also the king's officers and agents. All implications of the expression are only derivable from encyclopaedic knowledge linked to the history of the UK and the USA. These are examples of embodied reasoning; in other cultural and discipline-specific contexts they could be different.

The preposition *under* mentioned in the previous paragraph is primarily an indicator of space, which is one of the most fundamental parameters of embodied reasoning and of the functioning of humans. As pointed out by Levinson (2003: 16), a large number of abstract ideas are thought of and discussed in spatial terms. Ample literature demonstrates, for example, how our understanding of time and reasoning about it relies on space (Boroditsky 2000; Casasanto and Boroditsky 2008). The link is so deeply entrenched that we hardly ever notice it when saying, for example, that *the project is behind schedule* or some event is likely to happen in the *near future;* we speak about Christmas as *approaching fast* or the examination *coming soon.* Haspelmath (1997) in his typological study based on a large number of world languages demonstrated that many adverbials develop their temporal senses motivated by spatial senses. He also identified similar metaphorical paths between languages, which are not always genetically and geographically linked. The transfer between space and time, as demonstrated by other scholars (Casasanto and Boroditsky 2008; Duffy and Feist 2017), is apparently not straightforward; their relationship is more intricate than initially thought. Even if we admit that in principle TIME IS SPACE is almost a universal metaphor, when researched across several languages and cultures, the transfer from spatial to temporal domain points at numerous language- and culture-specific aspects (Radden 2011). For example, in the East, time tends to be understood as vertical, whereas in the Western world adherence to horizontality prevails (ibid.).

Spatiality underlies our reasoning in many domains, not only time. As pointed out by Pütz and Dirven (1996, xi), spatiality lies "at the heart of all conceptualization". We tend to discuss kinship in terms of distance (e.g. *close/distant relative*), social status in terms of vertical dimension (e.g. *high position/rank*), a circle of friends may be *wide*, our good emotions, or spirits, are often *high* and bad emotions and moods are often *low*, depression may be *deep*. Like emotion metaphors, morality metaphors also rely on the vertical dimension of space: what is moral is associated with the upper dimension, for example, *high esteem*, what is immoral is usually low, for example, *low status* (Yu 2016). Different states such as *in love* or *at war* also rely on space (Evans 2010), often signalled by prepositions, typical

spatiality markers and easily developing metaphorical senses (Steen, Dorst, Herrmann, Kaal et al. 2010a, 202–203).

As pointed out by Talmy (2000, 237), different languages carve up space in idiosyncratic ways, which seems to be preserved in rendering metaphorical senses of prepositions and other spatial expressions used to conceptualise abstract domains. Evidence can be found in Jamrozik and Gentner (2011), who convincingly demonstrated that the prepositions *in* and *on* in their abstract senses retain elements of their spatial meaning. For example, the element of support is identifiable in the expression referring to physical space *on the table* and in the abstract expression *on drugs* where a different type of support can be traced. The same can be noticed in other languages where prepositions develop their own paths of meaning extension in physical and metaphorical senses (see, for example, Šeškauskienė and Žilinskaitė-Šinkūnienė 2015 on the Lithuanian *už* 'behind' and Shakova and Tyler 2010 on the Russian *za* 'behind').

2. Legal discourse and metaphor. Translating metaphor

Legal discourse is extremely abstract and, despite its notorious rigor and formulaicity of expression (see Tiersma 1999; Tiersma and Solan 2012), also metaphorical (Johnson 2007a). Numerous recurrent sequences, such as *in accordance with, by reference to, subject to Article A, under the law*, according to Wray (2002), is a feature of any language. Legal discourse is also unlikely to change over time or its changes are slow (Tiersma 2006). Yet by its very nature law and legal reasoning is metaphorical in the same way as, according to some scholars, human rationality is imaginative (Winter 2008, 363), metaphor is "an indispensable tool of legal thought" (ibid., p. 364); legal reasoning is "embodied, situated and imaginative" (Johnson 2002, 951, mentioned in reference to Winter 2001). The metaphoricity of legal reasoning is determined by its abstract nature and is inevitable. It is therefore hardly surprising that, for example, in English we frequently use metaphorical expressions like *open, close or drop a case, pass a law, high court*, etc.

It is also important to mention that legal concepts emerge as a result of our functioning in "historically and culturally situated communal practices and institutions" and are "constrained by communally embedded understandings and practices" (Johnson 2002, 952). Different cultures may adhere to different metaphors. For example, in Lithuanian opening a legal case is rendered through raising, e.g. *iškelti bylą* (lit. 'to raise a case') and passing a law is expressed through the concept of taking, e.g. *priimti įstatymą* (lit. 'to take, accept a law'). There is some evidence that legal

discourse favours object and person metaphors: Twardzisz (2013) established this tendency in commercial contracts; Šeškauskienė and Stepančuk (2014) identified it in spoken discourse, in the court hearings of criminal cases of the US Supreme Court; Urbonaitė's (2017) findings demonstrate that these metaphors prevail in academic legal texts on criminal matters. There are also some findings which suggest that the choice of particular metaphors may depend on a branch of law.

As attested by Chiu and Chiang (2011), Taiwanese statutes and judgements, after passing an amendment to the Code of Criminal Procedure, have changed so that they now give preference to the metaphor of legal fight; as a result, litigation has become much more adversarial. Intellectual property law is often discussed referring to the pirate-predator-parasite metaphor (Loughlan 2006). A study into conceptualising copyright in a digital society resulted in identifying a prevalence of the metaphor of flow suggesting that media consumption is perceived as a natural process with hardly any implications of forced opposition or constrains (Larsson 2013). Another study by Tänzler (2007) sheds light on how corruption is conceptualised in many EU cultures. Interestingly, it is mostly understood as something hazy and mystical. Richard (2014) focuses on the role of metaphor in law analysing some selected metaphors (of a tree, water, person, object) and makes a point that metaphor is inevitable in legal argumentation, especially in texts where opinion is involved. A similar position is taken by Lloyd (2017) who claims that metaphor is a driving force in law. Ebesson (2008, 260) points out that metaphors reveal "how lawyers perceive different situations and contexts", "they shape the legal discourses and, in some sense, determine which arguments are valid in legal reasoning". He also notes the importance of spatiality is metaphors of legal discourse related, first of all, to higher and lower courts (ibid., p. 263).

Translating legal discourse may be treated narrowly as a purely technical undertaking; however, professional translators admit that this is a real conceptual challenge to anyone who has ever tried to translate such texts or to investigate how it is done. As rightly pointed out by Biel (2017: 78), legal translation is not only a matter of two languages but also of two legal systems. As a result, legal terms differ across the systems a great deal, especially in specific legal areas. Even such widely acknowledged notions as *freedom* and *liberty* in criminal law may be tough to a translator, and the problems are often due to cross-culturally differing conceptualisation (Šeškauskienė and Urbonaitė 2018); it is referred to by Šarčević (2012, 194) as conceptual incongruity. Translation challenges are also often due to differing metaphoricity, because "metaphors cut across cultures much more at the conceptual level than at the strictly linguistic level" (Monti 2009,

219). Thus translating metaphor in legal discourse may be seen as a cross-systemic, cross-cultural and cross-linguistic challenge.

3. Framework of the present research

This investigation focuses on some metaphorically used spatiality markers, which in their primary sense point exclusively at the vertical and horizontal dimension of the spatial domain, namely, the prepositions *over, above, under, below, behind, beyond, before, along,* and the adjectives *high* and *low, long,* and *short.* Prepositions are known for their rich polysemy and easily developing metaphorical senses (Gibbs 2015a, 161; Steen, Dorst, Herrmann, Kaal et al. 2010a, 202, etc.). In legal discourse, some of the metaphorical prepositional constructions are based on deeply entrenched metaphors such as POWER/ CONTROL IS UP briefly mentioned previously, e.g. *under the law, above the law,* etc.

Physical, non-metaphorical, senses of spatiality markers, especially prepositions, seem to be identifiable in many languages; for example, the sense realised in *under the table* is found in many (European) languages, but the metaphorical extension of *under* realised in *under consideration* or *under scrutiny* is not so widely spread; it is identifiable in English, but may be less likely to occur in other languages, especially not so closely related to English (e.g. Russian, see Shakova and Tyler 2010; also Lithuanian, see Šeškauskienė and Žilinskaitė-Šinkūnienė 2015). The translation of metaphorical spatial constructions into another language may become a real challenge. For example, a very frequent expression in legal discourse *under the law* is rendered into Lithuanian as *pagal įstatymą* 'along the law', which evokes a different conceptualisation of space and, possibly, has different implications.

The paper aims to attain two goals: 1) to identify metaphors employing space as a source domain in the utterances of the above type in EU documents and 2) to establish if and to what extent spatially motivated metaphors are preserved in the English–Lithuanian translation. Subsequent sections will focus on the data and methodology of the present investigation, major tendencies of metaphoricity in the selected texts and tendencies of translating spatially motivated metaphors from English into Lithuanian. Finally, some conclusions will be drawn and a way forward will be tentatively indicated.

4. Data and methods

The data for the present investigation has been collected from the case-law database *InfoCuria* and consists of 18 opinions of advocates general of the Court of Justice of the European Union (CJEU) and their translations into Lithuanian[1]. The translations are all official, performed by licensed professionals recruited by the CJEU. The corpus covers the period between 2011 and 2015. The opinions were selected according to topic and include those dealing with four freedoms of the European Union: the free movement of goods, of services, of persons, and of capital. The size of the parallel English-Lithuanian corpus is 203,181 words in total, with the English data amounting to 116,540 words and the Lithuanian sub-corpus including 86,641 words.

The spatial words in question and the concordances have been identified with the help of the AntConc software (Anthony 2015). The original English sentences were aligned with their Lithuanian translations manually, using Excel sheets. The metaphors were tagged following the key principles of MIP (Pragglejaz group 2007: 3; Steen, Dorst, Herrmann, Kaal et al. 2010) and the metaphorical pattern analysis (Stefanowitch 2006). A metaphorical pattern is understood as "a multi-word expression from a given source domain into which one or more specific lexical items from a given target domain have been inserted" (ibid., p. 66). In this analysis it means that the selected spatiality markers, e.g. *under,* used with abstract words like *law*, makes up a metaphorical pattern interpretable within the metaphor POWER/CONTROL IS UP.

The tagging of metaphors and their interpretation was also manual, using Excel sheets. To identify tendencies of translation, the framework suggested by Abdulah and Shuttleworth (2013) and by Jensen (2005) was adhered to; previously, a slightly amended model was applied by Šeškauskienė and Urbonaitė (2018). It can be briefly summarised as 1) metaphor-to-metaphor when the metaphor is retained (the same metaphor preserved in the target text or rendered as another metaphor); 2) metaphor-to-non-metaphor when metaphor is rendered as non-metaphor in the target text or 3) the metaphor in the original text is omitted in the target text altogether. The discussion will also take into account cases where, despite the retained metaphor, its realisation in the target language differs.

[1] Courtesy of my former student Modestas Talačka, who kindly allowed me to use the corpus collected for his MA paper in this investigation.

5. Results. Raw frequencies

The total number of spatiality markers in the English sub-corpus amounts to 634 items in total, with 474 items of verticality markers (given in Table 1) and 160 of horizontality markers (Table 2). The vertical dimension features much more prominently in the data, mainly due to the high frequency of *under*. It should be noted that the division of the data into verticality markers and horizontality markers relies on the primary meaning of the items. The primary meaning has been identified according to the criterion discussed in MIP and its further variety MIPVU (Praeglejaz 2007; Steen, Dorst, Herrmann, Kaal et al. 2010a).

Table 1. **Markers of vertical dimension**

Upper	OVER, 27	ABOVE, 56	HIGH, 29	Total: 112
Lower	UNDER, 339	BELOW, 7	LOW, 16	Total: 362
			Total	**474**

As already mentioned, most of the items in the above table are prepositions, adverbs or adjectives. The latter appear in the corpus in different grammatical forms (e.g. *high, higher, highest*), which are all included in the above table under the base form *high* and *low*. Other forms that have been included in the table are as follows: one verbal form (*lowering*), one noun (*the above,* 3 cases; all with the definite article) and four different compositional forms: *abovementioned* (used four times), *over-reliance*, *high-level* and *low-prize* (used twice; 8 cases of compositional forms in total).

Table 1 demonstrates that the lower scale of the vertical dimension is much more exploited when referring to the law, exclusively on account of the preposition *under,* with the other two (*below* and *low*) demonstrating much smaller figures. The upper scale of the vertical dimension is more evenly distributed, but the overall number of spatiality markers of the upper scale is about three times smaller than that of the lower scale.

Table 2 shows the frequency of horizontality markers. Their overall number is about three times lower than that of verticality markers. The preposition *before* linked with the front region clearly stands out making up over 70 per cent of all such markers in the corpus.

***Table 2*. Markers of horizontal dimension**

Back region	BEHIND, 2
Front region	BEFORE, 117
Unspecified	BEYOND, 20
Linear configuration	LONG, 8
	SHORT, 5
	ALONG, 8
Total:	**160**

Like in Table 1, most items in Table 2 are prepositions, adverbs or adjectives. However, the variation of the items included in Table 2 is much lower than of those included in Table 1. One occurrence of *beforehand,* metaphorical in its composition, has been included under *before* in the data*,* four occurrences of *longer* and a single occurrence of *shorter* are included under the respective base forms of the adjectives *long* and *short*. *Long* also includes a single occurrence of the compound *long-term* and the verbal form *prolonging.* However, formulaic phrases like *as long as* were excluded from this investigation. *Along* also includes two cases of *alongside.*

6. Metaphors derived from the vertical dimension

The vertical dimension of space has been long recognised as activating a well-established metaphor POWER/ CONTROL IS UP, which is mostly manifested in linguistic expressions with *under* and *over* (rather than *above* and *below*) and *high* and *low*. It is first of all attested in the ubiquitous expression *under (the) law.* It is interpreted as obedience to the law, as a principle whereby people and their actions are governed by the law (Winter 2008, 368–369; Larsson 2014) and/or people obey it. The analysis of 339 collocates, which are all metaphorical, are structurally and semantically very similar, with the preposition *under* collocating with numerous law-related nouns. In the corpus, there are only two cases of *under the law;* other cases include reference to legal norms, documents, principles, conditions, etc., e.g. ***under** the case-law of the Court; **under** German law; **under** Article 5; under point (c), **under** the terms of the contract of sale; **under** the national legislation, **under** an obligation to act, **under** Directive X, **under** the distribution scheme, **under** the principle of equal treatment.* They all in their own way point at the same idea of the law or legal rule being placed higher, which in terms of social hierarchy implies more power and authority, e.g.:

(1) *In my opinion, the judgment in Flos indicates that the items here in issue, although unprotected* ***under*** *Italian copyright law during the relevant period, were entitled to protection* ***under*** *EU copyright law.* (Op_4)[2]
(2) *In the opinion of the Registration Committee, the concept of architect implies that certain minimum requirements are fulfilled by a person aspiring to be recognised as an architect* ***under*** *the general system.* (Op_13)
(3) *It must not be interpreted in such a way as to limit the scope of application of the system for the recognition of evidence of training* ***under*** *Title III, Chapter I, of Directive 2005/36*. (Op_13)
(4) *Storage of products or consignments and splitting of consignments may take place where carried out* ***under*** *the responsibility of the exporter or of a subsequent holder of the goods and the products remain* ***under*** *customs supervision in the country(ies) of transit.* (Op_2)
(5) *The same provision, in paragraph 3, states that the Minister of Transport and Navigation may order, by way of decree, the removal from office of the President and the dissolution of the Port Committee* ***under*** *certain circumstances.* (Op_14)

The law is personified as someone in a position to control people and their actions; a higher position allows to make decisions, set taxes, impose restrictions. However, in some other cases the law protects and awards. Therefore, it would be logical to slightly extend the metaphor of CONTROL to include authority as well: POWER/ CONTROL/AUTHORITY IS UP. The vocabulary employed in the collocates varies from restricting and imposing obligations (as in (3)) to awarding and protecting (example (1)), exempting from certain obligations, etc. There is also variation as to the level of abstraction of nouns in the phrase: *Article 5* or *Title III* (example (3)) is a very concrete legal norm metonymically referred to by a specific paragraph; however, an abstraction like *responsibility* (4) is much vaguer. The latter, alongside with such nouns as *system* (2) or *circumstances* (5), in some cases also *supervision*, *conditions*, and *pressure*, is slightly different. Such words are of broader semantics and reference to their imposing character is less pronounced. However, elements of control or power in a more general sense are important, as, for example, such collocate as *under the circumstances*

[2] Sources of the examples are referred to after each example. A full list of sources is provided at the end of the paper, in the Sources section.

means that people do not act entirely how they choose but rather in accordance with the circumstances or someone's will.

In the data, there were several examples not straightforwardly linked to law. Their interpretation seemed more valid within the metaphor of more general authority, e.g.:

(6) *His application had been refused on the ground that his diploma did not correspond to one awarded **under** an architect department.* (Op_13)

Thus the architect department may be viewed as authority in charge of issuing and awarding diplomas to graduates. However, such usage is not quite typical as institutions are more often metonymically referred to as persons and in passive constructions like (6) introduced by the preposition *by*.

The other end of the vertical dimension, the opposite of *under*, is represented by phrases with *over*. Out of 27 cases, only 11 are manifestations of the POWER/ CONTROL/ AUTHORITY IS UP metaphor. Those cases, though linguistically rendered in a different way, conform to the same idea that law is perceived as controlling, as an authority whose instructions are obeyed, e.g.:

(7) *Such an obligation flows from the principle of primacy of EU law **over** national law.* (Op_7)
(8) *This principle is of relevance to the dispute at hand because it supports the competence of Member States to assert jurisdiction **over** copyright infringements that occur within their territory.* (Op_4)

In such contexts, the constructions with *over* are reinforced by explicit reference to primacy (example (7)) or jurisdiction (example (8)). The latter is defined in a general English dictionary as 'the authority of a court or official organisation to make decisions or judgements' (CDE), hence its metaphorical placement higher than the people, than copyright infringements or a certain territory.

Other cases with *over* realise two general metaphors MORE IS UP (e.g. *totalling **over** one tonne per producer or importer*) and TIME IS SPACE (e.g. *his total income **over** an entire tax year*); they are not exclusively confined to legal contexts. Both, measuring the quantity and temporality, are rather basic human experiences; therefore, the metaphors are found in different contexts, not only legal.

The occurrence of *high* and *low* in the corpus is mostly associated with the same metaphor POWER/ CONTROL/ AUTHORITY IS UP. The word *high* is more frequent (29 occurrences) in comparison to *low* (16 occurrences), but on the whole, their frequencies are rather low. The perception of being high and low is first of all deeply entrenched in the hierarchical structure of court systems and administrative structures in any country. Therefore, we have ***higher*** and ***lower*** *courts*, ***highest*** *administrative posts;* ***high****-level posts in the public administration.* For example:

(9) *According to a view held in particular by the* ***higher*** *administrative courts, a prohibition on intermediation of sports betting is contrary to EU law.* (Op_7)

At the same time, *high* and *low* are equally relevant for the realisation of the metaphor MORE (INTENSIVE, IMPORTANT) IS UP. Thus it is natural to speak about ***higher*** *or* ***lower*** *import duty;* ***higher*** *costs;* ***higher*** *tax rate; provisions (...)* ***lowering*** *the effective tax rate*, etc. Since the specificity of genre of a legal opinion in the data is not entirely devoid of evaluation, verticality markers are identifiable in contexts discussing emotions, influence and importance, which can be measured and graded. Therefore, in the data, we can find expressions like *very* ***high*** *concern;* ***high*** *level/standard of protection;* ***high*** *level of responsibility.* Interestingly, collocates like *low concern, low standard of protection* or *low level of responsibility* were not found in the corpus. A simple search in British National Corpus (BNC) resulted in zero utterances with *low level of responsibility* suggesting that people hardly use the downward scale for measuring such human features as responsibility.

The markers of the vertical dimension *above* and *below* are very different in their usage in the corpus. They are used exclusively for reference in the text. Claims made before a particular point are referred to as *above*, and any information provided further in the text is referred to as *below;* e.g:

(10) *For all the* ***above*** *reasons, I suggest that the Court should rule as follows in answer to the questions raised by the Conseil d'État. (Belgium)* (Op_11)

(11) *I will therefore consider the meaning of Article 4(1) of the Copyright Directive, in the context of relevant general principles of EU copyright law, in section C* ***below****.* (Op_4)

The difference between the number of occurrences with *above* and that with *below* is huge: *above* was found in 56 cases, and *below* only occurred six times. It is apparently due to the requirement of text composition whereby the author should use anaphoric (10) rather than cataphoric (11) reference. In other words, reference is usually made to what has been already written rather than to what is yet to come, as in example (10); such strategy makes the text much easier to read and is more reader-friendly. Using *above* and *below* still preserve their primary spatial meaning of verticality, especially if textual references are on the same page of a printed text; they could be easily interpreted as physically higher or lower on a computer screen or on a sheet of paper.

7. Metaphors derived from the horizontal dimension

Linguistic expressions pertaining to the horizontal dimension are less numerous by about three times. The back region with only just two occurrences of the preposition *behind* is hardly relevant at all. However, both utterances realise the idea of language or verbal expression being a cover, a surface behind which the true meaning or intent is hidden, e.g.:

(12) ***Behind*** *the question whether Directive 98/34 renders Law No 8/2013 unenforceable (it submits) lies the prior question whether a national court should examine that issue of its own motion.* (Op_3)
(13) (…) *the legislative intent* ***behind*** *the relevant provisions of Directive 2014/24* (…) (Op_8)

Such metaphorical patterns are in conformity with the usage of *behind* in other contexts, especially when reference is made to words behind which *meaning*, *emotions, sentiments, anger, scorn, beliefs, motivation* are hidden, as attested by a simple search of the phrase *behind * words* in BNC.

Utterances with *before* are more numerous (117 cases) and more varied in metaphoricity than *behind*. They appear in two patterns: 1) temporal and 2) dispute-related, usually based on opposition. The first pattern is not legal-specific and can be easily found in other texts as well. However, the primary spatial sense of *before,* as attested by CDE, is spatial opposition, as seen in the utterance *he stood before the crowd.* In temporal contexts, realising the metaphor TIME IS SPACE, *before* expresses sequential time, it is an indication of anterior (Haspelmath 1997: 61 ff). Therefore, we use it to point at events that happened or are about to happen later than another event. In legal contexts, we find phrases like ***before*** *the expiry,* ***before*** *the adoption,* ***before***

addressing the question, ***before*** *the entry into force,* ***before*** *the calculation of financial penalties,* etc.

A deeply entrenched pattern *before the court* realises the metaphor LEGAL ARGUMENT/DISPUTE IS SPATIAL OPPOSITION. The phrase is typically found in contexts concerned with legal proceedings, e.g.:

(14) [the law firm] *represented them* ***before*** *the national courts in proceedings against private betting suppliers.* (Op_7)
(15) *One of the appeals* ***before*** *the national court was brought by a German national.* (Op_10)

As a rule, one of the parties in the argument is a court or a similar institution such as *the disciplinary committee, National Bar Council, a district court*, etc. Spatial opposition is naturally transferred to a social situation where a legal dispute has to be resolved. Despite that in some cases the court as an institution may be interpreted as a metonymy for a panel of judges, in many situations (e.g. (14)) the concrete link is not as transparent, and courts are thought of as abstract entities, or institutions.

Utterances with *beyond,* another spatial marker of horizontality, are not numerous, there are only 20 cases in the corpus. In its primary meaning, *beyond* is concerned with further distances and moving outside the boundaries of a certain area (CDE); figuratively going beyond the law implies behaviour not conforming to a certain norm or standard. As pointed out by Larsson (2014), legal matters can be conceptualised as bounded areas, which is compatible with the metaphor UNACCEPTABLE IS CROSSING THE BOUNDARIES realised by utterances with *beyond,* e.g.

(16) (…) *the scope of that exception should not go* ***beyond*** *its original aim.* (Op_11)
(17) *An applicant is not required to demonstrate 'specific and exceptional reasons'* ***beyond*** *those referred to in Article 10(a) to (g).* (Op_13)

Interestingly, in almost all cases the preposition is used with the verb *go*, which is an additional argument for interpreting such cases as derived from situations involving movement, more specifically, crossing actual boundaries of a territory. In general English, *beyond* naturally collocates with words like *boundaries, limits,* or *limitations,* e.g. *beyond the limits of discretion* (BNC).

The two adjectives, *long* and *short*, mainly refer to temporal contexts realising the metaphor TIME IS SPACE. Thus we have *long-term income,*

longer delay, a shorter period. In several cases *long* and *short* refer to oral or written texts; they are used in such utterances as *long list of factors, the proposal was short, short answer*.

The preposition *along* in its primary meaning refers to a linear arrangement or motion. In my data, six out of eight cases are temporal contexts signalling simultaneity of occurrence of actions or activities, e.g. *issues along with the application, along with the Commission*. In one case, the metaphor of chain was activated and thus the linear arrangement came to the fore:

(18) *For that purpose, it institutes a number of information-related mechanisms aimed, all* ***along*** *the supply chain, at identifying any dangerous properties.* (Op_1)

The horizontal dimension in the data is much less systematic. Most cases are not specifically confined to legal contexts, for example, temporal metaphors with the source domain of space are ubiquitous in many contexts, both general and subject-specific.

As seen in the two sections above, in the English data, the metaphor CONTROL/AUTHORITY IS UP clearly prevails over others mainly due to the entrenched usage of the preposition *under* suggesting the superiority of law and expressing the idea that people should obey the law. The idea is reinforced by the metaphor realised through the adjectives *high* and *low*, mainly through their usage in reference to courts. In translation, the superiority of law realised through the vertical dimension, is not so clearly preserved as will be demonstrated in the section that follows.

8. Translation: major tendencies

This section will first focus on the translation of metaphors relying on the vertical dimension, primarily those that are specifically relevant for legal contexts. I will start with the metaphor CONTROL/ AUTHORITY IS UP, which is motivated by the vertical dimension of space and which clearly stands out in the English sub-corpus. Afterwards, I will proceed to law-related metaphors based on the horizontal dimension: UNACCEPTABLE IS CROSSING THE BOUNDARIES and LEGAL ARGUMENT/ DISPUTE IS SPATIAL OPPOSITION. The section will end with a brief discussion of temporal metaphors and a rather general metaphor MORE (INTENSIVE, IMPORTANT) IS UP.

As already mentioned, the most numerously represented metaphor CONTROL/ AUTHORITY IS UP is mostly due to the preposition *under*. In addition, prepositional phrases with *over* are sometimes employed in the

realisation of the metaphor; also the adjectives *high* and *low*, mainly used in reference to courts. The latter two are well preserved in translation: a higher court in English remains higher in Lithuanian, a lower court is lower in Lithuanian. The same applies to high posts or positions; in both languages the conceptualisation in vertical terms persists. Interestingly, *high* realises the metaphor of CONTROL in 9 cases out of 29 and *low* in 2 out of 16 cases. The scarcity of the data precludes any broader generalisations.

The preposition *over* has been indicative of the metaphor of CONTROL in 11 cases out of 27. In 10 of these cases, the metaphor is not preserved in translation; there is a single case where the metaphor is kept. There the verticality is expressed through the noun *viršenybė* 'superiority'. For the sake of convenience, sentence (7) discussed previously is repeated below as example (19); its translation into Lithuanian is provided below, as example (19a):

(19) *Such an obligation flows from the principle of primacy of EU law over the national law.* (Op_7)
(19a) *Tokia pareiga pagrįsta ES teisės viršenybės, palyginti su nacionaline teise, principu*. (Op_7a)
[*lit.* 'Such an obligation based on the principle of the EU **superiority**, compared to the national law.']

