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FROM *PATHOS* TO *NOUMIKOS* AND BACK: INSIGHTS INTO AFFECTIVE JURILINGUISTICS

I. Introduction:

“Any word contains an idea and an emotion” said Fernando Pessoa, the Portuguese poet. The emotional fluid is pervasive even in the prose which follows the most rigorous methods, and, as such, emotion is what triggers the very existence of law. Mastering human passions was, in ancient Greece, the reason of the existence of laws within the *polis*, while the Oracle of Delphi established that the most beautiful was the most just. Emotion and laws have coexisted, and expressions from different languages bear witness to this reality: *heat of passion* in English, *crimen pasional* in Spanish, *delitto passionale* in Italian, to name but a few.

Several disciplines within the realm of social sciences have started to show a keen interest in the role of emotions in the organization and evolution of societies and mentalities. A new and interdisciplinary area of research, that of the cultural and affective neurosciences, helps shed more light on human behavior and the construction of our identities, both individually and collectively, through the study of how experiences are expressed by human beings. Paving the way, P. Ekman isolated basic emotions which are universal and « valid for all cultures and part of our biological inheritance » (Ekman 1999), such as anger, disgust, fear, happiness, sadness, and surprise. J. Panksepp arrived at the revolutionary conclusion that

“capacities for thoughtful reflection emerge gradually in higher brain regions developmentally and epigenetically. In this hierarchical vision of self-awareness based on primal mental processes, one progresses from ‘cogito ergo sum’ (a top-down RAM inspired vision) to ‘I feel therefore I am’ (a bottom-up ROM inspired vision), and with experience-dependent cortical programming to ‘I feel, therefore I think’.” (Panksepp et al. 2012: 8)

M.H. Immordino-Yang endeavored to “uncover relationships between reasoning, feelings, and meaning making, on one hand, and neurobiological mechanisms, on the other.” (Immordino-Yang 2013: 42) We know that which we are capable of perceiving, and not necessarily that which is. Our cognitive capacity is determined by our affective response to external and internal stimuli. Hence, the ultimate cultural neuroscience question is: “Do individuals from these groups actually experience emotion and self differently, in any way that matters for the real social world?” (idem), where experience means expression, too. B. Cyrulnik has emphasized the role of emotions in acquiring resilience as well as in understanding the shifts in our societies, such as the manufacturing of a hero in times of crisis. In the field of economics, E. W. Dunn et al., show that people are happier when they help others than when they do things for themselves. F. Lordon positioned himself at the frontier between sociology, psychology and philosophy and wrote about the society of affects and the affects of politics. S. Thompson and P. Hoggett discussed “The affective turn in contemporary political studies”, remarking that “it seems odd that, whilst acceptance of the role of the emotions in public and political life was once commonplace, it is only now being rediscovered after decades of neglect.” (Thomson, Hogget 2012: 11). J. Butler questioned the power of language to act upon us as individuals and societies while G. Lakoff directed his attention to the highly affective function of metaphors and the framing of reality through language that triggers emotions in a political and social context.

Given all these developments in the social sciences, the field of jurilinguistics also opens itself to a new horizon, that of what we call affective jurilinguistics, as awareness raises more and more among users of legal language, both initiated and non-initiated, about the emotional origins and consequences of legal terms.

II. Affective jurilinguistics

a) Definition:

What is affective jurilinguistics? In order to answer this question, one needs to define several notions that are at the core of this new branch of applied linguistics. Firstly, a definition of legal language from an affective perspective is necessary, and, in this new light, it appears as the specific code, which is part of the natural language and shared by members of a group during specific situations of legal communication in order to organize and ensure the functioning and evolution of the structure of the social group aimed at preserving life. Secondly, the degree of competence of the users of the code needs to be addressed as variable, offering full access for the individuals initiated to the legal professions and partial access for the non-initiated individuals, and subject to evolution following assessment of needs by the members of the group, as it is aimed, for example, in plain language campaigns and laws in the English-speaking world. Thirdly, a definition of jurilinguistics as the study of the specialized language of the law, is needed to complete this description. Born in Canada at the end of the 1970s, the syntagma “legal linguistics” and “jurilinguistics” are described in Termium+, the Government of Canada’s terminology and linguistic data bank, as follows:

“The terms “legal linguistics” and “jurilinguistics” are not perfect synonyms as the field of legal linguistics is not clearly defined and its scope not universally accepted. It is thought to encompass generally the knowledge of the interplay between language, law and society and, therefore, its scope might be broader.”

The term “jurilinguistique” was coined for the first time in French by Alexandre Covacs of *Services linguistiques français* within the Department of Justice of Canada, but it is to be noticed that “jurilinguistique” et “linguistique juridique” do not cover exactly the same realities, as the latter, defined by Gérard Cornu (2005) also encompasses linguistic rights.