The remaining ten cases where metaphorical superiority is explicitly mentioned in phrases like *power/ prerogative over the other members, sanction over the President, jurisdiction over infringements* are rendered into Lithuanian through the non-metaphorical prepositional phrase with *dėl* 'concerning' or through the dative case, which, following previous research into the metaphoricity of Lithuanian cases, could be interpreted as a metaphorical beneficiary or recipient, sometimes a recipient of a disadvantage (Urbonaitė, Šeškauskienė, and Cibulskienė 2019), for example:

(20) (…) *the Minister of Infrastructure and Transport (...) retains powers of direction, control and, where appropriate, sanction* ***over*** *the President of a Port Authority*. (Op_14)
(20a) (...) *įgaliojimus duoti nurodymus uosto administracijos vadovui, jį kontroliuoti (...) ir taikyti* ***jam*** *nuobaudas turi infrastruktūros ir transporto ministras*. (Op_14a)
[*lit.* 'Powers to give directions to the President of a Port Authority, to control him (...) and apply sanctions **to him** has the Minister of Infrastructure and Transport.']

Since the metaphor of CONTROL is mostly rendered through utterances with *under,* it is worth discussing them in more detail. As seen in Table 3 below, an overwhelming majority of *under* expressions are translated into Lithuanian through the horizontality marker *pagal* 'along' (68.4 % cases).

Table 3. **Translation of collocates with *under* into Lithuanian (realising the metaphor CONTROL/AUTHORITY IS UP)**

Translated into Lithuanian through:	Raw	Percentage
Horizontal dimension	232	68.4 %
CONTAINER metaphor	35	10.3 %
BUILDING metaphor	10	2.9%
Different cases	37: Instrumental, 24 Genitive, 10 Dative, 3	11%
Different syntactic constructions, verbal forms, etc.	20	5.9%
Omission	5	1.5%
Total	**339**	**100**

So what in English is conceptualised as falling under the law, under Article 5 or 10, under provisions, conditions or jurisdiction, in Lithuanian is rendered as along the law, along Article 5 or 10, along provisions, conditions or jurisdiction. The pattern *pagal įstatymą* 'under the law'*, pagal teisės aktus* 'under legal acts'*, pagal Italijos teisę* 'under Italian law' is equally entrenched in Lithuanian and could be treated as dead metaphors.

The CONTAINER metaphor has been employed to translate 10.3% of all cases with the English *under*. The metaphor's most characteristic expression is the Locative case of the noun, one of the most frequent cases in Lithuanian. MIP and MIPVU have been mostly applied to English (Steen, Dorst, Herrmann, Kaal et al. 2010); however, there have been attempts to apply them to other languages as well (Nacey, Dorst, Krennmayr, and Reijnierse 2019). In Lithuanian, the Locative case of abstract nouns as well as the preposition *į* 'into' are prototypical indicators of the metaphor of CONTAINER (Urbonaitė, Šeškauskienė, and Cibulskienė 2019, 178), for example:

(21) *Nonetheless, it is established* ***under*** *the above cited case-law of the Court that* (…) (Op_4)

(21a) *Vis dėlto minėtoje Teisingumo Teismo praktikoje įtvirtinta* (...) (Op_4a)
[*lit.* 'However, **in the mentioned case-law** of the Court of Justice it has been established that...']

In the Lithuanian translation, the metaphor CONTROL/AUTHORITY IS UP is also realised through the BUILDING metaphor. Texts realising the metaphor make use of the lexemes of foundation and support rather than of other elements of a building, such as roofs or windows. In literature, this is known as highlighting (see Grady and Johnson 1997). The metaphor is equally relevant for English and Lithuanian, e.g.:

(22) (…) *the Court has held that only an infringement which the Court has declared, on the basis of Article 258 TFEU, to be well founded may be dealt with* ***under*** *that procedure.* (Op_16)
(22a) *Teisingumo Teismas yra nusprendęs, kad jos pagrindas gali būti tik įsipareigojimai, kuriuos Teisingumo Teismas, remdamasis SESV 258 straipsniu, pripažino neįvykdytais.* (Op_16a)
[*lit.* 'The Court of Justice has held that **the basis of** the procedure should only be obligations which the Court has declared, based on Article 258 TFEU, as outstanding.']

Other ways to translate the metaphor of CONTROL include several syntactic constructions and three Lithuanian cases: Genitive, Dative, and Instrumental. Genitive expresses possession and other relations derived from it, Dative mostly helps render the relation of reception and benefaction, and Instrumental is self-explanatory; it mostly serves to express instrumentality, e.g.

(23) (…) ***under*** *the exporter's responsibility* (…) (Op_5)
(23a) *eksportuotojo atsakomybe* (Op_5a)
exporter GEN.SG responsibility. INSTR.SG
[*lit.* 'by the exporter's responsibility']

There are a couple of cases when a particular English phrase was omitted in translation. It may have been due to the translator's individual choice and/or the editor's slip.

In my corpus, as already discussed, two metaphors relying on the horizontal dimension in English are LEGAL ARGUMENT/DISPUTE IS SPATIAL OPPOSITION and UNACCEPTABLE IS CROSSING THE BOUNDARIES. The first metaphor is mostly realised in English through the preposition *before* in (almost) formulaic phrases of *to bring before the court* type. In translation, such utterances are rendered by constructions with the Locative or the Dative case; the metaphor of LEGAL ARGUMENT is not preserved, for example:

(24) *Proceedings **before** the Court* (Op_5)
(24a) *Procesas Teisingumo Teisme* (Op_5a)
Process. NOM.SG Justice. GEN.SG Court. LOC.SG
[*lit.* 'Proceedings **in** the Court of Justice']
(25) *One of the appeals **before** the national court was brought by a German national, Mrs Baumeister* (Op_10)
(25a) *Vieną iš apeliacinių skundų nacionaliniam teismui pateikė Vokietijos pilietė J. Baumeister* (Op_10a)
[*lit.* 'One of the appeals **to** the national court was submitted by a German national J. Baumeister.']

The metaphor UNACCEPTABLE IS CROSSING THE BOUNDARIES in English is mostly realised through the preposition *beyond* in its primary meaning pointing at further locations. In the Lithuanian translation, there are at least two strategies identifiable: 1) the metaphor is replaced by another metaphor based on the vertical dimension, UNACCEPTABLE IS EXCEEDING THE UPPER LIMIT; 2) the metaphor is lost; the idea of crossing the boundaries is replaced by the negative construction or rendered as an obligation not to do something. To illustrate the first strategy, example (16) is reproduced below under number (26) and its translation into Lithuanian is provided below as (26a):

(26) (…) *the scope of that exception should not go **beyond** its original aim* (Op_11)
(26a)(…) *tos išimties taikymo sritis neturėtų **viršyti** jos pirminio tikslo.* (Op_11a)
[*lit.* 'the scope of that exception should not exceed [be higher than] its original aim.']

The second strategy includes different syntactic structures, often involving negation or reference to exceptions. One of them is provided below:

(27) *An applicant is not required to demonstrate 'specific and exceptional reasons' **beyond** those referred to in Article 10(a) to (g).* (Op_13)
(27a)*Pareiškėjas neprivalo įrodyti kitokių „specifinių ir išskirtinių priežasčių" nei tos, kurios nurodytos 10 straipsnio a–g punktuose.* [*lit.* 'An applicant must not prove 'specific and exceptional circumstances', **other than those** referred to in Article 10 (a) to (g).']

Of the three law-related metaphors, CONTROL/AUTHORITY IS UP, LEGAL ARGUMENT/DISPUTE IS SPATIAL OPPOSITION and UNACCEPTABLE IS CROSSING THE BOUNDARIES, in the Lithuanian translation the first is preserved only when conceptualising the hierarchy of courts and in some cases explicitly pointing at the higher, and controlling, role of law (*superiority of law*). In most other cases the metaphor of CONTROL in Lithuanian is rendered through the horizontality marker *pagal* 'along'; apparently, pointing at a different relationship between an individual or the society and the law. The second metaphor of LEGAL DISPUTE is lost in translation, despite that in less formal Lithuanian there is a phrase *stoti prieš teismą* 'to stand up before the court'. The third metaphor is replaced by a metaphor based on the vertical dimension or rendered by non-metaphorical linguistic structures.

Two other metaphors identified in the corpus are not confined to legal texts. The TIME IS SPACE metaphor where priority is rendered as opposition through prepositional phrases with *before* is well preserved in Lithuanian. However, the preposition *over* pointing at a period of time is rendered in Lithuanian through markers of horizontality, e.g.:

(28) (…) ***over*** *a fixed period of time …* (Op_14)
(28a)(…) ***per*** *nustatytą laikotarpį* (...) (Op_14a)
[*lit.* 'across a fixed period of time']

The other, more general, metaphor MORE (INTENSIVE, IMPORTANT) IS UP is realised in English through the adjectives *high, low* and the preposition *over.* In translation into Lithuanian, the metaphor is only kept in cases when the focus is on importance or intensity, such as *level of protection,* e.g.:

(29) (…) *the restriction is justified because it pursues the objectives of ensuring a* ***high*** *level of protection for players and the prevention of crime.* (Op_10)
(29a)(…) *šis apribojimas pateisinamas, nes jis nustatytas siekiant užtikrinti* ***aukštą*** *lošėjų apsaugos lygį ir nusikalstamumo prevenciją.* (Op_10a)

Such conceptualisation may be due to the fact that Lithuanian also keeps the understanding of protection in terms of levels. The same hierarchical structure is compatible with the reasoning in terms of vertical dimension.

In cases when *higher* refers to a larger amount and *lower* to a smaller amount of something, such as *duty, costs, tax, value,* Lithuanian gives preference to *didesnis* 'bigger/larger' and *mažesnis* 'smaller', e.g.:

(30) (…) f*or the purpose of fixing an import duty (**higher, or lower**).* (Op_2)
(30a)(…) *nustatant importo muitus (didesnius ar mažesnius).* (Op_2a) [*lit.* 'setting import duties (**larger** or **smaller**)']

Also cases such as *high concern* or *high risk* are rendered as *didelis susirūpinimas* 'big/large concern' and 'big/large risk', respectively. If in Lithuanian the risk may still in some cases be high, as attested in the Corpus of Contemporary Lithuanian Language (CCLL), emotions like concern would be *big/large* or *small,* but never *high* or *low*.

9. Concluding remarks

The investigation into some selected verticality and horizontality markers in the opinions of advocates general of the Court of Justice of the European Union has shown that in English markers of the vertical arrangement are productively employed to render the metaphor POWER/ CONTROL IS UP. Markers of the horizontal dimension are employed in the realisation of the metaphors LEGAL ARGUMENT/DISPUTE IS SPATIAL OPPOSITION and UNACCEPTABLE ACTIVITY IS CROSSING THE BOUNDARIES. All three of them are related to law and legal matters. The other metaphors identified in the corpus, TIME IS SPACE and MORE (IMPORTANT, INTENSIVE) IS UP, are not specifically legal.

The metaphor of CONTROL seems to be deeply entrenched in English, which is attested primarily in the expression *under the law* or numerous variations thereof; they made up over half of the data corpus. The metaphor of ARGUMENT/ DISPUTE seems also well-known in the English speaking world partially due to the widely-spread formulaic expression *before the court* and its numerous varieties. The metaphor of CROSSING THE BOUNDARIES is attested in expressions with *beyond* related to different limitations and restrictions; not only legal.

In translation into Lithuanian, an established English verticality schema identifiable in the POWER/ CONTROL IS UP metaphor is only preserved in some cases with *high* and *low*, mainly used in reference to courts. The pattern with *under* (e.g. *under the law*) in Lithuanian is mostly rendered through a metaphor based on horizontal dimension (e.g. *pagal įstatymą* 'along the law') presumably suggesting a relationship of partnership rather than control. The metaphor LEGAL ARGUMENT/DISPUTE IS SPATIAL OPPOSITION is lost in most cases in Lithuanian, even though in less formal contexts several expressions referring to standing before the court and suggesting a relationship of opposition may be found. The evaluative

metaphor UNACCEPTABLE ACTIVITY IS CROSSING THE BOUNDARIES based on a horizontal schema is rendered in Lithuanian through a metaphor based on a vertical schema referring to (not) exceeding the upper limit. The metaphor TIME IS SPACE is only partially preserved when a prior event is conceptualised as being in opposition. MORE IS UP is mostly rendered in Lithuanian by referring to (three-dimensional) size: small or large (taxes, duties, costs), except for concepts understood in terms of levels, such as high(est) level of responsibility.

Despite a limited corpus, this investigation has demonstrated that the superiority of law often understood as obvious or fundamental is not necessarily so obvious in cultures other than English; no such clear-cut tendency was identified in the Lithuanian linguistic data. Legal dispute based on spatial opposition is much less pervasive in Lithuanian than in English, which may be treated as a signal of different conceptualisation of deeply entrenched legal relationships. Implications of such discrepancy may be a topic for further discussion.

Acknowledgements

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Op_9a: Generalinio advokato Maciej Szpunar nuomonė ECLI:EU:C: 2015:585 pateikta 2015 m. rugsėjo 10 d. byloje C-315/14 Marchon Germany GmbH prieš Yvonne Karaszkiewicz. http://curia.europa.eu/juris/document/document.jsf?text=anddocid=167325andpageIndex=0anddoclang=LTandmode=reqanddir=andocc=firstandpart=1andcid=360929.

Op_10: Opinion of Advocate General Sharpston ECLI:EU:C:2013:747 delivered on 14 November 2013 in Case C-390/12 Robert Pfleger, Autoart as, Mladen Vucicevic, Maroxx Software GmbH and Ing. Hans-Jörg Zehetner. http://curia.europa.eu/juris/document/document.jsf?text=anddocid=144495andpageIndex=0anddoclang=ENandmode=reqanddir=andocc=firstandpart=1andcid=360929.

Op_10a: Generalinės advokatės Eleanor Sharpston nuomonė ECLI:EU:C: 2013:747 pateikta 2013 m. lapkričio 14 d. byloje C-390/12 Robert Pfleger, Autoart as, Mladen Vucicevic, Maroxx Software GmbH, Ing. Hans-Jörg Zehetner. http://curia.europa.eu/juris/document/document.jsf?text=anddocid=144495andpageIndex=0anddoclang=LTandmode=reqanddir=andocc=firstandpart=1andcid=360929.

Op_11: Opinion of Advocate General Sharpston ECLI:EU:C:2015:408 delivered on 18 June 2015 in Case C-298/14 Alain Laurent Brouillard v Jury du concours de recrutement de référendaires près la Cour de cassation and État belge. http://curia.europa.eu/juris/document/document.jsf?text=anddocid=165103andpageIndex=0anddoclang=ENandmode=reqanddir=andocc=firstandpart=1andcid=360929.

Op_11a: Generalinės advokatės Eleanor Sharpston nuomonė ECLI:EU:C: 2015:408 pateikta 2015 m. birželio 18 d. byloje C-298/14 Alain Laurent

Brouillard prieš Jury du concours de recrutement de référendaires près la Cour de cassation ir Belgijos valstybę.
http://curia.europa.eu/juris/document/document.jsf?text=anddocid=165103andpageIndex=0anddoclang=LTandmode=reqanddir=andocc=firstandpart=1andcid=360929.

Op_12: Opinion of Advocate General Sharpston ECLI:EU:C:2015:155 delivered on 5 March 2015 in Case C-9/14 Staatssecretaris van Financiën v D.G. Kieback.
http://curia.europa.eu/juris/document/document.jsf?text=anddocid=162699andpageIndex=0anddoclang=ENandmode=reqanddir=andocc=firstandpart=1andcid=360929.

Op_12a: Generalinės advokatės Eleanor Sharpston nuomonė ECLI:EU:C:2015:155 pateikta 2015 m. kovo 5 d. byloje C-9/14 Staatssecretaris van Financiën prieš D.G. Kieback.
http://curia.europa.eu/juris/document/document.jsf?text=anddocid=162699andpageIndex=0anddoclang=LTandmode=reqanddir=andocc=firstandpart=1andcid=360929.

Op_13: Opinion of Advocate General *Szpunar ECLI:EU:C:2014:2338* delivered on 5 November 2014 in Case C-477/13 Eintragungsausschuss bei der Bayerischen Architektenkammer v Hans Angerer.
http://curia.europa.eu/juris/document/document.jsf?text=anddocid=159261andpageIndex=0anddoclang=ENandmode=reqanddir=andocc=firstandpart=1andcid=360929.

Op_13a: Generalinio advokato Maciej Szpunar nuomonė *ECLI:EU:C:2014:2338 pateikta 2014 m. lapkričio 5 d. byloje C-477/13* Eintragungsausschuss bei der Bayerischen Architektenkammer prieš Hans Angerer.
http://curia.europa.eu/juris/document/document.jsf?text=anddocid=159261andpageIndex=0anddoclang=LTandmode=reqanddir=andocc=firstandpart=1andcid=360929.

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http://curia.europa.eu/juris/document/document.jsf?text=anddocid=153305andpageIndex=0anddoclang=ENandmode=reqanddir=andocc=firstandpart=1andcid=360929.

Op_14a: Generalinio advokato Nils Wahl nuomonė ECLI:EU:C:2014:1358 pateikta 2014 m. gegužės 5 d. byloje C-270/13 Iraklis Haralambidis prieš Calogero Casilli.

http://curia.europa.eu/juris/document/document.jsf?text=anddocid=153305andpageIndex=0anddoclang=LTandmode=reqanddir=andocc=firstandpart=1andcid=360929.

Op_15: Opinion of Advocate General Wahl ECLI:EU:C:2014:265 delivered on 10 April 2014 in joined Cases C-58/13 and C-59/13 Angelo Alberto Torresi v Consiglio dell'Ordine degli Avvocati di Macerata and Pierfrancesco Torresi v Consiglio dell'Ordine degli Avvocati di Macerata.
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Op_15a: Generalinio advokato Nils Wahl nuomonė ECLI:EU:C:2014:265 pateikta 2014 m. balandžio 10 d. bylose C-58/13 ir C-59/13 Angelo Alberto Torresi prieš Consiglio dell'Ordine degli Avvocati di Macerata ir Pierfrancesco Torresi prieš Consiglio dell'Ordine degli Avvocati di Macerata.
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Op_16a: Generalinio advokato Nils Wahl nuomonė ECLI:EU:C:2013:333 pateikta 2013 m. gegužės 29 d. byloje C-95/12 Europos Komisija prieš Vokietijos Federacinę Respubliką.
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Op_17: Opinion of Advocate General *Jääskinen* ECLI:EU:C:2014:15 delivered on 16 January 2014 in joined Cases C-24/12 and C-27/12 X BV and TBG Limited.
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Op_17a: Generalinio advokato Niilo *Jääskinen nuomonė* ECLI:EU:C:2014:15 pateikta 2014 m. sausio 16 d. sujungtose bylose C-24/12 ir C-27/12 X BV ir TBG Limited.

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Op_18: Opinion of Advocate General Sharpston ECLI:EU:C:2012:474 delivered on 19 July 2012 in Case C-342/10 European Commission v Republic of Finland. http://curia.europa.eu/juris/document/document.jsf?text=anddocid=125203andpageIndex=0anddoclang=ENandmode=reqanddir=andocc=firstandpart=1andcid=360929.

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CHAPTER 6

METAPHOR AS A FOUNDATION FOR JUDGES' REASONING AND NARRATIVES IN SENTENCING REMARKS

MIGUEL ÁNGEL CAMPOS-PARDILLOS

Abstract

One of the most interesting—and perhaps least studied—stages of criminal proceedings in common law countries, is the sentencing remarks: when the jury has already rendered a verdict of guilt, the judge orally hands down the sentence. This legal subgenre is especially attractive because it allows the judge to establish the "official" narrative of the case, the "judicial truth", including the account of the trial itself and, most important of all, why a specific sentence has been imposed given the circumstances of the case, as established and interpreted by the judge. From the argumentative point of view, this characterisation of events contains hard facts, but also a great degree of persuasion, through which judges aim to convey the impact of the crime to the offender, the victims, their families and society at large. One of the main tools for this characterisation is the use of metaphor, which is applied to the events themselves ("you concocted a tale"), the motivation therefor ("bait to lure her to her death"), the perpetrator ("you are a sexual predator") and the impact upon the victims ("devastating impact on the whole family"). Our study will be based on metaphors from a number of sentencing remarks delivered in 2020 in English courts, showing how figurative language helps judges to "colour" their argumentation while providing reasons for their judgments, thus sending the desired message to those in the courtroom (not only to the offender) and, through traditional media and online coverage, to the whole of society.

Keywords: courtroom language, legal language, legal metaphor, sentencing remarks

1. The sentencing remarks and the "official narrative"

In common law jurisdictions, where justice is predominantly oral (compared to the civil law systems, which show a preference for written documents), criminal trials end with what has come to be known as "sentencing remarks". In England and Wales, once a jury has delivered a verdict of "guilty", and after a sentencing phase in which the judge weighs all factors increasing or reducing the punishment imposed, the offender is brought before the court for the sentence to be delivered. When doing so, the judge is required to explain to the perpetrator the factors he or she has considered (aggravating or attenuating factors) and, where there is a life sentence (mandatory for murder), the conditions for potential release. More specifically, Section 174 of the Criminal Justice Act 2003 imposes a "general statutory duty on courts to give reasons for, and explain the effect of, the sentence passed", unless the sentence is fixed by law.

However, as we have noted elsewhere (Campos-Pardillos 2020), this stage of the proceedings fulfils a much greater role than merely explaining the sentence to the offender, if we consider the audience for these remarks. Of course, the primary addressees are the defendant, although he or she may choose not to be present, the victim and the victim's family and entourage, and at times other participants in the case (enforcement agencies and/or counsel, who are usually commended for their efforts and good work). But dissemination of this discourse does not end in the courtroom: the wording of Section 174 mentions "the offender and *other interested parties*" (our italics), a general term which not only includes victims and their families. Inevitably, sentencing remarks have an exemplary role, and as such, they have a secondary addressee in mind, namely, the whole of society. This component, which in the past might have been restricted to very high-profile trials worthy of media attention, has been enhanced over the past decades by an increased consideration of "accountability" on the part of the powers of the state and a desire for public "legitimacy", which has replaced a paternalistic tendency whereby public opinion was not to be considered, but marginalised or even "managed" or "contained" (Hough and Kirby 2013). Therefore, sentencing remarks are not only "exemplary" in that they act as a deterrent against similar offending by others, but also attempt to reinforce the connection between the judiciary and society by showing that "justice has been made". It is interesting to point out that the Criminal Justice Act was amended in 2012 to specify that such explanations were to be given "in ordinary language", such "ordinary" words allowing judges to send a message of their own beyond the restrictions of purely statutory language.

It may be very well said that the addressees of sentencing remarks have greatly changed over the last decades thanks to technology. In the past, sentencing remarks were reported by the press, but the advent of the Internet has facilitated unlimited dissemination, providing a unique opportunity for justice to speak to society about its role. More importantly, the Internet allows judges to provide a version of the sentencing remarks no longer mediated by the way they are transmitted by the press: in the past, readers were reliant on versions by journalists and at times the factors having an impact upon the sentence were not properly reported (Roberts and Hough 2011, 269). Nevertheless, while all sentencing remarks in England and Wales are recorded and stored on tape, such recordings are not made available (Padfield 2013), and it is only the "approved" version of some cases that is eventually published on the website of the UK judiciary.[1] Controlled, written publication may influence the very style of sentencing remarks, which are in principle oral, but are usually written beforehand, read, and then published in a written form: this makes it possible, at first sight, to "control detail" (Tugendhat 2016), but also has consequences of a stylistic nature, since little is left to improvisation and more time is devoted, not only to content, but also to form. Regrettably, not much is known as to which sentencing remarks are published compared to which are not: in an answer to a request for public information in March 2014, the Ministry of Justice stated that publicity is based on three criteria: (1) "actual or predicted level of media interest", (2) whether "the Lord Chief Justice or another senior judge might flag a case as one that gives specific guidance on legal issues such as sentencing", and (3) availability, as "not all judges have full written script of the remarks they make at the time the sentence is handed down" (Ministry of Justice 2014). As can be seen, none of the criteria are transparent or objective (e.g. length of sentence), which makes it impossible to conduct any reliable quantitative, evidence-based analysis.

Until fairly recently, sentencing remarks had received relatively little scholarly attention, probably because of their restricted availability (see above) or also because, unlike other courtroom genres, they are an "after-the-fact" stage, which occurs once the issue of guilt has been dealt with by the jury. This would place them at a disadvantage compared to other genres, like closing remarks or examination/cross-examination by counsel, which are very influential in jury persuasion. However, the last years have witnessed increased attention to this genre, and most interestingly, not only from a legal, but also a linguistic/stylistic point of view (e.g. disability, Sullivan 2017; gender issues, Potts and Weare 2017; Damiris, McKillop, Christensen, Rayment-McHugh et al. 2020; implicit vs. explicit attitudes,

[1] https://www.judiciary.uk/judgment-jurisdiction/crime.

Dai 2020), and it may be reasonably expected that such interest may continue thanks to online dissemination of sentencing remarks.

As a legal subgenre, sentencing remarks follow a cause-effect structure, where the judge first gives an account of the events and the circumstances of the trial, makes reference to the victims, provides a character description of the perpetrator, and then moves on to the sentencing considerations themselves, which are meant to follow from the previous remarks. In order to justify the sentence imposed, therefore, the judge develops a narrative of the events and a description of all participants, which is chronologically necessary, in that the sentence itself is not known until all the events are heard. Such events and character description are the final result of the contrast between the opposing narratives of the prosecution and the defence, and become the "judicial truth." This truth, as we shall see further on, discards all other versions, and is considered as the basis for sentencing, as is often explicitly said:

> I was the trial judge. The facts I now set out are those of which I am sure, having heard all the evidence. (R v Marcin Zdun)

As with all narratives aiming at establishing an "official" truth, all the elements contribute towards defining the objective and subjective details of the story to be transmitted to the audience. Some of them, for example, are the choice of detail which, out of context, may appear unnecessary, but contributes to increasing vividness and making the account "more real" (on detail in written judicial opinions, with different addressees and functions, but also related to severity of sentences, see Morra 2016). Note, for instance, this paragraph, where a seemingly unnecessary reference to the surroundings and the contents of the victim's shopping bag, stresses how normal life was disrupted by the perpetrator's actions:

> Your fourth and final victim was Michelle Samaraweera, who was 35 years old at the time of her encounter with you just after 1am on 30 May 2009 after she left the Somerfield store attached to the Texaco petrol station on Markhouse Road as she walked home along Queens Road, past an area where a children's playground is situated in a small park area, next to a community centre. She was carrying two Somerfield bags for life filled with £16 worth of groceries, comprising mainly snacks such as crisps, creme eggs and biscuits. (R v Aman Vyas)

From a stylistic point of view, this is a persuasive text, but it differs from other courtroom genres in that the judge does not seek to persuade, that is, move somebody to do something (as is the case of the prosecution trying to obtain a guilty verdict or the defence aiming for an acquittal), but to

convince the audience (which includes the whole of society) that the sentence imposed is the correct one by describing the reasoning and weighing process leading to such sentence. The emphasis at this stage does not lie in the "basic" events, i.e. "guilt" as counter to the "presumption of innocence", since that is the role of the jury, but rather the "(not-so-) peripheral" details which will justify the severity of the punishment. Seemingly, the purpose is that the offender may understand, and the victims or the victims' families may accept, the proportionality between the crime and the sentence, but given the wider dissemination of sentencing remarks, the judge is not only speaking to those in the courtroom, but to all citizens, who must be satisfied that justice has been at work and that the punishment fits the crime.