Thus, affective jurilinguistics can be construed as the part of jurilinguistics and applied linguistics that studies how affect and emotion determine and underline individual and collective ways of expression in legal communication situations and in different linguistic and cultural contexts.

b) Methodology:

Affective jurilinguistics privileges a semantic-pragmatic approach, close to *Rechtslinguistik*, aiming at the linguistic and extra-linguistic environment of the legal communication act. This approach is anchored in affective neurosciences and psychology and uses ethnographic, anthropological and socio-linguistic techniques, such as surveys, interviews, corpus analysis, as well as corpus linguistics and semiotics. Through diachronic analyses can be assessed the motivation, the reception, and the evolution of legal terms within a given society.

Contrastive analyses can shed more light on different legal languages and cultures in contact, hence on the manner in which a legal intercultural dialogue is established between societies at certain moments in time. The contrastive legal translation studies explore the challenges for legal translators in terms of their affective implication in the act of translating a legal text. J.-C. Gémar and N. Rouland talked about the cultural variation that characterizes the human species (Gémar 1998), while M. Oustinoff emphasized the “Weltansicht” that characterizes each language (Oustinoff 2003) and challenges the translators to find that which U. Eco named “saying almost the same thing” (Eco 2003). An example is the use of the

Present Tense Simple to translate the Past Simple in the French translation of the *Opuz v. Turkey* (no.33401/02) decision of the European Court of Human Rights and which gives a higher affective connotation to the sentence by installing it in the deictic center of ‘me-here-now’:

English: “Despite reforms in the field (Law no. 4320), the unresponsiveness of the judicial system and impunity enjoyed by aggressors indicated that Turkey was not committed to tackling the problem: police officers tried to persuade women to drop their complaints, delays were frequent and courts mitigated sentences on the grounds of honour or tradition.” French : « Malgré des réformes de terrain (adoption de la loi n° 4320), l’indifférence dont la justice fait généralement preuve en la matière et l’impunité dont jouissent les agresseurs révèlent un manque de détermination des autorités turques à prendre des mesures appropriées pour remédier au problème : les policiers tentent de convaincre les femmes de retirer leurs plaintes, les retards sont fréquents et les tribunaux atténuent la rigueur des peines au nom de l’honneur ou des traditions. » (ECHR 2012: 2)

The indexicality of the translator’s decision is highly performative and, as such, has emotional, legal, moral and political effects.

Thus, the aim of affective jurilinguistics is to identify and analyse the affectively valenced contexts and characteristics of the linguistic and extra-linguistic environment of the legal communication act.

Within the linguistic environment will be analysed, for example:

- the affective valences of fractolexemes and morphemes: e.g. *eco-* as in *ecocrime, ecocide, ecosystem, ecoterrorism, ecomafia*,
- the use of tenses and their translation
- the affective origins and consequences of neological phenomena such as re-specialization: e.g. *whistleblower*,
- pragmatic acts such as implication: e.g. “thou shall not kill”,
- performative euphemization as in double valenced terms and syntagma which both diminishes the emotional impact of the legal term and increases sensationalism through vagueness: e.g. *offshore dealings, fiscal optimization, tax relief, active hostilities/hostilités actives*,
- increased affective valences in compound terms: e.g. *punishment, capital vs. capital punishment*,
- new legal and quasi-legal concepts and neologisms: e.g. *migrant, ecocide, chaîne pénale/legal chain*, etc.

The analyses of the extra-linguistic environment will provide valuable information concerning the affective valences of the socio-political contexts in which the legal communication acts occur.

Within the extra-linguistic environment will be analysed:

- the images (metaphors, euphemisms, personifications, etc.) built around legal terms and concepts, such as *corruption, migrant, ecocide*, etc., in terms of the origins of the image (media, social media, civil society, authorities, etc.), its motivation and its perception and consequences.

By analyzing legal metaphors in English and French, for instance, the legal linguist discovers a difference in terms of sensitivity between English and French legal writers (Delisle 1993). Legal English appears to be more impregnated of emotion through natural and anthropomorphic metaphors than legal French which is highly abstract. In examples such as *thin skull doctrine/doctrine de la vulnérabilité de la victime; cloud on title/possibilité de contestation d’un titre*, the image is lost but the translation corresponds to the characteristics of the French language (Houbert 2010).

- the valenced reactions to the implantation of a legal neologism in a given language, as well as the connections between its evolution and that of the given legal system and language: e.g. *mariage pour tous, marriage for all*.

- the potential for change of a legal term and concept, within a given social group, and for exportation to other socio-linguistic groups in terms of its legal and jurilinguistic environment, by analysing its evolution and integration: e.g. *whistleblower* and its translations in Romance languages.
- patterns in a specific emotional area that are expressed through legal language, thus identifying fractality, as, for instance, when comparing legal communication acts diachronically and culturally and identifying language, emotional, behavioural fractals within the field of indignation and revolution.