In this respect, what takes place during sentencing remarks contains two components: explanation and justification. "Explanation" is the rational, objective aspect, the cause-effect process in which judges apply sentencing guidelines and take into account or disregard aggravating or mitigating circumstances. However, what may be of interest to the linguist is the "justification" part, where legitimation is sought from audiences. In this way, this component of sentencing remarks comes close to what has been termed "legitimation discourses" (cf. Van Leeuwen 2007; Campos-Pardillos 2021), where institutions aim to present a positive image of what they do and why they do it. As has been frequently observed, discourses about law and its legitimation often resort to metaphor, not only in order to facilitate the understanding of abstract concepts, but also to establish what is "right" and what is "wrong", or in other words, what is "just" (Campos-Pardillos 2017). In our study, we shall concentrate on the metaphors employed to characterise the elements of the case (the crime itself, perpetrator, victims, reasoning), and will see how they transmit a message ("the sentence is fair and proportionate") by activating and reinforcing mental images in audiences.

2. Our analysis

In order to carry out our study, we have selected all sentencing remarks issued in 2020 and published in the official Courts and Tribunals Judiciary website (www.judiciary.uk). The total number of documents was 23, with a total word count of 61,181 words (see Appendix for cases, dates and judges).

The metaphors were extracted manually using the MIP methodology (Pragglejaz Group 2007), according to which a word or expression is considered metaphorical if its meaning within a given context differs from

its basic meaning, but a figurative connection may be established between the two of them. As our purpose was more qualitative than quantitative, this paper focuses on the metaphors themselves and their persuasive power, and not on their quantitative presence, although where applicable it will be indicated if a metaphor is especially frequent.

Where applicable, mention will be made of whether the metaphor has already become a part of statutory or case law language. Such resource to pre-existing metaphorical stock may be of relevance, since the metaphor retains the persuasive value towards audiences, but at times it can hardly be considered a stylistic choice by the judge, but rather an almost unavoidable use of pre-established terminology. This is confirmed by the fact that a given image is used by statutes or official documents or by other judges (on "deliberate" vs. "non-deliberate" metaphors, see Steen 2017 and Reijnierse 2017). However, neither the use of previously defined terms nor resorting to common metaphors may be deemed to eliminate their evocative power: by embracing pre-existent images, judges conform to a given ideology or set of values, commonly present in the law and very often in everyday language.

3. Discussion

In this section, we shall examine some of the most frequent and salient metaphors according to the target domain or "tenor", i.e. the person, object or event/process being described. While this departs from other studies where classifications are based on the vehicle or source domain (such as war metaphors, path metaphors, etc.), it is our belief that, from the point of view of the general purpose of the narrative, the reader may obtain a better understanding of the processes at work towards the justification of the sentence imposed by focusing on each of them according to the target domain to which the metaphors are applied.

3.1. The perpetrator's character and actions

Given the cause-effect organisation of sentencing remarks, an adequate description of perpetrators and their actions is required so that the punishment is seen to fit both the offence and the offender. In order to describe the perpetrator and his/her course of action, judges resort to different source domains, having to do with various arts, such as painting or story-telling. Within the category of "literature-related metaphors", OFFENDERS ARE STORY TELLERS, with the added connotation that "a story is a false account of events" (after all, "literature" is also called "fiction"). It

must be remembered that the contest taking place during the trial between the opposite narratives of events has already finished, and therefore there is no longer a clash of narratives, but the difference between "the truth", on the one hand, and "stories", "tales" and other accounts on the other, which have been either unsupported or directly proven to be false. The audience is thus reminded of the artificial and untrue nature of alibis or explanations provided by offenders, whose characterisation is reinforced by the conclusion that "the offender is not only a murderer/rapist/etc. but also a liar":

(1) *The **story** that you had told the ambulance crew and the police was not true*. (R v John Doak)
(2) (…) *you invented, I am satisfied, a **story** that you knew May, and indeed had had consensual sexual intercourse with her* (R v Aman Vyas)
(3) *(…) you **concocted a tale** as to how this was a consensual sexual encounter gone wrong* (R v Aman Vyas)

At times, the narrative moves to the stage (OFFENDERS ARE DRAMA PLAYERS), especially when the offender's actions are intended to do wrong or deceive:

(4) *I turn to your **part** in this tragic story, Mr Rebelo*. (R v Bernard Rebelo)
(5) *I accept that you **played no part** in instigating that violence.* (R v Vasilios Ofogeli)
(6) *You also **played your part** in the prolonged deception of social workers.* (R v Jamie Chadwick)

In some other cases, the source domain for descriptions is that of painting, with clear stylistic preferences: out of seven occurrences, five are by the same judge (Justice Yip), twice even with the same collocation:

(7) *I have considered the psychiatric reports obtained by the prosecution and defence. They paint a **consistent picture**.* (R v Andrew Wadsworth)
(8) *A **consistent picture** emerges of a hard-working, diligent and caring doctor.* (R v Shahid Khan)

Judges also display a number of images shaping up the perception of the offence itself. In order to establish a pattern of criminal activity, at times it does not suffice to say that a crime is an "attack", since this could be a one-

time event, such difference being important towards rehabilitation and future release. The source domain of war is very powerful in this respect, as it carries the implication of a sustained, consistent activity, as shown by the Sentencing Guidelines themselves, which contain the image of "campaign" (e.g. "Offences may be of such severity, for example involving a campaign of rape, that sentences of 20 years and above may be appropriate"). The CRIMES ARE WAR metaphor, which is of great relevance towards the justification of punitive measures, is not only maintained (with the ideological consequences this entails), but also expanded:

(9) *It would not over-state your conduct to describe it as a* ***campaign*** *of rape.* (R v Aman Vyas)
(10) *This was a* ***campaign*** *of harassment of B. It involved planning, to get her alone with you. (*R v Charles Elphicke)
(11) *You first* ***struck*** *on the night of 23 March 2009. April was a 59-year-old stroke victim living in a flat in Walthamstow relatively close to your home address at the time.* (R v Aman Vyas)
(12) *A ten-year* ***battle*** *followed as you fought tooth and nail to avoid extradition to England.* (R v Aman Vyas)

In order to specifically describe the perpetrator's actions, their seriousness and gravity are emphasised through the source domain of hunting:

(13) *She told the jury she was shocked and terrified by what you had done; she felt* ***very trapped.*** (R v Charles Elphicke)
(14) *But you got them alone with you,* ***lured them into*** *a false sense of security with wine and work chat.* (R v Charles Elphicke)
(15) *You used Callum as* ***bait*** *to lure her to her death.* (R v Michael Samuel Cowey)
(16) *On the evidence, including the CCTV evidence, you were deliberately* ***stalking*** *her that evening as she went to Somerfield.* (R v Aman Vyas)

The metaphor of shooting (COMMITTING A CRIME IS SHOOTING) is a very visual one; while clearly lexicalised in most of its manifestations ("aim", "target"), in these contexts it is almost a topic-triggered metaphor (Koller 2003). From an argumentative point of view, it helps towards describing the offender in that, like the previous hunting metaphor, it conveys the idea that there is a previous intention to commit a crime regardless of the victim and, as such, becomes an indication of the offender's character. Given that life sentences specify conditions for release after a given number of years, this may serve as justification for delaying release, if it ever takes place:

(17) *I am satisfied that it was their intention to specifically **target** this age group.* (R v Hashem Abedi)
(18) *In terms of culpability there was a significant degree of premeditation and the deliberate **targeting** of a vulnerable woman*. (R v Aman Vyas)
(19) *Lindsay was not **targeted** for any reason, other than that she was a lone woman*. (R v Rocky Marciano Price)
(20) *In your case I find aggravating features in the way you **targeted** those women, exploiting their obvious vulnerability.* (R v Zahid Younis)

A similar picture is that in which the perpetrator has the same previous intention to commit a crime and simply searches for a victim, but acting as a wild animal. Thus, the scenario becomes THE OFFENDER IS A PREDATOR and THE VICTIM IS THE PREY. This identification, which is widespread in English-speaking media (see the experiments by Thibodeau and Boroditsky 2011), allows the judge to introduce all the negative connotations of animals as applied to the offender (interestingly, without dehumanizing the victim). As before, this maintains the notion that the offender is naturally inclined to commit a given crime, a factor that might justify serving a longer sentence or not being released after the minimum period:

(21) *You are a sexual **predator** who used your success and respectability as a cover.* (R v Charles Elphicke)
(22) *You have **preyed** upon the vulnerable with superficial charm.* (R v Zahid Younis)
(23) *In the spring of 2009, there was a stranger rapist prowling the streets of Walthamstow in East London looking for his **prey***. (R v Aman Vyas)
(24) *You had already been responsible for a series of serious assaults of increasing **ferocity***. (R v Aman Vyas)

Regarding the offence itself, a number of metaphors are based on the offence becoming a physical entity with dimensions, and occurring in a physical context:

(25) *The reality is that your offending cannot be **compartmentalised**, and I must select a minimum term in relation to Count 1 which reflects the totality of your offending on that day, set against your history of other serious violence*. (R v Andrew Wadsworth)

(26) *The matter has **weighed** heavily on you and your family, as it has on Mr Hales' family.* (R v Shahid Khan)
(27) *Your offending occurred against a **backdrop** of successive bankruptcies*. (R v Dominic Chappell)

Once offences acquire a tangible presence, they can be described as things to be hidden, as in OFFENCES ARE RUBBISH; as a logical consequence, LIES ARE A VEIL, and DISCOVERING IS SEEING:

(28) *She tried to **sweep this under the carpet** and simply said to you that this must not happen again.* (R v Charles Elphicke)
(29) *The jury **saw through** your blatant lies.* (R v Jamie Chadwick)

3.2. Metaphors of victims

The sentencing process in common law countries provides the victims with the right to be heard, and the consequences of the offences for the victims are part of the reasoning process behind the sentence imposed. In order to describe such consequences, institutional legal discourse has embraced the terminology of physical damage, even if the consequences are also (or mainly) psychological, through the expression "victim impact statement (VIS)". In this way, the physical perception of the consequences of a crime upon the victims becomes almost compulsory and is almost invariably found in all sentencing remarks (PSYCHOLOGICAL DAMAGE IS PHYSICAL VIOLENCE):

(30) *Their moving statements illustrate the **impact** on his wife, three adult children and his youngest daughter, who was only 11 years old when her father died.* (R v Shahid Khan)
(31) *I have also had careful regard to the victim **impact** statement from Michelle Samaraweera's sister which makes painful reading, and which I bear well in mind*. (R v Aman Vyas)

A reinforced version of this image is PSYCHOLOGICAL DAMAGE IS PHYSICAL DESTRUCTION. It may be noted that "devastate" is used in eight of the 23 sentencing remarks analysed, usually combined with the "impact" metaphor, and often applied to the victim's families, in order to emphasise the extent of the damage caused:

(32) *I have heard the statements from his parents about the **devastating** impact on the whole family.* (R v Jonty Bravery)

(33) *The **devastating** impact of your actions upon Andre Bent's family cannot be overstated.* (R v Vasilios Ofogeli)
(34) *His **devastating** loss in these terrible circumstances will follow his family forever.* (R v Long and others)
(35) *That is to achieve appropriate punishment for the **devastating** harm caused to the family of the deceased*. (R v Shahid Khan)

Similar images of physical destruction can be found when describing psychological damage to the victims themselves:

(36) *Before you killed her over a period of years, according to her mother, you "**destroyed**" her by **undermining** her self-confidence and taking away her happiness* (R v Michael Samuel Cowey)
(37) *May explains that her life has been **destroyed** by you, she has flashbacks of the rapes, she cannot sleep properly and she suffers from post-traumatic stress disorder*. (R v Aman Vyas)

The solid nature of the damage turns a sequence of crimes and the consequences thereof into a "path" (again, conveying the idea that offending has been repeated, intentional and purposeful):

(38) *Quite apart from such tragic loss of life, you left behind you a **trail** of physical and psychological injuries*. (R v Aman Vyas)

In the case of relatives and friends, the fact that murdered victims will no longer be with them is seen as a physical void:

(39) *The impact statements I have read speak of the **gaps** those women have left in the lives of others.* (R v Zahid Younis)
(40) *Further, you gave no thought to the enormous **holes** that your selfish actions would leave in the lives of their families and friends.* (R v Andrei Mihai Simion Munteanu)

Nevertheless, crime does not only bring about destruction and void spaces, but also darkness upon the victims and their families. In order to portray the victims and their lives, metaphors of "light" are applied (LIFE IS A LIGHT), in such a way that killing is equated to extinguishing a light:

(41) *His mother describes him as a happy loving son who was the **light** of her life.* (R v Vasilios Ofogeli)
(42) *The diverse, talented and extraordinary individuals whose lives have either been **extinguished** or forever blighted by the physical and psychological effects of the explosion.* (R v Hashem Abedi)

(43) *Despite the love that they showed you, I am satisfied that you had no empathy for this remarkable couple as you cruelly* ***snuffed out*** *their lives.* (R v Andrei Mihai Simion Munteanu)

The effects on victims are also described in terms of physical violence or partial amputation (A FRIEND/RELATIVE IS A PART OF ONE'S BODY), and also the victim's fear is described through the image A VICTIM'S HOME IS A PRISON. This may become very persuasive in order to justify a heavier prison sentence for the offender who has caused such "imprisonment" (an extension of the "eye for an eye" metaphor, the foundation of retributive justice):

(44) *All of whom have felt as though* ***part of their hearts have been torn*** *from them.* (R v Hashem Abedi)
(45) *April's* ***home was turned into a prison*** *for her, she was afraid to go out, she suffered flashbacks and depressive thoughts.* (R v Aman Vyas)

3.3. Metaphors of argumentation

Argumentation, as an intellectual activity, is hard to explain to other people: the human mind compares abstracts ideas so as to reach a conclusion, which though abstract, may have physical, concrete consequences. Therefore, metaphors are not only used in argumentation in order to convince or persuade about the content, but also to explain in concrete, understandable terms the process of argumenting itself. In order to see reasoning as a process involving physical properties, the general metaphor IMPORTANCE IS WEIGHT is basic in many languages, including English ("weighty arguments" are convincing, we "weigh" the pros and cons):

(46) *This factor cannot* ***weigh heavily*** *in your favour, given the wrong that you have done to Eloise Parry and her family.* (R v Bernard Rebelo)
(47) *In so far as mitigating factors are concerned, one factor which does* ***weigh*** *in the balance in the accused's favour is of course that he has no relevant previous convictions*. (R v Hashem Abedi)

Seen in this way, the act of sentencing is that of "balancing", a very visual metaphor central to legal discourse (the law being represented as "scales"). In this case, the scales are tipped towards one side or the other depending

on whether aggravating and mitigating circumstances possess greater "weight":

(48) *I have **balanced** all the aggravating and mitigating factors I have identified in arriving at the final minimum term which I impose.* (R v Jamie Chadwick)
(49) ***Balancing** all those factors I set the minimum term at 15 years.* (R v Jonty Bravery)
(50) *However, taking account of everything, I do find that the **balance** is tipped in favour of suspending the sentence.* (R v Shahid Khan)

Reasoning and certainty are measured in terms of physical strength as well, i.e. ARGUMENTS ARE PHYSICAL FORCE and CONVINCING/BEING CONVINCED IS A FIGHT WHERE STRENGTH PREVAILS:

(51) *In reaching that view, I am **fortified** by your remark to the police upon your arrest that you wanted to see if you could do it.* (R v Andrei Mihai Simion Munteanu)
(52) *You have been convicted by a **strong** prosecution case*. (R v Zahid Younis)

Factors taken into account in argumentation can also be seen as objects with physical properties:

(53) *Very often these two factors **overlap** where a child has been killed by someone left to care for them. They are two **sides** of the same thing.* (R v Jamie Chadwick)

A lexicalised metaphor, but still creating a vivid image, is that equating responsibility for proving guilt to a burden, and thus RESPONSIBILITY IS AN OBJECT WITH PHYSICAL WEIGHT. The metaphor, with a strong tradition in judicial culture and present in many languages (Campos-Pardillos 2016), reflects the fact that the prosecution is forced to carry a weight:

(54) *Placing as it does, in a criminal context, the **burden** on the prosecution to prove dishonesty to the criminal standard, as they have*. (R v Charles Elphicke)
(55) *It was a long, complex, and documentary **heavy** investigation.* (R v Charles Elphicke)

3.4. Metaphors of sentencing

As many actions in human life which are seen in terms of progress towards a point, sentencing is described as a path (following Sentencing "Guidelines"), which involves the judge "moving" in a given direction. Within this scenario, ordering custodial sentences is viewed in physical terms, those of entering a place or going past a given point. This source domain is here a non-deliberate metaphorical scenario, since the statutory framework uses such terminology: the Criminal Justice Act 2003 establishes the "starting points" in Section 270, and the phrase "starting point" appears eleven times in the Act. Nevertheless, even if it is part of statutory language, the usage of this source domain is highly persuasive because it depicts sentencing as a process, and not as a sudden decision taken on the spur of the moment. In this way, the frequent usage of this metaphor makes it possible for audiences (including society in general) to follow each step of the process so that the final purpose of sentencing remarks, i.e. justification of the sentence, is achieved.

The various possibilities being conceived of as a path, the basis for calculation and the final sentence are seen as the beginning and the ending of the path (although the expression "end point" itself does not appear as such in statutory documents):

(56) *Your offending is in Category 4 (loss between £500,000 and £2,000,000), with a **starting point** for category 4A of 7 years' imprisonment*. (R v Dominic Chappell)
(57) *The **first step**, in determining the minimum term, is for me to assess the seriousness of your offending.* (R v Aman Vyas)
(58) *That will not be the **end point** in this case.* (R v Jamie Chadwick)
(59) *However, even for that offence alone, that would not be the **end point** or anything like it.* (R v Andrew Wadsworth)

At times, the "path" source domain is combined with construction metaphors (A SENTENCE IS A BUILDING):

(60) *Sentences are **constructed** in a series of **steps**, although this is an exceptional case, I must follow those steps and apply the relevant guidelines*. (R v Jonty Bravery)

Any instructions to judges in sentencing, therefore, constitute "guidance". Within the domain of progress, the "guidance" component provides an idea of authority and reliability, as it suggests that the judge has acted following logical steps:

(61) *As regards to **guidance** in relation to the determination of the minimum terms for these offences*. (R v Hashem Abedi)
(62) *I must decide what the determinate term would be for an adult who had contested the trial and been found guilty, I take that as a **guide**.* (R v Jonty Bravery)

This is, however, not the only movement metaphor in the argumentation of sentencing, as CONSIDERING A TOPIC IS MOVEMENT TOWARDS SUCH TOPIC:

(63) *It is common ground that the appropriate **approach** is to have regard to the totality of the offending.* (R v Dominic Chappell)
(64) *I have already explained the **approach** which I have taken in relation to the criminality involved in count 23.* (R v Hashem Abedi)

As part of the progress metaphor, the difference between a custodial and a non-custodial sentence is seen as going past a certain point or entering a space. This image is important as it is one of the details the addressee, but also the public, may pay attention to, and is better visualised in these terms (the "threshold" is literally crossed by the offender when entering the prison):

(65) *First, I am satisfied that the custody **threshold** is passed for each of these offences.* (R v Charles Elphicke)
(66) *There is no doubt that the custody **threshold** is passed.* (R v Muhammad Rodwan)

Given that sentencing is a "path with guidelines", it logically follows that not applying such guidelines equals departing from a path. Such terminology is also part of the Criminal Justice Act ("state its reason for any departure from that starting point", Section 270 (2) (a)), and is the image used by judges in order to explain that they have not "followed" the calculations as prescribed. The source domain, regardless of whether the path is departed from, conveys the message that the process is a clearly established one (like the "guides/guidelines" we saw earlier), which reinforces the notion of fairness and justice:

(67) *Those would be the steps in reaching a determinate sentence. They only provide a framework. This is an exceptional case and I am not bound by that guide. Where there is good reason, as in this case, I am obliged to **depart** from that guide.* (R v Jonty Bravery)

Unlike other components of the sentencing remarks we have seen so far, sentences are "quantitative": while suffering or intentions cannot be measured, and are therefore abstract concepts which would warrant the use of metaphors for easier comprehension, sentences are measured specifically in terms of years, months and days. This indicates that the use of metaphors is not only determined by the abstract/concrete factor, but also by the importance of an element within a persuasive process and the desire that it may be focused on. In this way, the public is more likely to concentrate on the length of the sentence as the main content of the remarks.

In addition to the inevitable metaphorical nature of language (many expressions are figurative by themselves), the metaphors "colour" what may be seen by the general public as an excessively lenient or harsh sentence. This is of special relevance because of the importance of public perception of sentences, which, according to some authors, has resulted in a worldwide increase in the severity of criminal punishment in spite of a reduction in crime rates in most jurisdictions (Roberts, Stalans, Indemaur, and Hough 2003, viii). Thus, expressing in graphic terms the conditions of the sentence serves an key purpose; where the sentence may seem lenient, judges are "protecting" themselves from media criticism (*excusatio*), whereas with harsher sentences the punitive intention is underlined.

For the element of time and gravity in the sentence, metaphors of size and physical dimensions (a sentence is an object with physical properties) are used: while both time and space can be measured, space is better perceived than time. Therefore, sentences are also described in terms of MORE IS UP, LESS IS DOWN:

(68) *However, suspicion cannot form any basis for* ***uplifting*** *the sentence in this case.* (R v Jamie Chadwick)
(69) *I consider that in relation to each victim the multiple harm factors taken together with the aggravating factors justify* ***an uplift towards the very top*** *of the sentencing range.* (R v Aman Vyas)
(70) *That would have required a substantial* ***upward*** *adjustment because of the exceptionally* ***high*** *seriousness of the killing.* (R v Long and others)

As can be seen in the previous example, both the seriousness of the crime and the sentence are considered in physical terms, either of size or vertical position. Both dimensions being present and related, this leads in turn to the issue of proportionality in sentencing, one of the almost obligatory components of sentencing remarks, which nonetheless is expressed in figurative terms (THE CRIME IS LARGE, THEREFORE THE SENTENCE IS LONG):

(71) *To ensure that the overall sentence is **proportionate** to the criminality involved in these offences, both in terms of culpability and harm*. (R v Hashem Abedi)
(72) *Given the need to adopt a **proportionate** approach: properly reflecting the seriousness of your offending behaviour ...* (R v Sarah O'Brien and Martin Currie)

The issue of proportionality is widely exploited, also in relative terms, so that all the elements of the crime are also seen in terms of size and mathematical proportion:

(73) *I have regard also to the guideline for sentencing young offenders, and the need to avoid allowing a fairly **minor** difference in the ages of the offenders resulting in a **disproportionate** difference in sentence.* (R v Long and others)

The sentence is also depicted as something with physical weight, a burden. In this case, the "burden" is applied to the suffering by the offender, which allows judges to explain that the punishment has measurable consequences (in terms of weight, beyond the "time" implied by the duration of the sentence):

(74) *I adjust for totality, and to recognise the additional **burden** of a sentence of imprisonment during the Covid pandemic*. (R v Charles Elphicke)
(75) *I bear in mind the additional **burdens** involved in a prison sentence served at the present time*. (R v Barysaite and Jakimovas)
(76) *In addition, you will pay the Prosecution costs which I recognise will be a significant financial **burden***. (R v Shahid Khan)

Also, guidelines for maximum and minimum sentences are seen as physical limitations, or even physical restraint (which is linked to the notions of "guidelines" and "departing" we saw earlier):

(77) *The court is not **rigidly bound by or limited** to the specific aggravating factors in paragraph 10.* (R v Rocky Marciano Price)
(78) *But this a retrial, and I am **limited** in the sentence I can impose.* (R v Bernard Rebelo)

Given the fact that the sentence has physical characteristics, it is only normal that sentencing requires handling of precision tools:

(79) *The final determination of the minimum term requires careful **calibration**.* (R v Hashem Abedi)

Finally, it is worth mentioning that, since sentencing involves calculations, such calculations are viewed in terms of CREDIT AND DISCOUNT. This again is a consequence of statutory language, as "credit" is used in both the Criminal Justice Act 2003 and the Legal Aid, Sentencing and Punishment of Offenders Act 2012:

(80) *You have accepted responsibility and pleaded guilty. That must be acknowledged by the full amount of **credit** and that would reduce that term to 20 years in the case of an adult.* (R v Jonty Bravery)
(81) *King having pleaded guilty in December and intimated his plea before that (full **credit**), Long in January (25% **credit**) and Bowers and Cole at the start of the first trial in March (10% **credit**).* (R v Long and others)
(82) *This is the principal way in which I address the fact of your age, and the **discount** in relation to the custodial term will be modest.* (R v Long and others)

4. Conclusions

When sentencing, judges have a great responsibility, not only towards the perpetrator and the victims, but also towards society at large: the punishment must not only fit the crime, but also be "seen" to fit the crime. This is especially relevant in common-law countries, where society is asked to participate at many stages of the administration of justice, and where the credibility and the role of the judiciary are heavily reliant on societal acceptance. Thus, when delivering sentencing remarks, judges go to great lengths to establish the details and the sentencing calculation, but also carry the burden of justification of the sentence so that it is not only fair, but also appears to be so. As we have mentioned above, the purpose is that justice may be seen as a trusted pillar of modern society and public faith in justice may be maintained. This does not only involve the judiciary, but is part of a general accountability effort by democratic states that view legitimacy as something which is not "granted", but must be earned, deserved and maintained by all powers of the state.

In order to justify the punishment imposed, judges engage in a persuasive exercise which makes the actual sentence a consequence of the events. To do so, they elaborate on the truth which has come from the confrontation between the defence and the prosecution, establishing a

narrative where all the elements of persuasion come into play, figurative language being one of the main ones. As has been seen, some of the metaphors are inevitable insofar as they are part of statutory terminology, but there is a wide margin for stylistic choice, whereby judges resort to metaphors in order to facilitate the perception of abstract concepts such as offenders' intentions, the suffering of victims, the reasoning process or the sentences themselves. Of course, it cannot be said that such metaphors are fully "deliberate", in that they explore uncharted source domains; rather, our analysis has found no single novel metaphor, and all of them are so ingrained in our perceptions that they appear as secondary definitions in most dictionaries and can hardly be described as exclusive to legal reasoning. However, this does not mean they do not retain convincing power, but quite the opposite: by conveying ideas through more or less predictable metaphors, the judge reinforces values pertaining to a given *status quo*. It must also be remembered that this specific instance of legal discourse has a lay addressee in mind, and therefore, while referring to legal issues, it must also use metaphors which are more or less expected and acceptable to a wider audience. Inevitably, the issue of ideology emerges again, since many of the metaphors are shared (or fuelled) by the media, often keen on over-reporting crime and their consequences.

Regarding further avenues of research, we are aware that this study involves a relatively small sample, especially considering that sentencing remarks, although influenced by common guidelines, are after all instances of idiosyncratic language produced by individuals, who may have both ideological and most importantly, stylistic preferences. Examples have been found in our study where a given metaphor is used in different legal cases by the same judge. In view of the personal nature of persuasive language, future investigations might concentrate on analysing sentencing remarks by a given judge, although this would face the constraints of whether these remarks are available or not for more detailed research (not all remarks are published online). In this respect, it is expected (or, rather, hoped) that the criteria for publication of sentencing remarks are clarified beyond vague and subjective appreciations of "media interest", and that wider and more general access is provided to such an important component of criminal justice.

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Appendix

Name of Case	Date issued	Crime(s)	Judge	Sentence(s)
R v Aman Vyas	August 20th	rape and murder	Bryan	Life (minimum 37 years)
R v Andrei Mihai Simion-Munteanu	February 13th	murder	Peperall	Life (minimum 32 years)
R v Andrew Wadsworth	December 3rd	murder and assault	Yip	Life (minimum 32 years)
R v Bernard Rebelo	March 11th	manslaughter	Whipple	7 years
R v Carl Delton Stanbury	February 24th	contempt	Edis	7 months
R v Charles Elphicke	September 15th	sexual assault	Whipple	2 years
R v Doak	November 9th	manslaughter	Cavanagh	3 years
R v Dominic Chappell	November 5th	tax fraud	Bryan	6 years
R v Hashem Abedi	August 20th	murder	Baker	Life (minimum 55 years)
R v Jamie Chadwick	November 3rd	murder	Yip	Life (minimum 18 years)
R v Jonty Bravery	June 26th	attempted murder	McGowan	Life (minimum 15 years)
R v Long, Bowers, Cole and King	July 31st	manslaughter / conspiracy to steal	Edis	16 years/13 years/13 years/2 years
R v Marcin Zdun	December 18th	murder	Chamberlain	Life (minimum 34 years)
R v Michael Samuel	December 11th	murder	Edis	Life (minimum 3 years)
R v Muhammad Rodwan	January 24th	wounding with intent	Carr	16 years (minimum 2/3)
R v Sarah O'Brien and Martin Currie	November 11th	murder/child cruelty	Eady	Life (minimum 22 years)/8 years
R v Rocky Marciano Price	August 14th	murder	Yip	Life (minimum 16 years)

Name of Case	Date issued	Crime(s)	Judge	Sentence(s)
R v Shahid Khan	November 10th	manslaughter	Yip	20 months' imprisonment (suspended)
R v Vasilios Ofogeli	May 21st	murder	Cutts	Life (minimum 20 years)
R v Zahid Younis	September 3rd	murder	Cheema-Grubb	Life (minimum 30 years)
R v Zak Bennett-Eko	December 1st	manslaughter by reason of diminished responsibility	Fraser	Hospital order
R v Barysaite-and Jakimovas	December 31st	murder	Lavender	Life (minimum 14 years)
R v Lee-Abbott	February 21st	murder	Cummings	Life (minimum 28 years)

CHAPTER 7

METAPHORS OF KAIROS

LINDA L. BERGER

Abstract

This chapter is based on rhetorical analysis of kairic metaphors used in judicial opinions in the federal appellate courts in the United States. Like ethos, pathos, and logos, kairos is one of the modes of persuasion recognised by the Greeks. The effective use of kairos, or the rhetorical sense of timing, may be illustrated when the legal author employs metaphors to provide memorable settings for arguments or judgments. Such kairic metaphors are of two types. First, they convey the impression that this occasion is the most opportune moment to decide a particular claim: the time is *ripe*; or second, they portray the essential moment that makes up the core of the claim as one crying out for action: the state's mode of execution is equivalent to *burning alive*.

Keywords: Kairos, metaphor, rhetoric, rhetorical situation, setting, conceptual frames, kairic moments.

1. Introduction

The Greeks distinguished two concepts for time: kairos and chronos. According to their distinction, kairos constitutes the right moment within the chronos, or the entire sequence of moments. Although it is a concept of timing, kairos encompasses the dimensions of time and space. Not only do speakers or writers grasp the most opportune *moment in time* within the larger world to assert a particular claim, they also identify the most essential moment or the *space in time* that will "stand in" for and exemplify the crux of the problem that necessitates the claim (Berger 2015, 148). When, for example, Columbus sought funding and support for a voyage to find a new

route to the East Indies, the plan was accepted by the king and queen of Spain at an opportune moment in time—after the Spanish had defeated the Moors and they thus could turn their attention to something new—and his advocate identified an essential argument—that the cost, though high, was small compared with the voyage's potential benefits to church and country (Kidner, Bucur, Mathisen, McKee et al. 2013, 386).

The rhetorical concept of kairos is akin to the storytelling concept of setting: it requires us to fit our argument to the right time and place (Kinneavy 1986, 79–80; Kinneavy and Eskin 2000, 432–33). In more positive terms, understanding kairos helps legal advocates imagine and manage the settings for their arguments. And in order to imagine and manage settings—to memorably evoke a lasting image of time and place in words and phrases—the advocate must understand and use metaphor.

One of the most helpful definitions is I. A. Richards's foundational description of metaphor as covering all situations where we "speak of something as though it were another" thing and of metaphoric "processes in which we perceive or think or feel about one thing in terms of another—as when looking at a building it seems to have a face and to confront us with a peculiar expression" (Richards 1936, 116–17). As this description indicates, metaphor's core contribution is enhancing our ability to "see one thing as another." Because of that capacity, metaphor leads an audience member to see resemblances and patterns and to make inferences where such inferences and relationships might not otherwise be revealed.

Both metaphoric thinking and thinking in kairic terms are generative. Metaphoric thinking spurs us to see connections and relationships among disparate items. Similarly, and in contrast to the limitations of chronological time and linear paths, kairic thinking extends to making connections across boundaries.

As already noted, lawyers writing on behalf of their clients and judges explaining their rulings must create settings that "fit" their legal arguments and decisions. By constructing a fitting rhetorical setting, legal authors are able to pose the specific legal question that is best answered by their argument or their decision. Constructing such a setting is helpful to the legal writer, but also constraining. That is, when we construct legal rhetorical situations, we are setting the scene for argument. And our settings influence *what holds together* and *what rings true* (Fisher 1985, 347–55). Because credibility depends on reliably meeting the reader's expectations, the setting determines what plots, actions, themes, and characters will be deemed believable on this occasion. Because appropriateness depends on the conventions governing specific contexts, the setting affects what styles, tones, and figures of language will sound as if they belong in this situation.

Metaphors that simplify, crystallise, and portray kairic moments allow writers to construct memorable settings that are nonetheless coherent and credible.

Because kairos offers the promise of linking the recognition of an opportune moment in time to the "ah-ha" moment of what is essential in an argument, lovers of rhetoric take kairos seriously. Rather than a rhetorical trick, kairos represents rhetoric's potential for constructing actual turning points, the crossroads where we can see a way to advance mercy, equity, or justice.[1] And it reminds us that those moments can be missed.[2]

2. Kairos in theory

Differentiating chronos from kairos allowed the Greeks to view history as a grid of connected events, the chronos, spread across a landscape punctuated by hills and valleys, the interruptions of kairos (Smith 1986, 6). The chronological timekeeper acts as an observer who constructs a linear, measurable, quantitative account of what happened (Bruner 1987, 11–12). The kairic participant tells a more qualitative history by shaping individual moments into crises and turning points (Smith 1986, 4–5).

While the author typically chronicles a more passive passage through chronological time, kairos presumes that the writer will try to intervene in history's causal chain. The intervention occurs when a kairic moment appears, either as a door to be opened to a new opportunity or as a thread to be pulled to unravel an existing fabric. Despite the presumption that the writer will act, a kairic moment does not emerge simply because of the writer's desires. Instead, once it is initiated by the writer's action, the kairic moment enables a "dynamic interplay between objective and subjective, between opportunity as discerned and opportunity as defined" (Miller 1992, 312).

Conceiving of kairos in this way expands the author's role beyond merely recognising that something in the current circumstance constitutes a "rhetorical situation". Lloyd Bitzer first defined a rhetorical situation as existing when an exigence (or imperfection) calls out for responsive rhetoric aimed at an audience with the potential to solve or address the imperfection

[1] "[R]eferring to "turning points in the historical order, the opportunities presented, the opportunities seized upon and the opportunities missed, the qualitative changes and transitions in the lives of individuals and nations and those constellations of events which made possible some outcome that could not have happened at any other time." (Smith 1986, 10–11)

[2] "[I]deas have their place in time and unless … they are voiced at the precise moment they are called upon, they miss their chance." (Poulakos 1998, 28)

(Bitzer 1968, 1–2). In this view, the rhetorical situation might be thought to lie in wait to be discovered by the speaker. But critics argued that every moment has kairic potential that can be seized and developed in strategic ways. And other contemporary rhetoricians advanced the perspective that the "tool" of kairos (the turning point) works best when it finds a match in the "setting" (the lasting image that represents the heart of the matter to be advanced).

3. Framing kairic moments

In the same way that we "find ourselves in a world of space and time" (Goffman 1974, 21), metaphor can situate the problems we face within a world of meaning. Metaphor imparts meaning to problem settings because of its role as a conceptual frame (Lakoff and Johnson 1980). Working as a conceptual frame, metaphor persuades us that a collection of discrete items forms a coherent pattern or that a grouping of events hangs together to create a meaningful path (Berger 2011).

We organise experience by using pre-existing conceptual frames constructed from our brain's stores of images, metaphors, scripts, stories, and other schema.[3] We take advantage of these frames to sort the information we perceive into categories, saving us from becoming overwhelmed by details. Although we sometimes refer to the most accessible frames as being "active," the processes we use to organise information often are unconscious. But because they have become second nature, we rarely are aware of them. Further complicating our understanding of the discrete items we perceive, we filter information through frames that invoke tacit understandings and stereotypical associations embedded by historical and cultural forces. This means that we are more likely to observe some elements in our environment and not others, resulting in a selective process that ends up reinforcing initial biases.

Although the frames we use and their filtering effects obscure our ability to fully perceive new information, they serve as efficient and necessary shortcuts. As metaphor sorts, it also creates and organises, making connections, providing new insights, and assigning new meanings. Sometimes the results are illuminating, and sometimes they obscure important details. As an example, when the often-used metaphor of war is applied to drugs or crime, it is believed to reorient the reader's perspective away from efforts to advance individual healthcare or promote social welfare and toward arguments in favour of increasing budgets and personnel for policing

[3] For a more complete description, see Berger and Stanchi 2018, 12–15.

actions that echo military endeavors (Thibodeau and Boroditsky 2011). As discussed later in this essay, the kairic metaphors used in judicial opinions similarly frame the legal reasoning contained in those opinions, reorienting the reader's perspective in favour of one way of thinking.

4. Kairos in law

This chapter describes the metaphors used to depict kairic moments in two senses: those announcing that this is the most opportune moment and those seeking to capture the most essential moment. Viewed as the most opportune moment to advance a claim, the arrival of a kairic moment often becomes apparent only after the turning point is passed. Take, for example, the rhetorical developments that followed Justice Scalia's comment in *United States v. Windsor*, 570 U.S. 744 (2013) that there would be *no turning back the clock* after the Supreme Court's decision to strike down the federal Defense of Marriage Act.[4] That metaphor became a kairic fulcrum for lower court judges to, one after the other, invalidate state laws prohibiting same-sex marriage.

Many lower court decisions confirmed Justice Scalia's *no turning back* prediction, but one stood out for its author's refusal to grasp the moment. Recognising that the issue was "how best to handle [change] under the United States Constitution," Judge Jeffrey Sutton of the Sixth Circuit U.S. Court of Appeals deflected. Rather than rejecting change outright in *DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), reversed, *Obergefell v. Hodges*, 576 U.S. 644 (2015), Judge Sutton fell back on "process and structure." These, he wrote, were the "most reliable, liberty-assuring guarantees of our system of government" (*DeBoer*, 2014 U.S. App. Lexis 21191 *8). Even though the current moment was a kairic moment, the court would not grasp it, relying instead on the argument that "the people" would decide when change was desirable. Judge Sutton adopted another metaphor, saying he would prefer to see change occur "through the customary political processes, in which the people, gay and straight alike, become *the heroes of their own stories* by meeting each other not as adversaries in a court system but as fellow citizens seeking to resolve a new social issue in a fair-minded way" (*DeBoer*, 2014 U.S. App. Lexis 21191 **83).

[4] In his dissent, Justice Scalia predicted that the ruling would extend to state statutes as well, declaring that "[a]s far as this Court is concerned, no one should be fooled; it is just a matter of listening and waiting for the other shoe." What weapon had the Court used? "By formally declaring anyone opposed to same-sex marriage an enemy of human decency, the majority arms well every challenger to a state law restricting marriage to its traditional definition." 570 U.S. at 778–802, 800 (Scalia, J., dissenting).

Viewed as the most essential moment, or the space in time that encapsulates the heart of the argument, the kairic metaphor becomes a metonym-of-sorts that represents the whole situation. One example is the *super-predator* metaphor used in the 1990s as a concrete visual stand-in for the argument that because of the character of some juvenile criminal defendants, harsh federal and state laws were necessary to address juvenile crime (Berger and Stanchi 2018, 45). This metaphor, like many, was infused with racial, cultural, and historical undertones. The metaphor became a damaging interpretive frame through which criminal laws were enacted and enforced. Nearly 20 years later, the U.S. Supreme Court recognised that the characterization was both false and exceedingly harmful.[5]

5. The analysis

The following examples are drawn from my rhetorical analysis of kairic metaphors used by the authors of federal appellate court opinions in the United States.[6] Based on this analysis, as discussed in the first section below (5.1), judicial rhetoric about opportune moments—those that assert that "this is [or is not] the moment to act"—favourably characterised actions that would stabilise the state of the law and disavowed radical alterations in the law. As discussed in depth in the second section below (5.2), judicial rhetoric about essential moments does not lend itself to ready categorization: these kairic metaphors were much more subtle and complex.

To put the idea in narrative terms, the analysis initially sought out the metaphoric phrases used when authors were letting their audiences know that the plot had reached a turning point.[7] These metaphors usually signalled

[5] *Miller v. Alabama*, 567 U.S. 460 (2012) (striking down life without parole sentences for juveniles).

[6] I began the analysis by searching opinions from 1960 to present in the U.S. Supreme Court and U.S. Circuit Courts of Appeals electronic databases for a list of potential metaphors signaling "this is the opportune moment." The list was compiled from general-use dictionaries and thesauruses, and I was able to quickly narrow the analysis down to the few words and phrases that were used most frequently. To analyze the metaphors that conveyed essential moments, it was not possible to construct a list in advance. Instead, I began to read the opinions I found in the first set of searches along with other opinions that were referred to me that contained obvious or novel metaphors (burned alive, contaminated). As I continued to read, I moved on to opinions in which I was able to discern that more complex metaphorical systems were being constructed.

[7] Relying on Amsterdam and Bruner's commonly used description of the typical story plot. It begins with an initial steady state of stability; the plot is kicked into action by a Trouble or crisis; this is followed by efforts by the characters aimed at

that the writer would go on to construct the setting of a specific problem (again, in narrative terms, the Trouble) that cries out for resolution, no matter whether the resolution is a change in the law or a return to a prior state of settled law.

The analysis found that when judicial authors hoped to signal readers that a tipping point, or a kairic moment, was imminent, they were likely to choose a familiar metaphor, as shown in section 5.1. These metaphors were easily identified on the surface of the opinion—in part because of their familiarity—but the more difficult task of persuading audience members that something specific needed to be done in response required more subtle work. During this more complex construction, discussed in section 5.2, new metaphors appeared as the writer sought to capture and convey the "space in time" that embodied the essence of the problem.

5.1. Opportune moments

Time is ripe: Perhaps because of the legal concept of ripeness (in the U.S., ripeness refers to the readiness of a case for litigation), judges were most likely to favour the very familiar metaphor that *the time is ripe*. The usual settings for its use were long-standing disagreements among courts about conflicting rules of law that had created confusion or controversy on an important issue, and more recent but stark disagreements about whether the passage of time meant that existing rules should be revisited.

To establish these settings, the judicial authors who argued that the time was ripe for a resolution typically described a state of chaos affecting fundamental or very significant rights. For example, in *United States v. Bell*, 808 F.3d 926 (D.C. Cir. 2015), Judge Patricia Millett wrote in a concurring opinion that "the *time is ripe* for the Supreme Court to resolve the contradictions in Sixth Amendment and sentencing precedent, and to do so in a manner that ensures that a jury's judgment of acquittal will safeguard liberty as certainly as a jury's judgment of conviction permits its deprivation" (ibid., pp. 928–932, 929).

Similarly, in dissenting from a denial of certiorari in *Thompson v. United States*, 469 U.S. 1024 (1984), Justice William Brennan wrote that *the time is ripe* to reconsider an earlier opinion, *Swain v. Alabama*, 380 U.S. 202 (1965). In *Swain*, the Court had refused to declare unconstitutional prosecutors' use of peremptory challenges to criminal trial jurors because

"redress or transformation"; those efforts lead to a return to a stable and ordinary state, either through restoration of initial stability or finding a new stability; and the plot ends with the moral of the story (Berger and Stanchi 2018, 51). See also Amsterdam and Bruner 2002.

of race. Justice Brennan declared that the "erosion of *Swain*'s constitutional legitimacy and the dearth of creative state-law development counsel against further delay in resolving this important question." Moreover, by failing to grant review in *Thompson*, "we let stand a conviction in which we know that the prosecuting attorney excluded individual potential jurors because they were Negroes." Such an official use of classification by race, he wrote, is "so at odds with our most basic understandings of equal protection that we should not sanction it in this case or any other" (ibid., p. 1027). Not only was the issue "distressingly familiar," there had been frequent calls to reconsider the original decision. Most important, he wrote, the precedential opinion departed from two fundamental constitutional principles (ibid., pp. 1025–1026). Several years later, *Swain* was finally overruled.[8]

Sea change. Judicial authors who used *the time is ripe* metaphor followed up with arguments for change. But the authors of the opinions where *a sea change* was invoked most often were criticising the arguments made by others, either because they feared such a sea change or because they were warning about the effects of past sea changes.[9] In other words, even though they recognised that the current moment in time was an opportune moment, they characterised it as an opportune moment to resist or to turn back. The use of this metaphor (sea change) to signal a kairic moment typically preceded an argument rejecting a particular interpretation of the law on the grounds that it would bring about an unnecessary and largely negative change in the law or an argument that untoward significant change had already taken place and the court should return to the previous status quo. In *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005), for example, a case in which the plaintiff sought a federal due process right in enforcing a temporary restraining order against her ex-husband, Justice Scalia—arguing that such a change would be harmful—wrote that "[t]o accede to Gonzales's argument would therefore work a sea change in the scope of federal due process, for she seeks federal process as a substitute simply for state process" (ibid., p. 772).

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[8] *Batson v. Kentucky*, 476 U.S. 79 (1986).

[9] The metaphor of undergoing a sea change is credited to Shakespeare, in whose text to undergo a sea change was to "suffer." The metaphor is often used less literally and more positively. William Shakespeare, *The Tempest* act 1, sc. 2 (1623):

> Full fathom five thy father lies;
> Of his bones are coral made;
> Those are pearls that were his eyes:
> Nothing of him that doth fade
> But doth suffer a sea-change
> Into something rich and strange.

In *Holder v. Hall,* 512 U.S. 874 (1994), a complex, divided opinion about the interpretation and application of the Voting Rights Act, Justice Clarence Thomas argued in his concurrence that sweeping change had overcome the purpose of the act: "If one surveys the history of the Voting Rights Act, one can only be struck by the *sea change* that has occurred in the application and enforcement of the Act since it was passed in 1965" (ibid., pp. 891–946, 893). The statute, according to Justice Thomas, was supposed to be "a remedial provision directed specifically at eradicating discriminatory practices that restricted blacks' ability to register and vote in the segregated South." Yet, over time, again according to Justice Thomas, the Court had interpreted the Act to cover claims that voters' rights had been diluted by state action. As a result, "we have converted the Act into a device for regulating, rationing, and apportioning political power among racial and ethnic groups." Because of this overwhelming *sea change* in what Justice Thomas believed the Act was intended to do, the Act had already been reinvented as "a grant of authority to the federal judiciary to develop theories on basic principles of representative government," because only political theory would allow a court to figure out which electoral systems "provide the 'fairest' levels of representation or the most 'effective' or 'undiluted' votes to minorities" (ibid., p. 893).

In a different setting, Justice Sonia Sotomayor lodged a similar objection to a sea change that she argued had already taken place in the law. Dissenting from the Supreme Court's granting of a stay of an injunction of an immigration rule in *Barr v. East Bay Sanctuary Covenant*, 588 U. S. __, 140 S. Ct. *3 (2019),[10] Justice Sotomayor decried the 'sea change' brought about by the government's actions when it "skirted typical rulemaking procedures" to issue the rule. She pointed out that the federal district court had found serious questions about the validity of the rule "because the Government effected a 'sea change' in immigration law without first providing advance notice and opportunity for public comment" (*4).

[10] In *East Bay Sanctuary Covenant*, the Attorney General and Secretary of Homeland Secretary issued a rule forbidding almost all Central Americans to apply for asylum in the United States if they enter or seek to enter through the southern border, unless they were first denied asylum in Mexico or another third country. In a later case, Justice Sotomayor characterised *East Bay Sanctuary Covenant* as one of an unprecedented series of examples in which the federal government had sought stays, "demanding immediate attention and consuming limited Court resources." In a few words, her argument was that "the Government has come to treat 'th[e] exceptional mechanism' of stay relief 'as a new normal.' " *Wolf v. Cook County,* 589 U.S. __ (2020).

5.2. Essential moments

Metaphors that convey a lasting image standing in for the essence of an argument often serve as the seeds for later arguments and decisions, and they may be found in majority opinions, dicta, dissents, or concurrences.[11] Justice Sonia Sotomayor has been an influential source of these metaphors, and the examples that follow come from her opinions.

Concrete images. In this second sense as a metonymic stand-in that represents the whole of an argument, the kairic metaphor unearths and crystallises a concrete and lasting image. One of the most well-known of such images, the metaphor of *burning alive*, came from Justice Sotomayor's dissent from the Court's rejection of a challenge to a lethal injection method for carrying out the death penalty in *Glossip v. Gross*, 576 U.S. 863 (2015). Justice Sotomayor wrote that the method of execution being challenged was "intolerably painful—even to the point of being the chemical equivalent of *burning alive*" (949-78, 970-71).

A similarly vivid image, the metaphor of *contamination*, was at the heart of the argument in Justice Sotomayor's concurrence in *Department of Homeland Security v. Regents of the University of California*, 591 U.S. __, 140 S. Ct. 1891 (2020). In the concurrence, she agreed that the Department had violated administrative procedures in rescinding the Deferred Action for Childhood Arrivals (DACA) program (ibid., pp. 1916–1918). But she dissented on the Court's refusal to consider an equal protection challenge to the rescission. President Trump's statements before and after he assumed office were relevant to that challenge, according to Justice Sotomayor. These included his comments about Mexican immigrants as "people that have lots of problems," "the bad ones," and "criminals, drug dealers, [and] rapists." Some of his statements compared undocumented immigrants to "animals" responsible for "the drugs, the gangs, the cartels, the crisis of smuggling and trafficking." Viewed as a whole, what the President said helped to "create the strong perception" that the rescission decision was "*contaminated* by impermissible discriminatory animus" (ibid., p. 1917). That contamination was the basis for allowing the plaintiffs to pursue their equal protection claims in the lower courts.

Images form complex systems. The words of the Fourth Amendment to the U.S. Constitution become real-life experiences in police-citizen interactions. That constitutional amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable

[11] Dissenters often "seek to sow the seeds for future harvest." (Brennan 1986, 427, 430–431). See also Berger 2017, 147, 173; Krishnakumar 2000, 781–782; Hasen 2012, 779.

searches and seizures" and requires search warrants to be issued only upon probable cause. Its foremost protection derives from the protection of the home from searches and seizures by the government. But it also is the basis for laws regarding arrests, search warrants, stop-and-frisk policies, wiretaps, and other forms of surveillance.

The judicial decisions interpreting and applying the Fourth Amendment govern a vast range of the interactions between citizens and police. Devon Carbado recently wrote that "African-Americans often experience the Fourth Amendment as a system of surveillance, social control, and violence, not as a constitutional boundary that protects them from unreasonable searches and seizures" (Carbado 2017, 125–126). Viewing Fourth Amendment law not as a body of law, but instead as a *system of surveillance, social control, and violence* captures the essence of an argument: rather than providing constitutional protection, this body of law authorises systematic monitoring, intrusion, and punishment by the state.

Images related to this metaphor (*system of surveillance, social control, and violence*) are found in Justice Sotomayor's opinions, starting with the concurrence in *U.S. v. Jones*, 565 U.S. 400 (2012). There, she identified the image of *permeating police surveillance* made possible by technology. This metaphorical image provided insight into the Fourth Amendment issue that would be raised in situations involving long-term government monitoring of citizens. In *Jones* itself, the Supreme Court was able to fall back on the traditional analogy to physical trespass to find a Fourth Amendment violation because the government had physically installed a Global Positioning System (GPS) tracking device on a vehicle belonging to the defendant's wife. The installation occurred without a valid warrant and without consent, and the government used the GPS device to monitor the vehicle's movements over the course of four weeks. In her concurrence, Justice Sotomayor first agreed that a constitutionally prohibited search had occurred because a Fourth Amendment search occurs whenever "the Government obtains information by physically intruding on a constitutionally protected area" (ibid., pp. 413–418).

But Justice Sotomayor pointed out that because of recent technology, many forms of surveillance could take place without the need for any kind of physical intrusion, for example, through GPS-enabled smartphones. She painted a metaphorical picture of what pervasive long-term government surveillance would look like and how it would feel to the citizen being monitored:

> GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations. See, *e.g.*, *People v. Weaver,*

> 909 N.E.2d 1195, 1199 (2009) ("Disclosed in [GPS] data . . . will be trips the indisputably private nature of which takes little imagination to conjure: trips to the psychiatrist, the plastic surgeon, the abortion clinic, the AIDS treatment center, the strip club, the criminal defense attorney, the by-the-hour motel, the union meeting, the mosque, synagogue or church, the gay bar and on and on"). The government can store such records and efficiently mine them for information years into the future. And because GPS monitoring is cheap in comparison to conventional surveillance techniques and, by design, proceeds surreptitiously, it evades the ordinary checks that constrain abusive law enforcement practices: "limited police resources and community hostility" (ibid., pp. 415–416).

This context provided the setting for Justice Sotomayor's argument that rather than relying on traditional tests to decide whether a violation has occurred, the appropriate balancing test would ask "whether people reasonably expect that their movements will be recorded and aggregated in a manner that enables the government to ascertain, more or less at will, their political and religious beliefs, sexual habits, and so on." The balancing test would further consider whether it was appropriate to give the executive the power, without oversight, to use "a tool so amenable to misuse, especially in light of the Fourth Amendment's goal to curb arbitrary exercises of police power and prevent 'a too permeating police surveillance'" (ibid., pp. 416–17). Finally, she wrote, such omnipresent surveillance would undermine the relationship between the government and its citizens in a constitutional democracy: the "[a]wareness that the government may be watching chills associational and expressive freedoms" (ibid., p. 416). Throughout her opinion, she asked the reader to see the government's actions through the metaphor of *pervasive and permeating police surveillance*. In other words, GPS monitoring should be "seen as" an ever-present police officer following you to every private place you may wish to visit, and for the resulting record to be forever available.

Building on this first metaphor and emphasising the harm that occurs to the relationship between the government and citizens, Justice Sotomayor used her dissent in a later opinion, *Utah v. Strieff*, 579 U.S. __, 136 S. Ct. 2056, 2064–2071 (2016), to emphasise the kairic moment that occurs *after* surveillance. In this opinion, she asked the reader to view Fourth Amendment law as authorising police officers to treat citizens as *subjects waiting to be catalogued*. After surveillance, she wrote, "everyone, white and black, guilty, and innocent, [learns] that an officer can verify your legal status at any time." And not only can you be stopped, "your *body is subject to invasion* while courts excuse the violation of your rights." In sum, the decision "implies that you are not a citizen of a democracy but the *subject of a carceral state, just waiting to be catalogued*" (ibid., pp. 2070-2071).

In *Strieff*, Justice Sotomayor's dissent moved beyond police surveillance to the subsequent stop and incessant probing by a police officer. This is how Justice Sotomayor described that moment:

> Although many Americans have been stopped for speeding or jaywalking, few may realize how degrading a stop can be when the officer is looking for more. This Court has allowed an officer to stop you for whatever reason he wants—so long as he can point to a pretextual justification after the fact. That justification must provide specific reasons why the officer suspected you were breaking the law, but it may factor in your ethnicity, where you live, what you were wearing, and how you behaved. The officer does not even need to know which law you might have broken so long as he can later point to any possible infraction—even one that is minor, unrelated, or ambiguous (ibid., pp. 2069–2070).

Filling in the picture to bring the kairic moment to life, helping the audience members virtually experience what happens so that they can perceive the occasion as *cataloguing* and *invasion*, Justice Sotomayor used telling details taken from prior cases to describe the look and feel of the stop:

> The indignity of the stop is not limited to an officer telling you that you look like a criminal. The officer may next ask for your "consent" to inspect your bag or purse without telling you that you can decline. Regardless of your answer, he may order you to stand "helpless, perhaps facing a wall with [your] hands raised." If the officer thinks you might be dangerous, he may then "frisk" you for weapons. This involves more than just a pat down. As onlookers pass by, the officer may "'feel with sensitive fingers every portion of [your] body. A thorough search [may] be made of [your] arms and armpits, waistline and back, the groin and area about the testicles, and entire surface of the legs down to the feet'." (ibid., p. 2070).

Continuing to rely on details from prior cases to fully flesh out the metaphor, she recounted the ways in which the ordeal continues after the stop and the search:

> The officer's control over you does not end with the stop. If the officer chooses, he may handcuff you and take you to jail for doing nothing more than speeding, jaywalking, or "driving [your] pickup truck . . . with [your] 3-year-old son and 5-year-old daughter . . . without [your] seatbelt fastened." At the jail, he can fingerprint you, swab DNA from the inside of your mouth, and force you to "shower with a delousing agent" while you "lift [your] tongue, hold out [your] arms, turn around, and lift [your] genitals." Even if you are innocent, you will now join the 65 million Americans with an arrest record and experience the "civil death" of discrimination by employers, landlords, and whoever else conducts a background check. And, of course,

> if you fail to pay bail or appear for court, a judge will issue a warrant to render you "arrestable on sight" in the future (ibid., p. 2070).

In *Strieff*, the defendant was stopped by an officer shortly after Strieff left a house where the police suspected ongoing illegal narcotics activity. Only after the stop did the officer learn that Strieff had an outstanding arrest warrant. He was arrested, and a search of his person uncovered illegal drugs. The initial detention of Strieff was unconstitutional because it occurred without reasonable suspicion, but the Court relied on an "attenuation" exception to the exclusion of the evidence seized from his person.

Bringing the metaphor home, Justice Sotomayor pointed out that contrary to the majority's claim, what happened to the defendant in the case was not an isolated event. Instead, enormous numbers of outstanding warrants, most for minor offenses, are held in various federal and state databases, meaning that police officers are authorised by the Strieff decision to stop people without cause (ibid., pp. 2068–2069). She emphasised as well that these stops are not unusual, but instead are routine procedure for many police departments (ibid., pp. 2068–2069). Finally, in a portion of the dissent that has been often cited by lower courts, Justice Sotomayor pointed out that "it is no secret that people of color are disproportionate victims of this type of scrutiny" (ibid., p. 2070).

Because we are more comfortable with metaphors that leap off the page (*man is a wolf*, *Juliet is the sun*)—the kinds of metaphors that explain something new by comparing it to something more familiar or something abstract by aligning it with something more concrete—it may be helpful to explain the more unusual metaphors in section 5.2. Professor Carbado suggested that we view Fourth Amendment law not literally but "as" something concrete. The underlying suggestion is that the current "system of surveillance, social control, and violence" cannot be understood by reading the words written in the Constitution or in the many opinions interpreting and applying it. Instead, Fourth Amendment law can best be viewed as an existing, living organisation. That organisation constitutes a systematic operation. It is carried out by a variety of people: police officers, lawyers, judges, prison officials, state and local agency employees, legislators, and so on. The people who run and the people who work in the organization use government-approved methods and government-funded tools, including weapons, in order to watch, arrest, search, jail, imprison, and punish citizens. The system controls selected individuals and groups in society through pervasive surveillance and violence. This image is a metaphor because Professor Carbado is asking us to see, think, and feel about one thing—Fourth Amendment law—in terms of another. As I. A. Richards described, this characterization of Fourth Amendment law as a

system of surveillance, control, violence has an effect similar to looking at a building and discovering that it seems to have a face and to be confronting us with a peculiar expression.

In the same way, instead of viewing technological advances as merely new gadgets, Justice Sotomayor suggested that new GPS technology should be "seen as" making possible *permeating police surveillance*. Metaphorically, these advances should be viewed as if a police officer might be following us every place we go every hour of every day. Further, she suggested that the kinds of police practices in which citizens are confronted and asked for identification after surveillance should be perceived as if we are being treated as *subjects waiting to be catalogued* and *bodies subject to being invaded*. These subtle and complex kairic metaphors provide memorable settings, and in doing so, they frame Justice Sotomayor's arguments and reorient the reader's perspective.

6. Conclusion

Writers often adjust the chronological timeline of a narrative, shaping the plot so that they can begin the story at a moment that will allow them to stage the turning point at a time that will allow them to script the most favourable resolution of the plot as an inevitable ending. Legal authors often have limited options for working around chronological timelines. In the real world, finding just the right moment to pursue the most fitting claim may be months or years away. Developing a kairic sense of timing provides another alternative for shaping the plot, allowing the legal author to shift the reader's understanding of the setting through a kairic metaphor that captures and conveys the lasting image at the heart of the matter. By doing so, the writer closes the gap and brings closer together the eventual meeting of time and place.

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CHAPTER 8

ORDRE PUBLIC: A RESEARCH INTO THE ORIGIN AND EVOLUTION OF A LEGAL METAPHOR

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Abstract

The chapter analyses the origin and evolution of the legal metaphor *ordre public* through a two-pronged approach that combines a comparative perspective of the legal context of discourse with a cognitive–linguistic perspective of metaphors. After a methodological *caveat*, the first sections of the paper trace the origin of the locution back to an early speech by Montesquieu, and then consider the metaphorical function the expression *ordre public* was meant to serve, and the legal meaning it shaped, through a reconstruction of the semantic fields surrounding the words *ordre* and *public* at that time. The middle sections analyse the locution in the *Déclaration des Droits de l'Homme et du Citoyen* (1789), in the *Code civil* (1804), and finally in the *Code pénal* (1810) and how these documents polarised the concept, by bringing to the fore different facets of it. The final sections look at how the concept *ordre public* has evolved in Continental Europe during the Age of Nation States, leading to its present-day use.

Keywords: ordre, public, ordre public, Montesquieu, legal metaphor, public policy, bonnes mœurs, Civil Law systems.

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[1] The essay has been jointly conceived and discussed (conceptualisation, resources, reviewing and editing): Lucia Morra is responsible for sections 2–3, Barbara Pasa for sections 4–5; both authors share Abstract, Introduction and Conclusion. The usual disclaimer applies.

1. Introduction

This paper explores the origin and evolution of the legal metaphor *ordre public*, found in the legal codes of civil law countries, through a two-pronged approach that combines a comparative perspective of the legal context of discourse with a cognitive–linguistic perspective of metaphors.

On the one hand, the analysis combines functionalism, which emphasises law-as-rules, with hermeneutics, in which rules are the signifiers of concepts and of a *mentalité* (cognitive structures that support and anchor positive law); on the other, it weaves jurilinguistic insights into legal metaphors with etymological and historical research, to study the resulting data set using the pragmatic tools coined for textual analysis. Section 2 traces the first occurrence of the locution *ordre public* [public policy] back to an early speech by Montesquieu, and explains the way in which he created a metaphor by it. Section 3 analyses the occurrences of *ordre public* in the *Déclaration des Droits de l'Homme et du Citoyen* (1789), in the *Code civil* (1804) and in the *Code pénal* (1810), focusing on the different facets of public policy emphasised by the use of the expression in these documents and how it was coupled with the notion of *bonnes mœurs* [good morals]. Section 4 examines both the function of the locution *contraire à l'ordre public* throughout the Age of Nation States, and further evolution of the concept *ordre public* through its coupling with the concept *bonnes mœurs* in private law matters, influenced by the refinement of the concept *public* within public law discourse. Finally, section 5 looks at the emergence of a new supranational order in Continental Europe in the mid-20th century, and the autonomous and substantial concept European *ordre public* [public policy] shaped by the European Court of Justice's rulings on a case-by-case basis vis-à-vis the resistance of national *ordre public* exceptions.

2. Montesquieu's metaphor: l'*ordre* in human affairs

The first occurrence of the locution *ordre public* can be traced back to Montesquieu's *Discours sur l'équité qui doit régler les jugements et l'exécution des lois*[2]:

[2] Cf. https://www.cnrtl.fr/etymologie/ordre. Set up by the CNRS, the Centre National de Ressources Textuelles et Lexicales (CNRTL) relies on the Analyse et Traitement Informatique de la Langue Française laboratory (ATILF/ CNRS—Nancy Université).

> La Justice la plus exaéte ne sauve jamais que d'une partie des malheurs; & tel est l'état des choses, que les formalités introduites pour conserver *l'ordre public*, sont aujourd'hui le fléau des particuliers. (Montesquieu [1725] 2003, 465, our emphasis)

Here, *conserver l'ordre public* is a variant of *maintenir l'ordre*, a phrase which surfaced in the French lexicon in mid-17th century[3], in parallel with the locution *lois publiques*.

Maintaining order in the kingdom was indeed one of the purposes of public legislation, but Montesquieu's qualification of *ordre* as *public* did more than just establish a linguistic link between two conceptual domains that were already interconnected. A further and conflictual projection between the concepts conveyed by *ordre* and *public* is suggested by the meanings each of these words had at that time (sections 2.1, 2.2), by the role that the concept *ordre* was to play in Montesquieu's thought (Casabianca 2013), and finally by the binary distinction he put forth in *L'Esprit des lois* between *les lois civiles* and *les lois politiques* (sometimes *publiques*), namely between rules governing relations between individuals, and those governing relations between public authorities and individuals (Montesquieu [1748] 1977, I, 3; see Bart 2013; Millns 2014, 283–300)[4].

As the following sections will show by reconstructing the meanings of *ordre* and *public* at that time, in his 1725 speech Montesquieu coined in fact a metaphor, namely a cognitive-linguistic construction that, calling into question the established understanding of each of the concepts, shaped a legal concept whose seeds, planted in the Roman age and germinated in Mediaeval times, had finally grown under the *Ancien Régime*.

2.1. *Ordre*

In Old French *ordre* (in its oldest version *ordene*), from Latin *ōrdo* meaning 'row, line, rank, class of citizens, series, pattern, arrangement, routine', meant the rank conferred by the sacrament of priesthood (*antrer en ordre*), a religious or military congregation following specific rules (*ordre de Saint-*

[3] Cf. https://www.cnrtl.fr/etymologie/public.

[4] The difference between private and public law, lying within a classification of law that the Common Law tradition has never known (Dicey 1953, 217; Oliver 2001, 327) and designed for the purpose of protecting private interests v. public interests, and of securing property v. freedom, only began to be addressed and determined in Continental Europe during the 18th century; public law and private law are still separate fields of law within the civil-law tradition (Mattei, Ruskola, and Gidi 2009, 381).

Benoît, *ordre de la Jarrectière*), or a group of people forming, due to its condition or capacity, a specific class of society (*la concorde des ordres*).

Through such use, the word lost its synonymity with 'row' and 'series', coming to express the idea of a rational arrangement not only following a rule, but in which each thing is where it ought to be by reason of its relationships with the other things; namely, the idea of a logical arrangement following an organic, logical and reasoned plan organised by an authority. In this sense, *ordre* was used to refer to the system of laws of the universe, initially in its religious dimension (*ordenes des angeles*, dating back to the beginning of the 13th century), and later also in its natural dimension, with the appearance of the locutions *l'universel ordre des choses*, *l'ordre naturel*, which date back to the end of the 16th century[5], shortly after the word *ordre* was adopted in architecture to refer to the way in which, in each of the different species of columns inherited from antiquity, the elements were arranged to make up an organic style, consisting in the specific proportion and composition of the elements (i.e. *ordre dorique*)[6].

In addition, *ordre* began to be used in the early 13th century also to refer to the acts by which a divine authority imposed its will on someone to do something. In this specific sense of 'command,' the term was used more frequently as of the late 16th century, when the locutions *donner ordre que, avoir ordre de*, *recevoir l'ordre de* progressively emerged in the lexicon. But it was only a century later that the link this sense of *ordre* had with the divine nature of the authority commanding the act lost its necessity; until then, a command could be considered an *ordre* only by virtue of its source, an authority acting as an agent of God's will, thus a pope or a monarch[7].

The first occurrence of *ordre* in political discourse dates back to the very beginning of the 16th century, when Philippe de Commynes, regarded as a major primary source for the 15th century European history, used the words *ordre et justice* in his *Mémoires* to refer respectively to the laws enacted by

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[5] In 1580, Montaigne used the expression *l'universel ordre des choses*, Palissy *l'ordre naturel*; Malebranche used *l'ordre de la nature* in 1674 (https://www.cnrtl.fr/etymologie/ordre).

[6] In France the first occurrence of *ordre* in this architectural sense dates back to 1556 (ibid.), but it was Giacomo Barozzi da Vignola's rule book, published in Rome in 1562 with the title *Regola delli cinque ordini d'architettura*, that established its systematic adoption to define each of the five different species of columns inherited from antiquity. Vignola's book "was to have an astonishing publishing history of over 500 editions in 400 years in ten languages, Italian, Dutch, English, Flemish, French, German, Portuguese, Russian, Spanish, Swedish, during which it became perhaps the most influential book of all times" (Watkin 2011, vi).

[7] The 1737 locution *il y aura toujours un carosse à vos ordres* is emblematic here, see https://www.cnrtl.fr/etymologie/ordre.

Charles VIII and the activity of the *parlements* under his reign: "le mauvais ordre et justice qu'il faisoit en son royalme" (de Commynes [ca 1500], I, 10). While the extension of *ordre* to include the statutes enacted by the monarch was consistent with the supposed purpose of the monarch in transferring God's rational arrangement to human society through the statutes he enacted, the novelty in de Commynes' words lay in their encompassing the statutes enacted by the monarch and the decisions of the *parlements* into a perspective in which they could both be seen as parts of a whole, and then as instances of the emerging concept of the 'legal reality of the kingdom', which subsumed them both.

The phrase *maintenir l'ordre* surfaced in the lexicon more than a century later[8], around the time when the frequency of the locution *lois publiques* in scholarly texts marked the rise of 'public law' as an autonomous notion in the domain of knowledge and discourse. Such a notion, at that time, subsumed the arrangements that sustained "the modern immanent concept of sovereignty" (Loughlin 2010, 51–52), and was conceptually refined only in the mid-19th century (section 4). Today we could express the meaning that *ordre* acquired through its occurrences in the phrase *maintenir l'ordre* as 'social stability deriving from abidance by the laws' (section 4), but when the phrase was coined, the word was used with its core meaning of the necessary and rational order that God inscribed in human society through the agency of the monarch, and which it was the monarch's duty to preserve and protect from disruption.

2.2. *Public*

In Old French *public*, from *publicus*, a contraction of *populicus*, meaning both 'belonging to/concerning the people as a whole/the state' and 'of common/general use', originally meant 'concerning the people as a whole' (*paix et utilité publique*). Later, in Medieval times, it acquired the further acceptations of 'known by everybody' (*renummee populaire et publique*), 'belonging to the collectivity' (*bien publique/publicq*), 'performing an activity in favour of all' (*notaire public*), and 'available for everybody to use' (*place publicque*)[9].

During the *Ancien Régime*, a new use of the adjective gained currency to serve a notion that had emerged as a product of the early-modern territorial state and the Reformation, possibly prompted by Humanist

[8] Cf. https://www.cnrtl.fr/etymologie/ordre. On the first uses of the locution, see Plantey (1996, 27), Lemont (2013, 34).
[9] Cf. https://www.cnrtl.fr/etymologie/public, also Grossi 2010.

studies of the theorisation of Roman law sources[10]. In France, as in other European states, early modern doctrines crafted on neo-Aristotelian politics, natural law theories and literature on the art and science of government, which borrowed their terminology from Roman law (Gross 1973; Portemer 1959), extended the meaning of *public* as a qualifier for offices and functions serving the community (*charges et fonctions publiques*), for people invested with some authority or performing some official function (*personne publique*), for deeds officially sealed and recorded in a register (*acte public*)[11], and, finally, for the body of laws governing relations between individuals (as distinct from both the monarch and its officials)[12] and those who, by performing the official functions of the state, govern them (*lois publiques*). Such further extension of the meaning of *public*, as was said at the end of section 2.1, linguistically marked the emergence in French discourse of the notion of 'public law'—it is no coincidence that Jean Domat's *Le droit public* was published in 1697[13].

[10] In Ancient Rome, the Jurist Ulpian identified two kinds of matters: *quod ad statum rei Romanae spectat* (what belongs to the Roman state) and *quod ad singulorum utilitatem* (what is of utility for individuals, including both private and public interests). According to Ulpian, the *ius publicum* expressly covered religious affairs, priesthood, and magistracy, the major interests of the Roman State. This definition enjoyed a 'second life' when it entered the Justinian *Corpus iuris civilis* in the Digest: "[p]ublic law is that which respects the establishment of the Roman commonwealth, private that which respects individuals' interests, some matters being of public and others of private interest" (Dig. 1.1.1.2; see Coing 1973; Szladits 1974; Kaser 1986). Another excerpt from the Digest—*privatorum conventio juri publico non derogat* (Dig. 50,17,45: the private agreement cannot derogate public law)—placed the emphasis on the imperative nature of certain rules that affected society more directly than they affected the individuals themselves. However, Roman legal theory never developed a public law doctrine that separated it from private law: the focus of Roman jurists was entirely centred on private law, and public law issues were only discussed where appropriate, within the framework of private law analysis (Mattei, Ruskola, and Gidi 2009, 381–383).

[11] Cf. https://www.cnrtl.fr/etymologie/public.

[12] "In the medieval world, king and people were perceived as being bound together in an objectively formed right order in which both had duties to perform under God and the law" (Loughlin 2010, 94).

[13] In the English lexicon, the locution 'public law' had already emerged a century earlier (but with the different sense of a legislative act affecting the community at large), in the two acts of Parliament (1531 and 1536) that developed the first comprehensive English system of poor relief (Quigley 1996).

2.3. *Ordre public*

In his 1725 speech, Montesquieu coined a variation of the phrase *maintenir l'ordre*. He used *conserver* instead of *maintenir*, and, more significantly, he modified the noun *ordre* by adding the adjective *public*. This section analyses the meaning of such a qualification of *ordre*, which was unprecedented in the French lexicon.

As said in section 2.1, the phrase *maintenir l'ordre* belonged to the emerging discourse of public law, where the purpose of the *lois publiques* was to preserve the *ordre* the monarch was called to impose and maintain. As such, the meaning *public* had acquired in *lois publiques* and *droit public* (section 2.2) was prominent for the interpreters of Montesquieu's unprecedented coinage *ordre public* (with the discourse of public law acting as a primer, activating a particular memory to bring it to the fore so that it can be engaged in communication). Still, notwithstanding its cognitive salience[14], such a meaning of the adjective *public* was only one of the acceptations relevant for understanding the conceptual match proposed by Montesquieu's novel linguistic construction.

Such an interpretation of the term *public* in this specific sense would make the locution *ordre public* allude only to a stability deriving from and preserved by the *lois publiques* (or *politiques*)—an undue restriction on the scope of the concept the locution was coined to express, in which *lois civiles* (private laws) and *le droit des gens* (customary law) also played a substantial role, as *L'Esprit des lois* made clear (Montesquieu 1748, I, III). This was already suggested by the very words Montesquieu employed to introduce the locution *ordre public* in his 1725 speech. Not only did the expression *les formalités introduites* [the formalities introduced] allude to something more than legislative enactments; further meanings of *public* besides the one acquired in *lois publiques* were suggested by Montesquieu's second variant of the phrase that was coined during the *Ancien Régime* to denote the necessity of guaranteeing the stability of the early-modern state through abidance by enacted laws. As opposed to *maintenir*, which evokes the image of a hand holding in place a reality it had contributed to affirming, Montesquieu used the verb *conserver*, which alludes to the preservation of

[14] Developed in disciplines concerned with language and communication, the notion of salience refers to the degree to which a sign is prominent, important or more readily available—one that for contingent reasons most captures the interpreters' attention. Salience helps interpreters to rank information quickly, so as to focus attention on what appears most important. Here, it refers to the prominence or greater accessibility, in the context of interpretation, of one of the meanings of a word in relation to the others.

an arrangement in which the role of authority is less intrusive, and more observant, as it were, of the body of sources of law of which such a stability is the outcome[15].

Thus, Montesquieu's linguistic coinage built on other relevant understandings of the adjective *public*, which went beyond the acceptation shaped by the recent discourse of public law to encompass meanings that revolved around the idea of community: 'concerning the people as a whole', 'belonging to/for the general use of the community', 'serving the community' (section 2.2). Understanding *public* in this sense, however, can only give a consistent interpretation of *ordre public* if the concept *ordre* is stripped of the necessity it implies for a divine source in commanding a rational arrangement. Modifying *ordre* with the adjective *public,* considered in the sense of 'belonging to/serving the community' does just that, both as a requirement and a consequence, leaving us with a new and consistent acceptation of *ordre* as 'concerning, serving or belonging to the community'. By stripping *ordre* of its divine implications, *public*, in the sense of 'concerning, serving or belonging to the community', could thus consistently be used to qualify *ordre,* intended not only as the stability deriving from abidance by enacted laws (the sense of *ordre* in *maintenir l'ordre*), but also *ordre* as used by de Commynes in his *Mémoires* (of which Montesquieu had three different editions)[16] to denote the laws of the kingdom considered both as a whole and as a part of the emerging legal notion of state. Applied to this latter concept, the adjective *public* not only severed the link with the divine source that de Commynes had projected onto it by naming it an *ordre*, but reshaped it into the new concept 'the laws of the community', which maintained other meanings of *ordre*, in particular as a 'rational arrangement whose necessity derives from an authority commanding it'.

Montesquieu's unprecedented application of the adjective *public* to the noun *ordre* sketched out a solution to a theoretical puzzle of the time, which was, in what sense could human legislation instantiate an *ordre*, given its contingent nature? Detailed in his later writings and mainly in *L'Esprit des lois*, such a solution was different from Domat's attempts to systemise existing, highly disordered legal sources into a rational framework by justifying the foundation of law upon religious principles, but it also rejected the assumption by natural law theories that rationality was synonymous with necessity, constancy, and universality. For Montesquieu, human laws and institutions were rational but not necessary, immutable or universal, as they

[15] Cf. https://www.cnrtl.fr/etymologie/maintenir and https://www.cnrtl.fr/etymologie/conserver.

[16] Cf. Montesquieu 2013, *pensées* 1302 to 1306, No. 27. De Commynes is also implicitly quoted (ibid., n. 46).

belonged to a conceptual framework that was independent from both the divine and natural realms.

This solution lay *in nuce* in the locution *ordre public*, coined in 1725. From a cognitive point of view, the locution was a metaphor similar to Darwin's 'natural selection', but was characterised by an opposite direction of transfer. Whereas Darwin projected the human-derived concept of selection onto the natural domain (Prandi 2017, 199–201), Montesquieu projected the model of a rational arrangement of elements which until then was considered exclusive to the divine and natural domains onto human legislation, thus opening up the possibility of both systematic enquiry into and a rational management of human cultural norms and institutions, notwithstanding their constant evolution[17].

Considered as a metaphor, *ordre public* called into question the conceptual identity of both the concepts *ordre* and *lois positives* (positive law) (see Montesquieu 1748, I, III), by reshaping the conception of positive law to include rationality amongst its characteristics, and by recasting *ordre* to include human legislation among its instances, thus breaking the links which saw rationality, necessity and constancy as inseparable properties.

Not only unprecedented but also conflictual, Montesquieu's linguistic construction triggered projections between the concepts of *public* and *ordre,* in an effort to construct a consistent interpretation of their combination. Inducing a search in their semantic fields to individuate possible metaphorical transfers, the task meant tapping into meanings the words had acquired that were beyond those salient for the interpreters—meanings that were also functional from Montesquieu's perspective. The metaphor superimposed onto the meaning of *ordre* as given by the phrase *maintenir l'ordre* and modified by the qualifier *public* ('stability concerning the community and deriving from abidance by the law'), the meaning *ordre* had in de Commynes' *Mémoires*, as recast in turn by the addition of *public*, which cancelled the reference to the kingdom to indicate the whole of the laws and institutions of a society.

Onto the complex meaning thus resulting ('legislation of a society and collective stability deriving from abidance by it'), the metaphor projected the core meaning of *ordre* untouched by the application of *public*, namely the meaning remaining after the deletion of two of its essential traits, necessity and constancy. In this way, the metaphor recast the whole of the

[17] Constant change was a characteristic of human legislation, underpinning sceptic views (such as Montaigne's) which held it to be uncertain and arbitrary. Montesquieu acknowledged constant evolution to be a characteristic feature of human laws (Capra and Mattei 2015, 103), but, in contrast with the sceptics, did not consider it an impediment to rationality.

laws and institutions of a society as a rational arrangement, or, to use a term that appeared in late 16th century, as a *système*[18].

This projection also encompassed the meaning *ordre* had acquired in architecture, namely as 'elements arranged in such a way to make up an organic style, consisting in the specific proportion and composition of the elements'. Thus, *ordre public* also came to allude to 'the specific pattern characterising each system of law'. In *L'Esprit des lois*, Montesquieu was to describe a system of law as specifically determined by its necessary link with the political, economic, and religious profile of the society it serves, together with its customs and temperament, all of which was also influenced by 'la physique du pays': time, space, climate, etc. As he wrote, although the specific positive laws of each country are particular applications of the same general human reason, they are so rooted in the cultures that created them, and so fitting to the particular people for which they were enacted, that they rarely would be suitable in another context (ibid.; and see section 4).

Finally, tapping into another of the meanings the adjective *public* had at that time, the application of *public* to the concept 'specific system of laws and institutions of a society and the stability deriving from abidance by it' attributed to it the further quality of being 'open to general enquiry', which was equally functional for Montesquieu's perspective.

The metaphor *ordre public* does not occur in *L'Esprit des lois.* Its cognitive potential was superfluous in that work, in which Montesquieu detailed his idea of the rationality of human legislation. There the effectiveness and depth of the projection the metaphor was meant to prompt was rendered by the locutions *ordre judiciaire*, *ordre politique*, *ordre civil*, *ordre établi*, *ordre de citoyens*, *ordre législatif*, *ordre naturel des lois*, *ordre naturel des lois civiles*, etc., all disseminated throughout the work. Thus, order was definitely brought to human affairs, and not only from Montesquieu's legal perspective: in 1746 Condillac wrote about *l'ordre des mots* (Condillac 1746, 98) and in 1761 Rousseau would refer to *l'ordre social* (Rousseau 1761, 113, 306).

3. The French Revolution and the early age of codification: three polarisations of *ordre public*

After his use of *ordre public* in a 1725 speech delivered at the opening session of the Bordeaux *parlement* (a provincial appellate court, one of thirteen existing during the *Ancien Régime*), Montesquieu never used the locution again in his writings. The expression only surfaced again in the

[18] Cf. https://www.cnrtl.fr/etymologie/syst%C3%A8me.

political lexicon in 1771, when the *Discours sur l'équité qui doit régler les jugements et l'exécution des lois* was published for the first time. With the *parlements* protesting against Maupeou's reform of the magistrature, which suppressed them, Montesquieu's name rose to prominence in the *parlements* struggle against royal authority, creating the perfect publishing opportunity for the *Discours sur l'équité*. Soon other editions followed, before the text was included in the *Œuvres posthumes* of 1783, and then in subsequent editions of the *Œuvres* (Rétat 2013).

3.1. *Ordre public* in the 1789 Déclaration

In 1789, the locution *ordre public* was used in the *Déclaration des Droits de l'Homme et du Citoyen*:

> Nul ne doit être inquiété pour ses opinions, même religieuses, pourvu que leur manifestation ne trouble pas l'ordre public établi par la loi [No one may be disquieted for his opinions, even religious ones, provided that their manifestation does not trouble the *ordre public* established by the law]. (*Déclaration des Droits de l'Homme et du Citoyen*, Art. 10)

The wording *ordre public* was inserted in the text of the *Déclaration* only a few days before its enactment on August 26.

After Lafayette's formal motion on July 11, several drafts were proposed to the National Constituent Assembly (hereinafter NCA), none of them featuring the words *ordre public*. In progressive versions of Article 10, limits to freedom of opinion, religion and press (when present) were mainly referred to as *autant qu'elle nuit droits d'autrui* (*à personne*), and although other articles mentioned *l'ordre social*, *le bon ordre de la société*, *l'ordre civil et politique*, *la tranquillité publique*[19], they never used the words *ordre*

[19] Art. 19 of August 12 draft stated: "La libre communication des pensées […] ne doit être restreinte qu'autant qu'elle nuit droits d'autrui" (Archives Parlementaires, 1, VIII, 432); in the drafts presented on July 27 "sous l'unique condition de ne nuire à personne" and "nuire aux droits d'autrui" (ibid., p. 288 and 290, respectively). Art. 8 of Mirabeau's draft (August 17) stated: "le citoyen a le droit de rependre [ses pensées] sous la réserve expresse de ne pas donner atteinte aux droits d'autrui" (ibid., 439); similar wording had been used in two earlier drafts presented by Sieyès (ibid., 422) and Gouges-Cartou (ibid., 428), respectively. *L'ordre social* occurred in the draft Lafayette presented to the NCA on July 11 1789 (cf. Buchez and Roux-Lavergne 1834, 93–95); *le bon ordre de la société* in Art. 16 of August 12 draft ("Il est […] essentiel, pour le bon ordre même de la société, que [la religion] et [la morale] soient respectées", ibid., 432); *l'ordre civil et politique* in a draft presented

public. The locution found its way into the draft Declaration through the progressive merger of the articles addressing freedom of opinion and freedom of religion, as can be seen in a comparison of Article 10 as enacted and both Article 14 of the draft, presented on July 28, stating "Aucun homme ne peut être inquiété pour ses opinions religieuses, pourvu qu'il se conforme aux lois, et ne trouble pas le culte public" (*Archive Parlementaires*, 290), and Article 18 of the draft debated on August 12, namely "Tout citoyen qui ne trouble pas le culte établi, ne doit point être inquiété" (ibid., 432; in the respective drafts, both articles appeared next to an article addressing freedom of press). *Ordre public* finally appeared in the draft proposed on August 21 by Louis de Boislandry, which stated in Article 16:

> Tout homme est libre de professer telle religion qu'il lui plaît; de rendre à l'Être suprême tel culte qu'il juge convenable, pourvu qu'il ne trouble point la tranquillité des autres, ni l'ordre public. (*Archives Parlementaires*, 468)

On August 23, Boniface Louis de Castellane suggested merging the proposed articles on freedom of press and freedom of religion into a single article stating "Tout homme est libre dans ses opinions; tout citoyen a le droit de professer librement son culte, et nul ne doit être inquiété à cause de sa religion". Jean-Baptiste Gobel (Bishop of Lydda) requested the addition of the provision "pourvue quel leur manifestation ne trouble point l'ordre public", and after a heated debate the final version of Article 10 was adopted (ibid., 480). The qualification *établi par la loi* was added to *ordre public* to further explain that freedom of press, opinion and religion could be limited only by enacted laws, thus excluding religion and *bonnes mœurs* (section 4), two reservoirs of ethical limits alluded to by a member of the NCA while expressing his relief about the limits to freedom of press set out in Article 10[20].

De Boislandry was close to both Lafayette and Thomas Jefferson, so the draft he presented (the first to adopt the locution *ordre public*) had possibly absorbed suggestions from them both. Since Jefferson was an admirer of Montesquieu and was closely acquainted with his works, it is likely that the

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on July 27 (ibid., 288); *la tranquillité publique* in Art. 67 of August 12 draft (ibid., 431).

[20] M. de Machault said: "Je satisfais à ma conscience qui me presse, ainsi qu'au mandat que j'ai reçu: il y a du danger pour la religion et les bonnes mœurs dans la liberté indéfinie de la presse." http://www2.assemblee-nationale.fr/decouvrir-l-assemblee/histoire/grands-discours-parlementaires/rabaut-saint-etienne-robespierre-et-de-machault-24-aout-1789

addition of *ordre public* was suggested by Jefferson[21], as the locution was not yet part of current French political discourse; Condillac, for instance, in an essay advocating a free market economy in contrast to the prevailing contemporary policy of state control in France, made extensive use of the locution *le maintien de l'ordre*, but never with the adjective *public* (cf. Condillac 1776)[22], and on August 24, 1789, in his defence of the wording adopted for Article 10 at the NCA, Rabaut Saint-Etienne spoke of *troubler l'ordre* without mentioning the word *public*, notwithstanding the fact that the article contained the expression *ordre public*[23].

In any case, the time was ripe for the locution *ordre public* to enter a normative text as a technical term. By then, the expression had in fact lost the conflictual effect it was meant to have when it had been coined, because *ordre* was no longer considered inconsistent with human legislation.

By entering the text of the *Déclaration*, the concept first sketched out by Montesquieu was not only translated into a normative context of use, but also reshaped. First, by the addition of the qualifier *établi par la loi*, as we saw, to exclude both customary law and case law, and the stability they assured from possible limits to freedom of expression (which in Montesquieu's view similarly contributed to the systematicity of a legal system). Secondly, by the polarisation of the concept *ordre public* in Article 10.

For Montesquieu, *ordre public* was instantiated by both legislation (the system of laws and institutions of a given society) and its outcome (the collective stability deriving from abidance by such a system), where the inextricable intertwining of cause and effect made the two facets of the concept equally prominent. Article 10, on the contrary, turned the stability

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[21] Jefferson, at that time Minister to France, studied Montesquieu intensively between 1764 and 1774 (Chinard 1925), and arrived in Paris the year in which the *Oeuvres posthumes*, containing also the *Discours sur l'équité*, was published; *ordre public* therefore may have been added to Art. 16 of the draft presented by de Boislandry at his suggestion.

[22] In Condillac's essay, *ordre* occurs several times, e.g. in ch. 10: "[la] puissance […] souveraine […] protège, parce qu'elle maintient l'ordre audedans […] par les lois qu'elle porte et qu'elle fait observer" (Condillac 1776, 29). For Condillac, "l'ordre se maintenait en quelque sorte de lui-même chez un peuple qui avait peu de besoins" (ibid., 86); "maintenir l'ordre" (later in the text also "la liberté") was the only protection the sovereignty was required to guarantee, otherwise it could trouble the *ordre* ("qu'elle le troublerait si elle avait des préférences", ibid., 29).

[23] Rabaut Saint-Etienne said: "Si l'on s'élève contre un homme en place, il s'écrie que l'ordre est troublé, que les lois sont violées, que le gouvernement est attaqué, parce qu'il s'identifie avec l'ordre, avec les lois et avec le gouvernement."
http://www2.assemblee-nationale.fr/decouvrir-l-assemblee/histoire/grands-discours-parlementaires/rabaut-saint-etienne-robespierre-et-de-machault-24-aout-1789

deriving from abidance by the system of laws and institutions into the prominent facet of the concept, a polarisation linguistically marked by the verb *troubler*, whose applicability is more straightforward to 'stability' than to 'system'. Derived via *turbulare* from *turbidare*, to disturb, make cloudy or turbid, stir up, mix (from *turba* 'crowd', but also 'confusion, tumult, commotion'), *troubler* had been used to speak of actions disturbing either the peace between humans, family included (*trobler la paiz*), or normal courses of events; emotions like joy could also be troubled. Then, in the 17th century, as witnessed by the works of Racine and Molière, *troubler* acquired the further meaning of 'action making someone insecure of himself, perplexed or bewildered'[24].

Given the proximity between the semantic fields of 'peace' and 'stability', the application of *troubler* to the stability afforded by abidance by the system of laws and institutions of a society sounded acceptable enough: wars of religion, for instance, had shown how the expression of opinions could even destroy stability, and twenty years earlier, for instance, Condillac had written that sovereign power could *troubler l'ordre* (Condillac 1776). But how a system of laws and institutions could be troubled, also by the expression of opinions, was not straightforward. The consistent application of *troubler* to this facet of the concept built by the metaphor *ordre public* required a further figurative shift, requiring the system of laws and institutions to be considered either as a configuration whose necessary outcome—stability—can, like a normal course of events, be troubled, and then impeded or altered by a particular action (here, the expression of a particular opinion), or as something that can be made cloudy/turbid. By choosing the first option, expressions of opinions that troubled the *ordre public établi par la loi* become those altering the 'normal course' of the legal system and its outcome, an interpretation that converges towards the facet of the concept that was already consistent with the meaning of *troubler*—collective stability. Exploring the second option available might thus seem cognitively useless; nevertheless, it uncovers a third facet of Montesquieu's concept, one that still lay in the background in Article 10, but was to emerge shortly after in the *Code civil* (section 3.2) and would come to the fore in the Age of Nation States (section 4), namely a facet for which both the consistency of the system and the principles holding its elements together are prominent.

In order to see the legal system of the *République* as something that can be made cloudy or turbid by manifestations of opinions that trouble *l'ordre public établi par la loi,* these manifestations must be interpreted as the

[24] Cf. https://www.cnrtl.fr/etymologie/troubler.

presentation of opinions on the stage of the ideas which differ from those opinions that hold together the laws and institutions of the *République;* they must be seen as manifestations calling into question the apparent consistency of the legal system by expressing wills that depart from the general will displayed in enacted legislation and institutions (see Article 6 of the *Déclaration*)[25]. Such an interpretation builds on the idea of a set of principles holding together the elements of the system to revive both the semantic root of *ōrdo*, which captures the concepts 'to fit together' and 'way to proceed'[26], and a nuance in the meaning of *ordre* which Montesquieu's metaphor had not captured, but which proved essential for the Revolutionary perspective; while Montesquieu considered the unity resulting from the whole of the laws and institutions of a society to be non-intentional (Casabianca 2013)[27], the idea of an intentionality lying behind the rational arrangement of enacted laws served the ideal of a collective (and consistent) agency enacting them.

Finally, the verb *troubler* served the reactive stance conveyed by the statement in which *ordre public* now occurred (*ne trouble pas l'ordre public établi par la loi*), whereas Montesquieu's statement (*pour conserver l'ordre public*) conveyed a proactive stance. The purpose that the locution was now called on to serve in the normative context was that of safeguarding principles deemed essential to society, through a formulation that made it clear that only enacted laws could perform such a function.

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[25] *Déclaration des Droits de l'Homme et du Citoyen* de 1789, Article 6 : "La loi est l'expression de la volonté générale. Tous les citoyens ont droit de concourir personnellement, ou par leurs représentants, à sa formation. […]".

[26] Originally 'a row of threads in a loom', cf. https://www.etymonline.com/search?q=order.

[27] Casabianca 2013: "It is by exposing the outline of the work that the spirit of law is defined as an ensemble of relations and that their order is evoked (EL, I, 3). If 'all these relations' (*tous ces rapports*) can appear as an order, that is because the spirit allows us to pass from the diversity of factors, the list of which Montesquieu establishes, to the non-intentional unity that results from them. The spirit of law is Montesquieu's object of study: he intends to explain positive laws by exposing the ensemble of relations that determine them. The spirit also appears as the faculty of order, insofar as to have the spirit of law is to be capable of grasping the relations 'all together' (ibid.), to be capable of 'judging the whole together' (*juger du tout ensemble*, EL: preface)."

3.2. *Ordre public* in the *Code civil* (1804) and in the *Code pénal* (1810)

Fifteen years later, at the suggestion of the politician and magistrate Boulay de la Meurthe, the locution *ordre public* was used in three articles of the Civil Code with a similar function[28]:

> On ne peut pas déroger par des conventions particulières, aux lois qui intéressent l'ordre public et les bonnes mœurs. (Art. 6 *Code civil 1804*)
>
> Il est permis aux propriétaires d'établir sur leurs propriétés […] telles servitudes que bon leur semble, pourvu néanmoins [...] que ces services n'aient d'ailleurs rien de contraire à l'ordre public. (Art. 686 *Code civil 1804*)
>
> La cause est illicite quand elle est prohibée par la loi, quand elle est contraire aux bonnes mœurs ou à l'ordre public. (Art. 1133 *Code civil 1804*)

None of these Articles use the adjunct *établi par la loi*, which had qualified *ordre public* [public policy] in the *Déclaration.* Instead, it was replaced by another limit on personal liberty, *bonnes mœurs* [good morals]. This locution drew on the rules of social behaviour commonly accepted by the community, which *établi par la loi* had effectively excluded in the *Déclaration*. As of that moment, the locution *ordre public* would appear more often than not coupled with *bonnes mœurs* (section 4.3).

The coupling of *ordre public* with *bonnes mœurs* appears as early as Article 6 CC (which holds that private agreements may not derogate from statutes relating to public policy and good morals), where the expression 'legislation concerning either the *ordre public* and/or the *bonnes mœurs*' implies that *public policy* and *good morals* refer to distinct sets of rules. The expression also suggests the existence of general principles: the reference to good morals aims to capture the set of ethical principles governing social cohabitation in a certain society at a particular time, while the reference to public policy refers to the fundamental rights and freedoms of a society (section 4). If the contrary were true, the textual implicature suggesting the existence of laws not concerning the *ordre public* or the *bonnes mœurs* would prove inconsistent. In short, Article 6 CC hints to principles of the

[28] A code of civil law common to the whole kingdom had been announced by the NCA; amongst the projects advanced, one in the IV year used the locution *ordre social*, one in the VIII year featured the phrase "laws which affect the public", while one proposed in the XII year mentioned the *droit public*, and prohibited "to derogate from the laws which form part of public law" (Terlizzi 2012, 11).

system, which are what prohibit private agreements from derogating from legislation concerning either the *ordre public* and/or the *bonnes mœurs*.

In addition, Article 686 CC ('owners are permitted to establish over their property […] such servitudes as they deem proper, provided however that [those servitudes] are not in any way contrary to public policy') and Article 1133 CC ('the cause is unlawful when it is prohibited by law, when it is contrary to good morals or to public policy), introduced a new construction, *contraire à l'ordre public* (in Article 1133 *contraire aux bonnes mœurs ou à l'ordre public*), which would spread into the different branches of law, in parallel with the evolution of loan translations in the civil law countries influenced by the *Code civil*.

Contraire, deriving from *contrarius* (from *contra*, against) and meaning 'adverse', 'opposite', 'opposed', 'conflicting', had by that time lost its medieval sense of a hostile action, and was used as an adjective indicating the quality of being 'opposed', as in the case of the wind, but also of being 'radically opposite' to something (*tot le contreire*)[29].

The aims and purposes of private law explain why in the French *Code civil* enacted in 1804, the term *être contraire* was chosen instead of *troubler*. The choice linguistically rarefied the concreteness of the owner's conduct, or of the cause of a contract, prohibited by virtue of its being contrary to good morals or to public policy, by eliminating the presumption of agency implied by *troubler*—by denoting a *status,* and not an action, *être contraire* presupposes no agency. In addition, the lexical choice marks a polarisation of *ordre public* that is different from the polarisation effected in Article 10 of the *Déclaration*, as *être contraire* signals a focus on the other facet of the concept pictured by Montesquieu's metaphor (the system of laws and institutions), which would come back to the fore once the ideal of a complete and self-sufficient 'codification' of different sectors of substantial and procedural law, in which judges had no role other than to apply the rules, lost credibility (section 4).

As said in section 3.1, to understand how expressions of opinions can trouble a system of laws and institutions, a figurative extension of the meaning of 'system' is required. Similarly, to imagine how the owner's conduct or the cause of a contract may be against the system, a virtual extension of the system must be conceived. In prohibiting certain conducts by owners and causes of contracts, such conducts and causes must be seen as actions giving rise to arrangements (between properties in the case of servitudes and between private individuals in the case of contracts) opposed to those created by conducts and causes the legislation would admit as

[29] https://www.cnrtl.fr/etymologie/contraire.

lawful had it contemplated them in a statutory provision. To be considered one with the legal system, such virtual provisions must be consistent with it, namely they should share its principles. Therefore, by using the wording *ordre public*, Articles 686 and 1133 of the *Code civil* capitalised not only on the concept 'the system of laws and institutions of a society' (one of the facets of the concept enshrined in Montesquieu's metaphor), but also on a further meaning of the metaphor, already suggested by Article 10 of the *Déclaration* and implied by Article 6 of the *Code civil*; namely, those principles that, by holding together the laws and institutions of the state, give systematicity and consistency to their whole, while at the same time sketching out an ideal framework for any legislative developments.

Before examining how the function of the locution *contraire à l'ordre public* evolved over the Age of Nation States (section 4), the use of *ordre public* in the Penal Code enacted in 1810 remains to be considered.

Consistently with the aims and purposes of penal law, the Penal Code could not build on an open-ended clause such as *contraire à l'ordre public*, nor on the notion of *ordre public*, due to their intrinsic vagueness, given that penal law was (and still is) based on the legality principle, which entails that state legislation is to protect individuals against arbitrary measures by the state itself[30]. Nevertheless, the locution *ordre public* appeared in the title of Section III, Chapter IV, Title I, Book III of the Penal Code.

At that time, Title I of Book III dealt with crimes and offences *contre la chose publique*. Chapter IV specifically addressed crimes and offences *contre la paix publique*; including forgery (Section I), forfeiture and crimes and offences by public officials in the exercise of their office (Section II), and finally troubles brought to *ordre public* by ministers of religion in the exercise of their ministry [*troubles apportés à l'ordre public par les ministres des cultes dans l'exercice de leur ministère*] (Section 3). This last section was in turn divided in subsections: the first, on offences against the civil status of persons, punished ministers of religion who celebrated a marriage without the prior issue of a marriage licence by a public official; the second and third subsections dealt with criticism, censorship or provocations contained in public religious speeches or writings directed against public authority; and the fourth dealt with the correspondence of ministers of religion with foreign courts or institutions on religious matters. To complete the context for understanding the meaning of *ordre public* in penal law at that time, it is also significant that the following and final

[30] *Nullum crimen, nulla poena sine lege*. Such measures included not being prosecuted or sentenced without sufficient evidence and not being sentenced without due process.

section of Chapter IV dealt with the offences of resistance, disobedience, and other infringements of public authority.

Section 3 concretely exemplified what at that time was considered trouble for the *ordre public*; namely, altering the marital status of individuals by creating a legal relationship between them without the prior authorisation of the state, and expressing critical or even contrary opinions to those allowed by the state in religious speeches or writings, and in correspondence about religious matters with other countries. By classifying these actions as specific crimes and offences against la *paix publique*, and resorting to the verb *troubler*, the title of Section III stressed one facet of Montesquieu'sconcept of *ordre public*, namely the stability afforded by the system, as Article 10 of the *Déclaration* had already done; however, just like Article 10, the title of Section III also hinted at other facets of the concept *ordre public*. In section 3.1 it was seen how the choice of the verb *troubler* effected a figurative shift that justified the interpretation of Article 10 of the *Déclaration* as prohibiting the manifestation of opinions on the stage of the ideas different from those which hold together the enacted laws and institutions of the *République,* thus from those which call into question the consistency of the system by expressing wills that depart from the general will displayed in enacted legislation and institutions. The provisions of Section III of the 1810 Penal Code were consistent with such a meaning: celebrating a marriage without the prior issue of a marriage licence by a public state official expressed the idea of the supremacy of the Church over the State, which was *de facto* contrary to *ordre public*; written and spoken criticism, censorship or provocation against the public authority, for an audience either inside or outside the borders of the state, could express ideas that not only differed from those holding together and sustaining enacted legislation, but were *de facto* contrary to them.

To sum up, the occurrences of *ordre public* in the *Déclaration* and the French Civil and Penal Codes polarised in their different ways the meaning Montesquieu attached to his original locution. In both the *Déclaration* and the Penal Code, the concept stressed the stability deriving from abidance by a system of laws and institutions, leaving both the system and its principles in the background, where they could be drawn on to determine, as required, which opinions it was unlawful to express. The Civil Code, on the contrary, spoke of *ordre public* from the perspective of the system, leaving the stability it afforded in the background, where it could be drawn on to determine the principles offended by the owner's conduct or causes of contract not expressly prohibited by enacted laws. Hence, by focusing on different facets of *ordre public*, the different branches of law that used the

locution worked (and still work, section 4) as a "prism" refracting the whole concept (see also Picheral 2001, 10).

4. The Age of Nation States and further evolution of *ordre public*

As seen in the previous sections, the concept *ordre public* entered the French normative discourse undergoing three polarisations, which alternatively stressed its meaning as a 'system of laws and institutions of a given society,' the 'stability deriving from abidance by it,' and the 'general principles of the system.' Such polarisations survived not only in the dissemination of the locution in the different branches of law, functional to their specific purposes, but also in loan translations of the term in legal systems influenced by French law. Moreover, the codification of the concept *ordre public* evolved beyond the original intent of the expression, with the wording *contraire à l'ordre public* technically becoming a general clause in private law, where it was coupled with *bonnes mœurs*. Furthermore, during the Age of Nation States, the adjective *public* underwent an extension of meaning in legal discourse that would be of consequence for the concept *ordre public* as well. In practice, although it remained functional to the ideal goal of reducing the sources of law to written statutes only, such an evolution artificially abstracted the concept from the customary meanings of its components, for which it would lose its specificity.

4.1. The evolution into a general clause

In the French Civil Code, the term *contraire à l'ordre public* expressed the safeguarding of principles deemed essential to society. The legal text left these principles unspecified, distinguishing them only from those shaping *les bonnes mœurs* (section 3.2), as the expression *contraire à l'ordre public* served precisely as a guide for identifying them.

At the time of the enactment of the French codes, this function presupposed no creative interpretation on the part of the courts, but rather the contrary, with the ideal being that the set of principles from which judges could draw to rule on a specific situation was sufficiently clear and determined so that the choice was merely a question of individuation. Yet in the years following the enactment of the *Code civil*, socio-economic conditions changed so rapidly, and with them the principles deemed essential to society, that judges were often called to rule on owner's conducts (Article 686 CC) and causes of contracts (Article 1133 CC) not contemplated

by enacted law, and thus not immediately determinable within a framework of 'principles of the system'.

The very idea of a general clause conflicted with both the revolutionaries' intention of limiting the multifaceted interpretations provided by judges of enacted legislation, and the fitting metaphor of the judge as the *bouche de la loi*, enshrined in Articles 4 and 5 of the *Code civil*. However, it proved a contingent necessity, and it was well served by the locution *ordre public,* vague enough to leave judges room to act in the name of the law in cases not expressly contemplated by its provisions, but at the same time sufficiently constrained by the combination of *ordre* and *public* to give judges a guide for closing loopholes in the system. However, after an initial period in which jurists at the *École de l'exégèse* argued that judges' interpretations should aim to convey the will of the legislature in an almost religious respect for the text to be interpreted[31], *contraire à l'ordre public* served the purpose of a formal shell through which judges could impose limits on personal liberty and private autonomy when needed; namely, when no specific enacted legislation prohibited a certain owner's conduct or a contract cause, and yet they proved contrary to the system.

In short, when the Civil Code was enacted, the locution *contraire à l'ordre public* identified, in the drafters' intention, a predetermined (although unspecified) set of principles, which was then used as a metaphor with an intended definite meaning; whereas during the Age of Nation States, the courts turned it into a metaphor open to interpretation. The distinction between closed and open metaphors concerns the interpretive attitude towards metaphors, rather than a characteristic intrinsic to them, and the evolution of the metaphor *ordre public* in the Age of Nation States exemplifies how legal communities "may (re)open to interpretation a metaphor used until then as closed" (Morra 2010, 391). Montesquieu had created a metaphor serving a descriptive function in the context in which it was used (a speech); using *ordre public* in statutes with a directive function, the Republican drafters considered its metaphorical potential as defused, as they conceived the system of enacted legislation as a guide to interpretation sufficient to avoid the creative interpretations they had forbidden. The legal

[31] Demolombe said: "La suprême mission du législateur est précisément de concilier le respect dû à la liberté individuelle des citoyens avec le bon ordre et l'harmonie morale de la société. Et l'on peut dire qu'il emploie en général, pour atteindre ce but, trois moyens principaux : […] Il prive de tous effets légaux les conventions qui blesseraient les principes de la morale […] En dehors et au-delà de ces limites, les préceptes de la morale ne sont plus des lois, ne font plus partie du droit et ne peuvent pas exactement recevoir ces dénominations dans les ouvrages de jurisprudence" (Demolombe 1860).

praxis after the enactment of the codes in the Age of Nation States, however, opened the locution up again to interpretation.

4.2. The evolution of *public* over the 19th century and its impact on the contemporary meaning of *ordre public*

Over the 19th century, the locution *contraire à l'ordre public* underwent a change in function, but also in meaning, as the adjective *public* became more specialised in meaning.

As anticipated in section 2.2, it was only in the mid-19th century that the conceptual refinement of the notion of public law was completed. German professors, such as Carl Friedrich Gerber (Tübingen), Paul Laband (Heidelberg), and Georg Jellinek (Vienna) conceptualised an autonomous public sphere, where the state was institutionalised as a legal entity, depersonalised and sustained by the rule of law, while public law was defined as an autonomous sector in the domain of knowledge and legal discourse (Padoa Schioppa 2007, 566–567). Such a conceptualisation also impacted on the meaning the adjective *public* had in public law discourse and statutes, where it came to mean both 'pertaining/belonging to the state' and 'under the control of the state'– a shift in meaning that in turn affected the meaning of *ordre public* throughout Continental Europe's legal systems.

As regards one of the facets enshrined by the concept *ordre public* coined by Montesquieu, namely 'collective stability deriving from abidance by a system of laws and institutions', it was transformed by the legal discourse of codification into 'stability concerning the community and deriving from abidance by the law'. The further specialisation acquired by *public* during the Age of Nation States made *ordre public* allude to a general stability derived and maintained essentially (and necessarily) by legislative enactments, and notably by abidance by positive law, thus further shifting into the background the customary laws included in the concept expressed by Montesquieu.

As regards the other facet of the concept *ordre public* ('system of laws and institutions of a given society'), the new meaning of *public* severed ties with any legal source other than positive state laws, as accepting something other than 'the system' in the legal and political discourse of Nation States would have undermined the very foundations of the system itself, whereas previously, it would only have tarnished the universalistic *façade* of the system built by Enlightenment thinkers.

Finally, as regards the third facet of the concept ('principles that give systematicity and consistency to the system of laws and institutions'), —a nuance emphasised to varying degrees by all the early normative occurrences

of *ordre public* (section 3.2) and put in further evidence by the re-opening of the metaphor *ordre public* to interpretation in private law—the new meaning of *public* appeared in penal law.

As seen in section 3.2, the *Code pénal* had introduced a specific set of crimes and offences defined by their troubling the *ordre public*, alluding to a basic principle of the system, which was the supremacy of the State over the Church. In accordance with the 1789 Declaration, here to trouble the *ordre public* was considered an offence against the public security and safety of the Nation State. Over the 19th century, what constituted an offence against the *ordre public* would vary greatly, with some offences repealed, while many others were added to the Penal Code. Further examples of the principles implied by the concept *ordre public* were given by the various legal systems influenced by the French codes. In short, any crime and offence against national security (i.e., any breach in the stability and pacific coexistence of the community) that perturbed public safety and public security, or rendered social coexistence impossible, made its way into penal codes by special legislation, satisfying the principle that criminal offences should be clearly and precisely defined. Thus Nation States reserved for themselves the capacity to limit individual rights and civil liberties in order to guarantee public security and safety, and progressively all constitutions would envisage a strict list of restrictions to rights and liberties for reasons of public safety and public security. As a limit on civil liberties, *ordre public* took on the narrow meaning of 'public order', absorbing the concepts of public safety and public security.

Since the 20th century, other kinds of crimes and offences have come to be defined as being against *l'ordre public,* where they undermine the fundamental rights and primary public interests on which an orderly and peaceful coexistence of the Nation (i.e. of a specific society) must be based, and the principles whose existence, and supposed uniqueness, makes such coexistence possible; namely, the physical and psychological integrity of the person, his/her security, and the protection of any human right of fundamental importance for the existence and the functioning of the state.

4.3. Specificity and relativism in *ordre public*

As seen in section 4.1, the new function of the locution *contraire à l'ordre public* in the 19th century as a general clause in private law rendered explicit one of the facets of the concept captured by Montesquieu's metaphor, namely 'principles that give systematicity and consistency to the system of laws and institutions'. At the same time, however, it also revealed an aspect of the concept that had remained veiled in the early days of civil law

codification, for the specificity of any system of laws and institutions serving a given society meant that such laws and institutions were tailored to that society, and so could hardly be suitable for a different society.

In section 3.1, it was seen how through the addition of the qualifier *établi par la loi*, the drafters of the 1789 Declaration had sought to reduce the concept *ordre public* to both the system formed by the written laws enacted by the legislature, and its outcome, the stability of society at large, thus blocking the role not only of customary law, but also of case law. Such a compression of the concept was meant to impede an interpretive practice which, through the recourse to general clauses (as *ordre public* and *bonnes mœurs*), would have paved the way for ethical principles (common decency of average reasonable people included) and fundamental freedoms and rights for governing collective coexistence in a certain society at a particular time. However, the locutions *ordre public* and *bonnes mœurs*, as seen in section 3.2, were both incorporated into the French Civil Code, despite a lively debate in which both judges of Appellate Courts and members of the Tribunate (such as Faure and Andrieux) had criticised the introduction of *bonnes mœurs* for both its vagueness and uselessness, arguing that it was already assumed in the notion of *ordre public* (Fenet 1827, 67).

The coupling of the locutions *contraire à l'ordre public* and *contraire aux bonnes mœurs* (in the other civil law systems *buon costume*, *buenas costumbres*, *guten Sitten*, etc.), aimed to capture the set of ethical principles governing social coexistence in a given community, at a particular time, and was enshrined in codified law as a counterpart to the fundamental principle of contractual freedom, together with the limit of *utilité publique* [public interest].

The formulation *contraire aux bonnes mœurs ou à l'ordre public* (Article 1133 CC), among other things, undermined the idea of universality, typical of the Enlightenment. In particular, *contraire à l'ordre public* tied into one of the facets of the concept conveyed by Montesquieu, namely the specificity of the system of laws and institutions of a society and the specificity of the stability deriving from abidance by it, where the specificity of a legal system, in the 19th century, coincided with the Nation State. Coupled with *ordre public*, the concept of *bonnes mœurs* soon lost its relevance, as the 'system of laws and institutions specific to a society' was no longer shaped by extra-legal elements such as morals and traditions, which belonged to non-legal spheres such as religion and philosophy.

Within the framework of civil codes, statutory prohibitions based on public policy and good morals provided much of the foundation for positive limits to personal freedoms and party autonomy (for instance, in contract law by declaring contracts void or unenforceable). Also in penal law, further

limits to personal freedom and freedom of contract were introduced and certain conduct was prohibited by statute (incitement; fencing; prostitution, as well as gaming and betting), making what was against 'the law' automatically against 'public policy and good morals', with any possible contract or conduct to the contrary being unlawful. Thus, locutions such as 'contrariety to mandatory law,' 'to public policy' or 'to good morals' (in various translations of the notion in the different civil systems) at once became the outer walls of Nation States, limiting the incoming tide of 'external' *ordres*, and the inner perimeter of personal liberty in general, and of freedom of contracts more concretely.

The growing secularisation and pluralism of societies soon made it impossible to refer unequivocally to the notion of the good morals shared by a society, even within the borders of a single Nation State. In the 20th century, this would give rise to the "judicializing of morality in contemporary legal systems" (Terlizzi 2012, 86; Resta 2015). Ultimately, the recognition of a plurality of values, founded on the accepted norms rooted in each system and reflecting the pluralism of societies and cultures, eroded the space for *bonnes mœurs* in favour of *ordre public*.

According to a first scholarly approach, the two locutions are still two separate notions, where *ordre public* [public policy] concerns the mandatory provisions expressed by positive law (such as those contained in penal provisions, or rent restrictions, insurance law, labour law, etc.) and *bonnes mœurs*[good morals] concerns the spontaneous code of conduct, immanent and external to any given state-institution[32].

A more commonly-held view argues that the open-ended clause of public policy absorbed that of good morals in a process of osmosis. Some civil law systems have indeed eliminated the notion of good morals from their civil codes (i.e., France, with the 2016 reform; Québec); others have opted for a less radical break with their legal traditions, circumscribing the meaning of good morals to the set of ethical and moral principles implied by the average perception of decency. Today, public policy and good morals generally constitute a hendiadys (whereas being contrary to mandatory law remains a separate notion), conveying all the principles derived from the legal, moral, political, economic and social spheres shared by a certain community at a given time (Trabucchi 1959, 700–706; Ferri 1970, 270; Guarneri 1988, 121–126).

Still today, Montesquieu's concept *ordre public* has not lost its various facets. Rather, it has become a repository of rules of conduct, based on the sense of duty, dignity, and honesty of the human being, and of public

[32] Different opinions are reported in Terlizzi (2012).

interest, commonly accepted by citizens, no matter what religious or philosophical opinions they hold, with the aim of guaranteeing precisely that collective stability deriving from abidance by the law (Fauvarque-Cosson 2004, 473). Although judges are not allowed to impose their own subjective standards, they must gauge what society, as a whole and within a specific state, believes to be morally unjustifiable and contrary to public policy. However, as *ordre public* (now encompassing good morals) undergoes continuing transformations, it is not surprising if another 'absolute value' has emerged to cope with the relativism of values: that of human dignity (section 5).

5. The new International Order and the European Supranational Order

The facet of the concept conveyed by Montesquieu's metaphor *ordre public* that was considered in the last section—namely the specificity of any system of laws and institutions serving a specific society, making it hardly suitable for a different society—emerged explicitly in the 20th century as a consequence of the new post-war order, and as an equal and opposite force in response to international trade law negotiations under the General Agreement on Tariffs and Trade of 1949 (GATT) for the creation of a new economic world order. In Europe, *ordre public* was absorbed in EU law from the beginning, when the six founding states started the process of unification with the European Coal and Steel Community (ECSC 1950) in order to secure lasting peace on the continent and to foster economic growth through the European Economic Community (EEC, 1957), through to the last enlargement, when 28 States (Croatia was the last to join in 2013) formed the European Union (section 5.1). By then, the general clause *contraire à l'ordre public* was widely found in all branches of EU law and interpreted by judges according to one of the meanings of the concept conveyed by Montesquieu's metaphor, namely a 'system of laws and institutions of a given society'. But the very specificity of the system this definition alludes to, a facet of Montesquieu's concept until then not capitalised on by legal constructions, revealed a contrast between an international notion of *ordre public*, on the one hand, and several national *ordres publics*, on the other (also called 'internal' or 'domestic' *ordres publics*).

In the light of the values widely accepted by the international community, in any international case potentially involving a conflict-of-laws[33], *ordre public* i.e., public policy, sometimes also called 'public order law' to allude to public security policies and to distinguish it from general 'public policy, could not remain a mere domestic notion, vested in a conflict of laws meaning. Since the aftermath of World War II, the notion *ordre public* has fulfilled a function of exclusion, allowing a national court to reject any decision or an act which has been made in conditions which are considered to be intolerable with regard to what are recognised as fundamental rights within the internal *ordre public* (defence rights; arbitration clauses; equality between spouses; etc.). The content of this *ordre public* is both substantial and procedural, in the dual sense that: a) its sources can be procedural or substantial, and b) its application produces substantial as well as procedural rules, as happens in the field of international arbitration (Fauvarque-Cosson and Mazeaud 2008, 112–114).

Even in the European *supranational* legal system, *ordre public* is translated both as 'public policy' and as 'public order law'.

As 'public policy', the European Court of Justice (ECJ) in the *Bouchereau* case of 1977 gave a first interpretation that converged towards the facet of the concept already matching with the meaning of *troubler*, namely the stability concerning the community and deriving from abidance by the law (section 3.1), stating that:

> […] the recourse by a national authority to the concept of public policy presupposes, in any event, the existence, in addition to the perturbation to the social order which any infringement of the law involves, of a genuine and sufficiently serious threat affecting one of the fundamental interests of society. (ECJ in the *Bouchereau*, paragraph 35[34])

The Board of Appeal of the European Patent Office, in the decision *Plant cells* of 1995, illustrated, instead, the still lively dialectic between *ordre public* and *bonnes mœurs,* saying:

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[33] They address three principal questions; first, when a legal problem touches on more than one country, it must be determined which court has jurisdiction to adjudicate the matter. Second, once a court has taken jurisdiction, it must decide what the applicable law before it will be. Third, when the court ultimately renders a judgment in favour of the plaintiff, conflicts of laws address the enforcement of the judgment (https://www.britannica.com/topic/conflict-of-laws). These rules are national in origin (except for countries that have entered into treaties concerning them) and are not part of international law.

[34] Case 30/77, judgment of 27.10.1977, 1977, I-999.

> […] the concept of *ordre public* covers the protection of public security and the physical integrity of individuals as part of society. This concept encompasses also the protection of the environment.
> […] the concept of morality is related to the belief that some behaviour is right and acceptable whereas other behaviour is wrong, this belief being founded on the totality of the accepted norms which are deeply rooted in a particular culture. (EPO in the *Plant cells,* paragraphs 5 and 6[35])

Notwithstanding *ordre public* is considered to have absorbed the *bonnes mœurs* in a process of osmosis (section 4.3), *mœurs* continue to represent a useful general clause for the gap-filling function of judges. Since *Plant cells*, any breach of public security or any threat affecting social peace, or any serious prejudice for the environment are to be excluded from patentability on the grounds of being contrary to the *ordre public* and, in particular, any exploitation of inventions not in conformity with the conventionally-accepted standards of conduct pertaining to the "inherent culture of European society" are to be excluded from patentability on the grounds of being contrary to morality[36].

As 'public order law', since the ECJ *Arblade* case of 1999[37] the notion has been crucial for the protection of the political, social, or economic order of the Member State concerned, requiring compliance by all persons present on the national territory of that Member State.

Since then, a 'European public order' has started to contend with the various Member States' public orders, and to take precedence over the materials law of non-Member States, which are designated as 'applicable' by the different conflict of laws rules of Member States (Basedow 2005). This aspect of *ordre public*, already present in the concept when it was first coined, served to reinforce the international or supranational mandatory character of certain rules: those which should be internationally, or supranationally applied, highlighting the 'specific modality' in which they apply (laws of immediate application/*lois d'application necessaire/leggi di*

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[35] EPO, Case T356/93, of 21.2.1995.

[36] In Case C-34/10, judgment of 18.10.2011, 2011, I-09821, the ECJ emphasised that patent law must be applied so as to respect the fundamental principles of *safeguarding the dignity and integrity of the person* [emphasis added].

[37] Joined Cases C-369/96 and C-376/96, judgment of 23.11.1999, 1999, I–8498. In the original language and in the Italian, French, and Spanish versions, the category is not public order law, but 'leggi di polizia e di sicurezza,' 'lois de police et de sûreté,' 'leyes de policía y de seguridad,' expressions that intercept most of the meaning of the civil law concept of *ordre public*; still, there remain different meanings between the civil law and common law systems due to the difference in the legal systems.

applicazione necessaria), and those which place emphasis on the 'content' of such laws and in which *ordre public* is only one of the criteria defining such provisions (*public order law/leggi di ordine pubblico*).

5.1. The emergence of an autonomous European *ordre public*

The emergence of an autonomous and substantial concept of 'European *ordre public'* was furthered by ECJ rulings on a case-by-case basis, as illustrated by a number of examples (Basedow 2005, 65), until the recognition as "a public policy provision" of what is now Article 101 of the TFEU, which prohibits, as incompatible with the internal market, all agreements between undertakings which have as their object or effect the prevention, restriction or distortion of competition[38].

The notion of a 'European *ordre public'* was also recognised by the European Commission through its Interpretative Communication on the freedom to provide services[39], in which the Commission considered the "domestic mandatory provisions in the public interest" and the "imperative reasons in the general good" and recognised the following objectives as imperative: the protection of the recipient of services, the protection of workers (including social protection), consumer protection, the preservation of the good reputation of the national financial sector, the prevention of fraud, the protection of intellectual property, the preservation of national, historical, and artistic heritage, the cohesion of the tax system, the protection of creditors, and the protection of the proper administration of justice.

Other provisions explicitly admitted prohibitions or restrictions on the freedom of imports, exports or goods contained in Article 36 TFEU, justified on grounds of "public policy, public security and public morality":

> The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; […] Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States. (Article 36 TFEU)

The list of TFEU provisions is in fact open-ended (Mak 2020, 19), and the European Court of Justice can draw on this list to expand the scope of

[38] Cf. for instance in relation to the New York Convention 1985 (recognition and enforcement of foreign arbitral awards), the case ECJ C-126/97, judgment of 1.6.1999, 1999, I-3055.

[39] Commission Interpretative Communication 20.6.1997, Sec (97), 1193.

application of the 'European *ordre public'* as follows: to the free movement of goods (TFEU, Article 36, according to which the restriction on imports, exports or goods in transit can be justified only on the grounds public policy, public security, and public health, subject to compliance with the principle of proportionality)[40]; to the freedom of movement for workers (ibid.: Articles 45 and 22 include limitations justified on grounds of public policy, public security, or public health); to the freedom of establishment (ibid.: Article 52 provides for special treatment for foreign nationals on grounds of public policy, public security, or public health); to the freedom of movement for capital (ibid.: Article 63 sets out the right of Member States to take measures which are justified on grounds of public policy or public security).

Generally speaking, one of the facets of the concept conveyed by Montesquieu's metaphor *ordre public*—the specificity of any system of laws and institutions serving a specific society, making it hardly suitable for a different society—emerged explicitly in the respect that national measures that can hinder or make less attractive the exercise of fundamental freedoms guaranteed by the European Treaties must be justified on grounds of public policy and public security, which in practice means they must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it[41]. Accordingly, from the perspective of European institutions, the concept of internal (or domestic) public policy must be understood in a very restrictive sense. For example, the ECJ has consistently held that economic objectives cannot constitute public-policy grounds[42].

5.2. National '*ordre public* exceptions' in the light of human dignity

More recently, in its *Omega* decision of 2004, the ECJ held that EU law, in principle, does not interfere with national conceptions of public policy, and it took a deferential approach towards the national interpretation of domestic 'public policy exceptions' in the light of human dignity[43]. Competent national authorities must be allowed a margin of discretion within the limits imposed by the European Treaties; the protection of human dignity, as a general

[40] Case C-17/92, judgment of 4.5.1993, 1993, I-2239.
[41] Case C-55/94*,* judgment of 30.11.1995, 1995, I-4165.
[42] Case 352/85*,* judgment of 26.4.1998, 1988, I-2085.
[43] Case C-36/02*,* judgment of 14.10.2004, 2004, I-614, paragraph 31.

principle of EU law, can fill out the concept of public policy, but it is left to the Member States to determine the consequences and sanctions for any specific cases (Fauvarque-Cosson and Mazeaud 2008, 118).

Other European public policy rules have been acknowledged by the European Court of Human Rights (ECHR) and the European Convention, in the process of the 'fundamentalisation' of the sources of private law, either by imposing positive obligations upon the contracting parties, or by settling disputes of a purely private nature, such as those involving a testamentary disposition[44]. The ECHR placed itself alongside national judges as guardians of different possible notions of public policy (Fenouillet 2001)[45], to be used as national public policy exceptions.

In particular, at national level we can observe the emergence of a new facet of *ordre public,* aimed at protecting individuals from both public and private abuses. The criteria which have been put forward by Continental legal scholars include a nuanced range of factors.

French authors have created two new categories of *ordre public*: the 'public policy of direction' (*ordre public de direction*), with reference to fundamental principles in general, and the 'public policy of protection' (*ordre public de protection*), for the protection of consumers, workers, and other categories of vulnerable persons (Ripert 1934; Malaurie 1953; Francescakis 1966; Ferri 1970; Guarneri 1974).

Italian authors have preferred juxtaposing political public policy (*ordine pubblico politico*) and economical public policy (*ordine pubblico economico*), to highlight, on the one hand, an intangible 'core of individual rights' that cannot be measured in terms of money or commodified by the market, where human dignity is a right to be protected, and also a duty that other human beings or the state can oppose to individual rights, thereby prohibiting completely free self-determination and self-disposal; and, on the other hand, the value in itself of 'any socially significant economic operation' showing a generous attitude towards freedom of contract, with

[44] ECHR, Chamber Judgment of 13.7.2004, 69498/01, [2004] ECHR 334, (2006) 42 EHRR 25, [2004] 2 FCR 630. See §§ 59-64.

[45] See in France the pioneer judgments of the Supreme Court: Cass civ 3, 18.12.2002 and Cass civ 3, 12.06.2003 comments by Rochfeld, in Rev des contrats, 2004: 231; Cass civ 3 12.06.2003 comments by Marais, in Rev des contrats, 2004: 465. Cf in Italy Cass civ 1, 8325/2020, comments by Poggi. (https://www.statoechiese.it, 18, 2020), Cass civ Sezioni Unite 12193/2019, comments by Angelini in AIC 2/2020: 185; Cass civ 14878/2017 and 19599/2016, comments by Lorenzetti (https://www.costituzionalismo.it/costituzionalismo/download/Costituzionalismo_201802_676.pdf).

the aim of facilitating commercial dealings in cases in which there is no threat to mandatory law (Bessone 1984; Breccia 1999; Sacco 2004).

These new categories based on juxtaposing elements are often contested, because any distinction is more a matter of degree of the mandatory nature of the laws (Malaurie, Aynes and Stoffel Munck 2009, 650), a binding nature which seems on the decline since less drastic sanctions than nullity have gradually appeared (see the technique of severance of illegality, which involves eliminating the illegal elements; and the principle of *locus poenitentiae,* i.e., a place of repentance, or a right to withdraw, by which restitution is admitted) (Fauvarque-Cosson and Mazeaud 2008, 147–148).

To a large extent, the different notions of *ordre public* more recently adopted by European States have left it to the realm of *bonnes mœurs* (as good morals have been subsumed into public policy, see section 4.3) to phrase a new facet of *ordre public,* based on fundamental rights and human dignity (Resta 2010), in which a 'physical public order' intertwines with a 'philanthropic public order' and encompasses notions such as the right to bodily integrity and human dignity. This facet acquired by *ordre public* aims to protect individuals from abuses, whereas the 'old' *ordre public* aimed to protect society from individuals (see also Fenouillet 2001; Fauvarque-Cosson 2004).

Perceived as a more objective concept, *ordre public*/public policy has taken over the role of good morals[46] and has been given a more philanthropic dimension, to cover values that can be drawn from morality, i.e., values that protect not only a society, but also individual freedoms. Since the notion of good morals draws on pre-juridical values, it cannot be rigidly formalised; thus, good morals as an open-ended clause attached to *ordre public* is valuable in managing legal pluralism, because it appears to be "neutral" and "objective" with respect to human conduct (Sacco 2004:

[46] Remarkably, in common law the term public policy captures a facet of *ordre public* that Lord Mansfield CJ recognised in *Holman v. Johnson* as the principle *ex dolo malo non oritur actio* [No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act]. Immorality, in the context of the public policy doctrine, appears only to concern sexually reprehensible conduct (Mansoor 2020, 61). In the UK, public policy does not seem to be a general principle and the courts treat it carefully. It cannot work as a general clause because common law is attached to the idea of freedom of contract 'on whatever terms', although there are a number of instances where this generous freedom is curtailed. Nevertheless, such exceptions remain small in number and applied restrictively: cf. Twigg-Flesner (2018, 52, 63).

68; Caterina 2014, 1261)[47]. In the end, what used to be seen as "against good morals" (i.e., immoral) is now being recast as "against public policy".

The current occurrences of different expressions in legal texts such as *ordre public*/public policy, mandatory law, statutory provisions of public policy, public order laws, and laws of immediate application, sometimes used interchangeably, testify to how, since its first use in Montesquieu's speech, the metaphor *ordre public* has given rise to several *ordres publics* "which all add up and jostle together" (Favaurque-Cosson 2004, 473).

6. Conclusions

The locution *ordre public* was coined by Montesquieu in his speech to the Bordeaux *parlement* in 1725. In such a context, the utterance functioned as a metaphor, namely as a cognitive-linguistic device that served Montesquieu's conceptual perspective of human legislation by calling into question the received understanding of both the concepts of *ordre* and *public,* and merging them in what was not only an original way, but necessarily perceived as far from linear, given the meanings the two words had acquired. Then, several years later, when its original metaphorical potential was defused by the triumph of the Enlightenment, the locution *ordre public* [public policy] became part of the lexicon of the *Déclaration des Droits de l'Homme et du Citoyen* (1789) and of the French *Code civil* (1804) and *Code pénal* (1810). These brought to prominence different facets of the concept forged by Montesquieu (the system of laws and institutions of a given society; the collective stability deriving from abidance by such a system; the principles of the system). In addition, in the codes the locution served the function of safeguarding principles deemed as essential to society, through a formulation that made it clear that only enacted laws could perform such a function, namely as a metaphorical expression closed to interpretation, at least in the drafters' intention. Very soon, however, during the Age of Nation States, the metaphor was re-opened to interpretation and construed as part of a general clause in conjunction with the locution *bonnes mœurs* [good morals]*,* and as such was used in the legal codes of other civil law countries. During the 19th century, the new function of general clause assumed by the locution *contraire aux bonnes mœurs ou à l'ordre public* in private law revealed a further aspect of the concept crystallised by Montesquieu's metaphor, a facet that had remained veiled in the days of the

[47] Some authors, however, pointed out that the meaning of 'good morals' is not neutral at all (Maffeis 1999, 97): certain sexual behaviours, for instance, are seen as unacceptable in certain societies but not in others.

early French codification: the specificity of any system of laws and institutions serving a given society that may not be suitable for a different society. In the 20th century, an autonomous and substantial concept of European *ordre public* emerged, through the European Court of Justice ruling on a case-by-case basis; simultaneously, several national *ordre public* exceptions were established in the light of the principle of human dignity. The protection of human dignity, as a general principle recognised within EU law, can fill out the concept of *ordre public*, but it is left to the Member States to determine its extension and effects for any specific cases.

Our research into the origin and evolution of *ordre public* prompts us to suggest capitalising on the expanded meanings of this legal metaphor and on the hendiadys *ordre public+bonnes mœurs* jurists are faced with, possibly by abandoning the contrast between a European *ordre public* with different national *ordres publics*, in favour of their full integration within a common European notion. In conclusion, this analysis of the legal metaphor *ordre public* illustrates how the interpretation of a legal metaphor is shaped by habits of adjudication and by conscious and unconscious choices that determine the drafting process of a legal text. The law is not only about the content of detailed legal rules, but also about foundational principles and values, and the assumptions underpinning them. According to this view, law is a socially valuable practice of regulation in a given time and place, a practice that reflects the variability of socio-legal conditions. In such a practice, what counts in defining what is 'legal' are particular social settings, a reflection of social values, educational conditioning, ideology, and economics. Legal interpretative activity, in particular, is a relational and social practice that involves cognitive elements, some related to personal beliefs. Through an open-ended exploration of the multiple sites of normativity and of the multiple forms of legal communication we can understand law better.

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CHAPTER 9

THE ROLE OF METAPHOR IN POLICE FIRST RESPONSE CALL-OUTS IN CASES OF SUSPECTED DOMESTIC ABUSE

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Abstract

The role of metaphor is qualitatively explored in the data from three real police-victim interactions during first response call-outs in cases of suspected domestic violence. We first analyse how metaphor is used to describe the abuse by the alleged victims, which adds emotional weight to their narrative (xx was off his face; xx was like a bull in a china shop) and encourages the listener (the POs) to picture the incident from the victims' perspective rather than from a frame of typical domestic interactions in the hope that the abusive nature of the incident is recognised and recorded. Secondly, we discuss how the POs largely restrict their use of metaphor to eliciting the evidence using metaphor primarily to break up and structure the victims' narrative into a statement. In so doing, the police officers typically neutralise the account of the incident, using metaphors to (re)-gain control (you ask her in a bit more depth) and put some order into the victims' description of what happened (that needs to be cleared up, let's go over it again) to produce the statement which is a different 'destination' from the victims who uses the journey metaphor to progress their narrative and reach the 'destination' of getting out of the relationship. We argue that these contrastive styles re-inforce the power asymmetries in these call-outs and potentially contribute to the victims reporting that their voice is not heard.

Keywords: domestic abuse, police-victim interaction, metaphor

1. Introduction

In this chapter, we explore qualitatively the role of metaphor in the interactions between the police officers and alleged victims in three first response call-outs in alleged domestic abuse incidents. A first response call-out, in this context, refers to the police being dispatched to, aiding, and gathering evidence from an alleged victim at the scene of a reported domestic abuse emergency. All incidents occurred in one policing territory within the England and Wales jurisdiction between 2019 and 2020. Our analysis, here, is one part of a larger project (cf. Steel in progress) investigating police-alleged victim communicative interactions in first response call-outs in domestic abuse incidents and focuses on how both parties employ metaphor to achieve their communicative goal of describing their experiences (the victim) or gathering evidential information (the police officer). Our data are from three such call-outs where the police officers wore a body recording device and we had access to the recordings for transcribing purposes. The reported perpetrators were not present for any of these interactions. For the ease of reading, our discussion refers to *victims* and *perpetrators*, but it should be clarified that no arrests had yet been made. We evaluate here then how metaphor is used to represent both what happened in the alleged domestic abuse incident and how the institutional procedure of evidence gathering was achieved during the interview.

The function of metaphor is, of course, to represent abstract concepts in terms of those which are more accessible (Lakoff and Johnson 1980), and we analyse here how they are used to describe a past chaotic event and to add structure to the criminal justice procedure of co-producing a statement. We also add to the literature that has described the traditional prioritisation within the criminal justice system of physical violence over the less visible, everyday aspects of domestic abuse (e.g., Robinson, Pinchevsky, and Guthrie 2015; 2018; Lagdon, Armour, and Stringer 2015; Crossman, Hardesty, and Raffaelli 2016). Given that metaphors (Lakoff and Johnson 1980) are central to how we make sense of the world, it is not surprising that we find them in abundance in the narrative of victims who are trying to report what has happened to them in a way another person may understand it (Walton 2001). Indeed, when people undergo traumatic events, they frequently turn to metaphor to explain and make sense of something that has happened to them (cf. Nacey 2018) and we see here, particularly, how victims use the container/ment metaphor, especially the most basic, pre-conceptual (Johnson 1987) universally comprehensible adoption of parts of the body and their home (cf. Radman 1997) to demonstrate how the perpetrators invaded their space thereby overpowering them. In contrast, the

police officers, working very much within the police agenda of gathering evidence and turning a spoken account into a written statement, use far fewer metaphors and those adopted tend to be journey metaphors which break the data gathering exercise into stages with the aim of supporting the victim to give a full, chronological structured account.

2. Data

The analytic data are three audio recordings extracted from police body-worn video footage of first response call-outs to domestic abuse incidents. Permission to analyse the data was given by the relevant police forces' and our university's ethics committees and the data selection was further dictated by a series of ethical considerations, including the process of obtaining informed participant consent and the exclusion of others from the recordings, such as the perpetrator and vulnerable witnesses such as children. To further protect people's privacy, all analyses were performed from audio data rather than the video data although during transcription, one of the authors noted all interactional features visible in the footage. The extracted audio data were fully anonymised to remove all potentially identifying details and has been stored on an encrypted site. We analyse here every occurrence of metaphor in three transcripts of first response call-outs, two involve female victims and male perpetrators and one involves a male victim with a female perpetrator. This variation has resulted in a mix of gendered pronouns denoting victims and perpetrators in both the data extracts and the discussion of individual examples. For this study, we extracted all instances of metaphor use in participants' representations of both the domestic abuse incident and the institutional procedure of evidence gathering, as the two central topics underpinning the interactions and representative examples are discussed here. We turn first to how metaphor is used within the interview to describe and explain what happened; focussing first on how the victims described the incident in question and at times, their relationship with the alleged perpetrator.

3. Analysis

3.1. The victims' use of metaphor in describing what happened

This section begins by examining how metaphor is employed by the victims to heighten their descriptions of the perpetrators' actions and their state of mind. More specifically, we argue how the container metaphor is employed by victims to emphasise how the perpetrators invade their space and how

the distancing metaphor is used to show that the perpetrators are out of control and thereby separate from their actions. We argue that employment of such metaphors adds power to the perpetrators' actions and emphasises how the victims felt that their own space was invaded, and they had no control over the situation. Examples (1) illustrate how spatial metaphors are a key means of conveying the idea of targeted attacks:

(1)

a. *He's in my face like screaming in my face grabbing me.*
b. *We're both just stood there and he's screaming his eyes are massive in my face.*
c. *I was scared then for my life like I didn't know what he was gunna do cause he's just looking through me.*
d. *Before I knew it he was back with his foot in the door.*

In each of these examples, then, by using spatial metaphors, actions which do not entail physical contact are conceptualised in terms of penetration into or through the victim's body (face) and if the body is not adopted, another personal space, namely, their home (trying to get through the door) is adopted to emphasise how the victim's personal space is violated—abusive behaviour which, of course, defines domestic abuse.

We posit that this metaphorical extension of the perpetrator's actions draws the listener's attention to the victim's experience of being violated and invites an interpretation of events (and recording of the evidence) from their perspective as the target—they are powerless and have been abused. The power differential is emphasised in (1b) through the shift in the spatial configuration from being 'both just stood there', which suggests equal access to the space, to one imposing metaphorically into the other's body. The use of penetration metaphors conveys that the threatening effect of the perpetrators' conduct extended beyond physical actions such as 'grabbing' to include the feeling of an attack generated by other behaviour. In this way, victims not only add emotional weight to their descriptions of specific actions, but they also account for their overarching fear of greater violence—a causal relationship that is explicit in example (1c). The persuasive potential of such descriptive devices is indicated by the fact that in this case, the officers' decision to make an arrest is based on their conclusion from her narrative that she was 'put in fear of violence' (example 5a).

The following examples relate to the wider context of the abusive relationship, prior to the incident under investigation. Whereas the metaphors in (1) centre on the victims' sense of their person being invaded, those below depict physical restriction and control:

(2)

a. *I said "that was retaliation where you had me pinned to the floor by my neck".*
b. *You're coaxed into being in the principle position when you're made to feel like they're gunning.*
c. *You've got somebody actually mentally manipulating you.*
d. *I didn't ever want [a baby] but he'd be pushing pushing pushing.*
e. *Before I knew it he was back with his foot in the door.*

In the first extract, the image of the victim 'pinned to the floor' conveys the deliberateness with which the perpetrator immobilised her, as well as the utter helplessness of her position. Interestingly, although the remaining examples describe non-physical manifestations of abuse, these are similarly conceptualised in terms of physical domination. Example (2b) represents verbal attacks as gunfire to which the victim has been subjected after having been 'coaxed into (…) the principle position', expressing her lack of agency in becoming the target and fear of the unpredictable nature of the next 'bang' (act of abuse). This description of how she is 'made to feel' communicates the fear generated by verbal abuse by conjuring an association with the fear one (the PO) would experience when faced with a gun. The final three extracts portray the psychological control which dictated the victims' behaviour within the relationship. In (2c), the perpetrator manually controls the mind, as if it were an entity to shape as he wishes. In (2d), the victim is physically pushed towards a destination she does not want to reach. The perpetrator in (2e) forcibly re-enters the victim's life as if blocking her attempt to close the door on him. The victims thereby add weight to accounts of non-physical abuse by accessing the more tangible features of physical force to convey the perpetrators' overwhelming power and while it would be difficult to know how the perpetrator's actions make one feel, the PO can readily understand the fear and pain inflicted physically. With reference to examples (2d) and (2e) above, the facts of having a baby with an abuser or re-entering a relationship with them have the potential to expose a victim to a degree of blame or at least, consent within the relationship, and thereby, perhaps, not a context where abuse might occur. However, the descriptions of the perpetrator 'pushing' and putting his 'foot in the door' mitigate the victims' responsibility and choice by presupposing their lack of agency in making these decisions.

The metaphors discussed so far have foregrounded the perpetrators' agentive role and the victims' agentless role. The following extracts demonstrate that the victim not only fears that the perpetrator is in their space and there is nothing they can do to stop it but also frames the

perpetrator, through metaphors, as having an out-of-control persona, therefore, making it even harder to cope with the perpetrators' behaviours as there is no scope to reason with them. Consider the examples in (3):

(3)

a. *I was just stood there, because I was like if I go anywhere near him he's gunna bomb into the baby's room.*
b. *Then when he came in he's just like, it was just like a bull in a china shop, like just went nuts.*
c. *She's just stormed in and started screaming and shouting […] and then she's just stormed out.*

Each of these examples communicates power, speed, destruction, and a lack of control. Notably, the bomb detonating in (3a) recalls Cotterill's (1998) observations on the prosecution's use of the 'ticking time bomb' metaphor during the O. J. Simpson murder trial, which also centred on the issue of domestic abuse. Cotterill noted that although the use of this metaphor activated 'an innate sense of fear and danger' (1998, 147), it also presupposed that Simpson's actions were inevitable; that he was on an unstoppable journey towards destruction. The same assumption underpins (3a), in which the perpetrator's action of entering the baby's room is projected as the inevitable result of the victim approaching him (i.e. lighting the fuse). The victim thereby positions herself as the one responsible for the behaviour of the perpetrator, whom she portrays as volatile beyond self-control. The 'bull' and 'storm' metaphors in examples (3b) and (3c) depict wild rampages through the victims' home and workplace, respectively, conveying the same sense of inevitable destruction as a bomb.

Furthermore, the first two extracts above entail striking spatial configurations which foreground the vulnerability felt by one who is threatened in the privacy of their own home. The juxtaposition in (3a) between the murderous nature of a bomb and the innocence of a sleeping baby's bedroom—the potential bombsite—produces an emotive description which we argue, encourages the officers to sympathise with the victim's experience of feeling paralysed by fear. The same spatial dynamic characterises (3b), in which the victim's home is depicted as a previously peaceful, albeit fragile, site in which the perpetrator wreaks havoc. As with the bomb, the power of the 'bull in a china shop' metaphor lies in contrast between the size and strength of the beast and the fragility of china, with the assumption being that every move made by the perpetrator-as-bull will cause dramatic and irreparable damage. There is also an incongruity in the image of an animal which belongs outside invading such a delicate indoor

space, in a violation of nature which recalls body penetration metaphors like 'he's in my face' (example 1a).

Whereas the examples discussed so far focus on the perpetrators' actions, those below orient specifically to their state of mind. These representations are more explicit in expressing the lack of control behind the abusive behaviour:

(4)

a. *See in his face he was off his face on drugs.*
b. *I dunno, his head's obviously gone.*
c. *His head's just going, I dunno what shit he had.*
d. *Because he's off his head on drugs, he thinks there's somebody here.*
e. *She was pissed out of her face.*
f. *He's on one can you see? The look in his eyes and stuff.*
g. *He can't be around her now, that's bang out of order.*

Examples (4a) to (4e) employ a frequent means of describing a state of inebriation as a physical distancing between the head (or face) and the self. The perpetrator's mind is thus conceptualised as separated from their body, which is therefore beyond their control. These distancing metaphors raise a question over the degree of intention and even awareness with which the abusive actions were performed. Similarly, the two spatial metaphors in (4f) depict the perpetrator as being carried along by something ('on one') and having a 'look in his eyes', as if other entities had taken control. Eisikovits and Buchbinder (1999, 855) also observed this 'image of an invading stranger' in women's reports of domestic abuse, and they note that this construct draws from offenders' own self-justification that 'they are prisoners of larger forces, foreign and unrelated to them' (ibid., p. 852). Example (4g) above takes a more evaluative stance with 'bang out of order', a commonplace metaphor signalling unacceptable conduct. However, the association with a machine that has malfunctioned again somewhat obscures the intentionality behind the conduct. The extracts in (3) and (4) thus demonstrate how metaphors for violent behaviour have the potential to be (re-)interpreted in such a way as to complicate issues around causality, blame and responsibility.

The set of extracts above therefore demonstrates how the construction of the perpetrator as being out of control can have the dual effects of mitigating their responsibility while also strengthening the victims' narrative by underscoring their vulnerability against an unstoppable force.

We see here then substantial use of metaphor in the victims' account of the perpetrator's behaviour. In contrast, in line with the police officers' goal of 'diagnosing' the situation as opposed to describing it (Agar 1985), they employ very few conceptual metaphors in their representations of the reported abusive behaviour and those used (5) express the likely impact on the victim rather than offer a commentary of the perpetrator's behaviour:

(5)

a. *She was put in fear of violence from him.*
b. *Because you have children there's been an impact on that thing hasn't there.*
c. *So maybe emotions are high for obvious reasons.*
d. *Like a train wreck in front of you isn't it.*
e. *You don't need that headache in your life.*

These utterances were all produced by officers in response to aspects of the victims' narratives and, to varying extents, the metaphors used all have the effect of backgrounding or otherwise obscuring the perpetrator's agentive role and minimising the impact the abuse has had on the victim. Whereas the victim consistently described the abuse as dominating, intrusive and outside her control, the descriptions here are minimised to the victim being an observer rather than an experiencer (5d) and being routine, like having a headache (5e), rather than something extreme (bang out of order (4g)). More specifically, in (5a), the officer reformulates the victim's account of threatening behaviour as 'she was put in fear of violence from him', as if she were placed into a particular mental state by an unknown agent. This construction omits the actions which caused the fear and instead transfers the perpetrator's agentive role to the theoretical future act of violence 'from him'. Similarly, the 'impact' in (5b) captures the forceful effect of the abuse in relation to being a parent but removes the perpetrator as the agent and the victim and children as the ones impacted. The officer's assessment in (5c) that the perpetrator's 'emotions are high for obvious reasons' refers to a recent traumatic event, and the officer employs the conventional metaphorical strategy of describing mental states in terms of height (Lakoff and Johnson 1998). The concept of high emotions is associated with volatility, so the suggestion is that the perpetrator's aggressive behaviour was dictated by the configuration of his mental state according to circumstances beyond his control. The metaphor thereby obscures intentionality, echoing the victims' descriptions of the perpetrators' frenzied mental state in example sets (3) and (4) further above.

There are also echoes of the victims' bomb, bull, and storm metaphors in the officer's characterisation of the perpetrator as a 'train wreck' in (5d), insofar as they all share the key conceptual properties of power, lack of control and destruction. However, the police representation here differs crucially in its repositioning of the victim vis-à-vis the events she has described. The perpetrator-as-train-wreck is something that is merely observed by the victim, instead of something which causes direct damage comparable to, for instance, a bull in a china shop. By associating the abusive behaviour with an unfortunate accident, therefore, the train wreck metaphor deletes the victim as the target and marginalises the impact on her. Furthermore, the assigned role of bystander entails a degree of choice as to whether to look at what is unfolding. In fairness, in this respect, the 'headache' in (5e) conceives of the perpetrator as an unwanted presence within the victim's body, thus capturing the latter's lack of agency and the sense of invasiveness activated by the penetration metaphors discussed previously. Yet the choice of metaphor here is curiously reductive, in that the comparison with the relatively minor nuisance of a 'headache' diminishes the serious physical and mental effects of abuse detailed by the victim. The markedly less evaluative language used by the officers, in these examples, perhaps reflects their requirement to remain neutral, but their representational choices are nonetheless consequential in shaping the official version of events that emerges from this interaction and reinforces the lack of control the victim feels as they are not getting their message across to the listener who could help them. Let us now analyse how metaphor is used to represent the institutional processes.

3.2. Representing institutional processes

Our analysis now turns to representations of institutional processes, which in these data comprise procedural aspects of the call-out and the potential passage of the case through the criminal justice system. The extracts show how both parties use the journey metaphor to mark progression within the interview (e.g. Landau, Oyserman, Keefer, and Smith 2014) but they do so with a different destination in mind. More specifically, the victims use the metaphor to conceptualise the institutional processes as stages within the wider trajectory of the abusive relationship and how the outcome of the call-out can be used to enable the victim to get out the relationship while the police officers use the journey metaphor to break up the narrative into evidential chunks of information to elicit a statement rather than addressing the incident and potential outcome. We discuss first the victims' use of the journey metaphor (6):

(6)

a. *I never wanted it to get to this*.
b. *If this carries on I'm gunna end up dead*.
c. *It cannot go on any longer*.
d. *I can't let him get away with this any more*.
e. *But it gets to the point now where I personally believe that you belong in prison*.
f. *I'm just gunna put this really fast through*.
g. *No I'm fine I'd rather just get it out the way*.
h. Following an interruption: *Er where were we*.
i. *I'm telling you I'm taking this all the way; I'm not letting this go*.
j. *Can you put limits on, like she's not allowed to mention me on social media*.

These examples variously refer to the relationship (6a to 6e), the process of providing the account (6f to 6h) and the future investigation and legal proceedings (6i and 6j). The representational similarity across the set illustrates how institutional procedures slot in amongst other aspects of the victims' experience in relation to their ongoing issues with the perpetrators. In (6f) and (6g), the account construction process is conceived of as an entity which must be dealt with quickly so as not to impede the victims' progress ('put fast through'; 'got out of the way'). In (6h), 'where were we' expresses the same desire to keep moving forwards in a journey through the narrative. Correspondingly, (6i) depicts the case against the perpetrator as something that is being carried by the victim to a destination, presumably justice in some form. Reflecting the fact that the perpetrator and victim are undertaking simultaneous journeys and that only one can reach their desired destination, the victim in (6j) desires the perpetrator to be impeded by the imposition of 'limits'.

The victims' use of journey metaphors summarise their relationship with the perpetrator and their goal orientations in relation to the official procedure, which is treated as a means of freeing themselves from their abusers. In the same vein, the officers also conceptualise the criminal justice process through a journey, according to their own list of institutional objectives with a particular focus on eliciting evidence and co-producing a written statement. The extracts below all pertain to the immediate task of eliciting the victims' narrative:

(7)

a. *Which part during that has he…*
b. *In the absence then of him grabbing you pushing you or otherwise assaulting you, sounds like it's a case of removing him from the property to prevent the breach of peace.*
c. Regarding a claim about grabbing: *It's even better now that we've got that.*
d. *I've put two and two together.*
e. *Yeah that needs to be cleared up.*
f. *It's just a bit wishy washy on whether he's actually assaulted her or not.*
g. *You ask her a bit more in depth a second.*
h. *So let's go over this again then.*

In these examples, the officers conceptualise evidentially salient information in terms of individual parts which they must obtain from the victims. The use of this metaphorical strategy to express the officers' overarching goal orientations is particularly prominent in (7b) and (7c). In the first of these examples, desired information is described as an 'absence' from the victim's narrative, and the vacant slot is subsequently filled with an alternative item. In (7c), an unspecified 'it' has been improved with the obtainment ('got that') of the desired information. The officers, in both examples, are explicit in their treatment of the interaction as the construction of a satisfactory whole using the correct pieces, according to the potential criminal offence elements.

Whereas some information items need to be obtained, others require clarification, and the officers employ a variety of metaphors in addressing this goal. Example (7d) depicts a maths problem whereby the addition of details together reveals the missing information. In the following two extracts, points of uncertainty are conceptualised as needing 'to be cleared up' (7e) and 'a bit wishy washy' (7f). The first of these metaphors correlates ambiguity with messiness, while the second conjures associations with weak, watery liquid. Both entail negative evaluation and thus implicitly assign some blame to the victim for providing information that is unsuitable for the officers' institutionally defined purposes. (It should be noted that both examples are taken from brief exchanges between officers which take place beyond the victims' earshot.)

The final two extracts above have a similar focus on clarifying a narrative element, but they differ from those prior in that they emphasise the officers' responsibilities more so than the victims' performance. In (7g), 'ask her a bit more in depth' is comparable to (7f) in conceiving of the

victim's contribution as water, or some similar substance whose depth might be explored. However, in contrast to the victim's 'wishy-washy' contribution in (7f), the 'more depth' metaphor does not evaluate the quality of the substance but rather visualises its potential to yield more detail, which it is the officer's task to ascertain. Finally, 'let's go over it again' in example (7h) recalls the victims' concept of a journey insofar as it depicts movement from one point to another. Yet in contrast to the victims' goal of getting this stage of the journey out of the way quickly, the officer here proposes repeated movement over a problematic spot, like ironing a stubborn crease out of a shirt. As such, this metaphor captures the police goal of clarifying evidentially salient details, while the use of inclusive 'let's' invites the victim to understand this process as a collaborative effort towards a destination they both want to reach. Demonstrably, therefore, officers may conceptualise the account elicitation process by foregrounding either the victims' or their own role-responsibilities, with the latter approach applying less pressure on the victim to perform to a particular standard.

The final set of examples (8) comprises the officers' representations of the investigative and legal processes stemming from the reported incident in question.

(8)

a. *What we need to do then we need to get a statement from you.*
b. *I need to take a statement from you as soon as possible, alright?*
c. *Even if it's just a quick holding statement to know what's happened today.*
d. *Just see, for the criminal damage side of stuff anyway.*
e. *Once we get a charge we can put bail conditions on her. That'd be part of it as well.*
f. *That can be an added offence she's committing there.*
g. *To actually stop her from doing it that's gunna be the difficult part.*
h. *We've also got the difficulty on top of that until we can grab hold of her and then put those restraints on her it's gunna be difficult.*
i. *Social media is an absolute nightmare.*
j. *I've had to record this because it's a domestic incident we relate it to, and that's what we'll be dealing with.*

In these extracts, the officers orient to their potential task of gathering the evidence and building a case against the perpetrator. As with eliciting the victim's narrative, the investigative process is conceptualised in terms of parts which the officers must gather to form a whole. The first three

examples pertain to an essential part of this process: the statement. Examples (8a) and (8b) employ entity metaphors which treat the victims' spoken accounts as objects to be obtained. Yet the statement itself is an official document created from this stage of the police-victim interaction, so it only becomes tangible through the process of entextualising the victim's experience into written form. The statement is therefore a collaboratively produced text that is shaped by many factors, including the officers' interactional and representational choices, as well as the institutional procedures, which dictate the format and the information required. The conventional metaphor of 'taking' a statement 'from' victims positions them as responsible for the official document, while obscuring the processes of co-production behind the finished product (e.g., Rock 2001; Komter 2012). Example (8c) conceptualises the statement as an entity that can hold the investigation, as if to prevent its loss, until the next part can be obtained. The statement's ability to hold the case against the perpetrator relies on the officer's knowledge of 'what happened here today', for which the victim is responsible. In this way, the use of the 'holding statement' metaphor increases the pressure on the victim to provide evidence that is sufficiently strong to protect the investigation.

Beyond statement-taking, future investigative procedures are similarly conceived of as a selection of parts amounting to a predefined whole. Potential criminal damage is described in (8d) as a 'side of stuff', referring to this one charge in relation to the multifaceted entity that is the prosecution case. The following three extracts identify some other possible components ('a charge', 'bail conditions' and 'an added offence') and the metaphors used express the officers' active role in *getting, putting, adding,* and *stopping* in the process of piecing the parts together according to institutional procedure. Correspondingly, in (8g) and (8h), hindrances are also conceived of as entities, with difficulties piling 'on top' of each other. Another problem is identified in (8i) in the form of suspects' social media activity, which is characterised as 'an absolute nightmare'. The maximally negative associations triggered by the nightmare metaphor reflect the difficulty of controlling social media usage, revealing the officer's need to impose order on every aspect of the process. The representation of investigative problems in examples (8g) to (8i) thereby recalls our earlier observations on how officers sought to 'clear up' perceived ambiguities in the victims' narratives.

A key property of a nightmare is that it cannot be controlled and emerging from the above set of examples is the conceptualisation of legal controls in terms of physical restriction. This metaphorical strategy is epitomised in (8h), in which the perpetrator is depicted as a moving object which the officers need to immobilise through arrest and post-arrest

procedures ('grab hold' and 'put (…) restraints on') while they piece together their case. There is a conceptual parallel between this image of officers pursuing a fleeing perpetrator and the victims' vision of a journey with police procedures as potential impediments (examples 6f and 6g). Just as the officer in (8i) seeks to halt the perpetrator's progress, the officers in example set (7) counter the victims' impetus to proceed through their narratives by controlling the focus on details until the required information is produced. The officers' conceptualisations of institutional procedure, both in the immediate context of constructing the account and in the future context of the investigation, reflect an overarching orientation to their professional role-responsibilities, rather than to an understanding of the victims' experience or needs.

4. Summary and conclusion

The analysis of victim and police-officer metaphor use during these call-out interactions has revealed contrastive styles which both reflect and reinforce the inherent power asymmetry between speakers. When representing domestic abuse, victims were observed to use metaphor in vivid descriptions which highlight their overwhelming fear and the perpetrators' power and aggression. Both physical violence and non-physical actions are conceptualised alike using metaphors which trigger associations with size, strength, volatility, and invasiveness. The use of physical force metaphors for psychological and verbal abuse adds persuasive weight to these descriptions by encouraging the listener to understand the damaging impact of non-violent forms of domestic abuse. The analysis has also demonstrated a distinction within victims' metaphors between those which foreground perpetrators' agentive role in targeted abuse and others, which deny this agency by assuming they have no control over their actions. While the construction of an out-of-control attacker underscores the victims' sense of helplessness, it also has the potential to raise questions around the issues of intentionality, responsibility, and blameworthiness.

The ways in which institutional participants orient to these issues during call-outs can inform not only the investigation but also victims' self-positioning in relation to what they have experienced. In this study, the police officers use considerably fewer metaphors than the victims in their representations of the reported abuse, and those used are less evaluative in terms of the negative associations they trigger and the degree of agency they assign to the perpetrators. During co-constructing the narrative, the power asymmetry between the speakers renders the officers' representational choices particularly salient in building an overall impression of what

happened. The police may be required to display neutrality but, nonetheless, denying the perpetrator's agentive role could influence victims' understanding of the abusive behaviour, including its criminality. The implications of this are considerable, particularly considering extensive research indicating that domestic abuse victims withdraw from police support if they feel they are not taken seriously (Coulter, Kuehnle, Byres, and Alfonso 1999; Wolf, Ly, Hobart, and Kernic 2003; Birdsey and Snowball 2013; Langan, Hannem, and Stewart 2016). It would be enlightening to examine further the persuasive effect of victims' reports of non-physical abuse according to their use of physical force metaphors.

Corresponding with their respective interactional roles and goal-orientations, victims' conceptual strategies were shown to focus primarily on their experience of abuse, whereas officers centre on the institutional tasks of constructing the initial narrative and conducting the wider investigation. In relation to both contexts, the police use of metaphor expresses their need to impose order on each element of the investigative process. Their impetus to control the narrative during the call-out is reflected in certain conceptualisations which negatively evaluate the quality of the victims' contributions. Yet we also observed examples of how officers can portray the co-construction of the account in such a way as to foreground their own role-responsibilities, thereby reducing the coerciveness of their questioning. Furthermore, a comparison of victims' and officers' representations of institutional processes revealed contrasting approaches to achieving their shared end-goal of prosecution, whereby the victims' conceptualisation of continuous progress towards a destination conflicts with the police desire to collect and organise the constituent parts. This tension reflects research in other legal contexts which examines the clash between institutional and lay modes of communication (e.g., Trinch and Berk-Seligson 2002; Tracy 1997; Imbens-Bailey and McCabe 2000; Heffer 2005) and adds to literature such as Morgan (1997) evaluating the importance of separating the impact of the path aspect of the journey metaphor (process) from the destination (outcome).

Finally, it is worth briefly addressing the role of police body-worn video in relation to the observations made in this chapter. The advent of body-worn cameras preserves a more authentic version of the victim's representational choices, which are otherwise subject to significant transformation in the form of the attending officer's written report. Emotive imagery which foregrounds the victim's vulnerability, such as that of a bomb in a baby's bedroom, may therefore be carried forward for the benefit of future audiences viewing the footage at any stage of the investigation or legal proceedings. Furthermore, because the recording captures the victim's

initial telling of events, this immediacy can imbue their descriptions with authenticity, particularly when their distress is evident. In the same way, police representations which are captured on video transmit certain meanings to future audiences who might be making decisions about the perpetrator's fate, and who may orient to the officers' institutional authority and experience. In tension with this perceived authority is the possibility that the officers' representational choices may be influenced by their awareness of potential 'overhearing' audiences (see further e.g. Heritage 1985; Haworth 2013). Body-worn video might therefore be a double-edged sword, from the victim's perspective, if footage reveals ambiguities in officers' assessments of the quality of the victim's narrative or the intentionality behind the perpetrator's actions. The choice of metaphors to add emotional intensity to accounts of abuse and (re-)assign responsibility can thus be consequential not only within the immediate context of the police-victim interaction, but at every subsequent stage of the criminal justice process.

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