It will be noticed that affective jurilinguistics is different from forensic linguistics, which is the «application of language description in legal contexts», as Malcolm Coulthard defined it (Coulthard, 2010). Its areas of investigation surpass those of forensic linguistics (the language of written legal texts, the spoken language of the legal process, the linguist as expert witness), as it can be of useful assistance in any of these areas, for example by identifying patterns in legal communication acts that may help characterize specific individual behavioral patterns. It can be of valuable support in cross-disciplinary and cross-cultural studies related to legal anthropology, ethnology, sociology, law philosophy, comparative law, legal psychology, political sciences and international relations, psycholinguistics, translation studies. Affective jurilinguistic analyses can bring to light motivations as causes of actions, and possible outcomes as consequences of those actions, while also identifying cultural common points and variables in the field of law through language.

III. The affect system and the society structure

As M. Sharwood Smith put it, «affect has a powerful influence on decision making [...], a central role in the mind as a whole. This role becomes even more important as new experiences are evaluated during an individual's lifetime and existing evaluations are amended.» (Sharwood Smith 2017:61) The affect system contains structures that have positive and negative valences which design approach and avoidance patterns. The legal systems are built in order to ensure the survival of the individual and of the group, on the basis of what is good and what is not good for the group and the individual, mirroring the structure of our affect system. In this “beauty and the beast” paradigm, affects and emotions, both basic and complex, determine our actions. Our actions make up our behavior, individually and collectively. Behaviour is regulated within the group we belong to by laws and contracts, which are explicit and implicit, and which structure the organization and functioning of the group. By ordering and controlling the expressions of emotions and affects, the group ensures its existence. These structuring elements are expressed through language, while the underlying emotion at the foundation of the linguistic expressions which structure the group may be immediately visible or not. As such, the laws and regulations represent “the language of society” (Le Bris 2014). In this context, the question that arises is: how do we create norms? In legal terms, we feel the need to be safe within the group we belong to and ensure that our life and that of the group will continue. We thus need to transform passion into order, and understand and contain *homo passionis* within society, as emotions frame laws and laws frame societies. As a corollary to the first question, there is the question of understanding how emotions work linguistically, which was answered by A. Pavlenko who analyzed emotions as a linguistic category and arrived at the conclusion that emotions are

“emergent phenomena that a) arise in the process of subjective appraisal of incoming stimuli in terms of individual needs and goals, b) integrate positive appraisals, physiological states, behavioral consequences, and discursive resources and c) lead to culturally appropriate responses and courses of action” (Pavlenko 2014: 252).

To complete Pavlenko's description, M.H. Immordino-Yang asserts that

“complex emotions like admiration for virtue and compassion move the responder beyond the here and now to consider the broader picture of a person’s quality of mind, given a cumulative set of social circumstances and inferences about that person’s perspective and beliefs. As such, these emotions play important roles in interpersonal relationships, motivation, and morality as well as in the construction of self and identity. Questions about whether and how culture impacts these emotions are therefore highly pertinent for understanding cultural variability in how individuals experience the social world.” (Immordino-Yang 2013: 42)

When construing law as a cultural variable and a way for individuals to structure their social world, reactions to legal concepts, obeying and disobeying, agreeing and disagreeing, giving meaning to legal and quasi-legal terms and concepts appear as a subjective matter based on extra-legal and linguistic factors.

Thus, in affective jurilinguistics, identifying which legal terms may be experienced differently in different cultures, and which ones are more likely to trigger similar responses, as well as the causes of these qualitative variations may lead to a better grasping of the bigger picture of the birth and evolution of legal concepts such as the *R2P-the responsibility to protect*, a much debated international norm, which replaced the syntagms *right to interfere*, *just wars*, *humanitarian wars*, etc. From a legal anthropological point of view, the R2P represents an evolution in the intercultural dialogue between traditional legal systems and the Western ones, as well as an influence of the collaborative way in which traditional societies construe conflict resolution and prevention over the Western hierarchical, pyramidal theatricalisation of it. The main difference of approach here is that which exists between restorative justice and punitive justice and resides in cultural differences when it comes to dealing with emotion and affect. In traditional legal systems, justice is partnership-based, founded on an ‘us and them’ matrix and rendered by the whole social group through public speech. The trauma and disorder represented by the crime committed within the social group by a member of the group is felt, voiced and experienced individually and collectively. The social group assumes responsibility for each member and acknowledges its existence through and thanks to each member. In a holistic approach, emotions are evacuated both at an individual and collective level, in an open space. The act of justice is both a speech act and an affective act aimed at restoring balance and harmony within the social group (Eberhard 2010). On the contrary, in the legal systems of the Western countries, justice is adversarial and, as such, rendered by an elite through isolation, victimization, finger-pointing, deepening the trauma and disorder inside the social group in an ‘us vs. them’ matrix and with an approach based on the master and slave, Hegelian philosophy. Thus, the act of justice is a speech act banishing emotion and affect, aimed at removing the disorderly element from the social group (Foucault 1972, 1975).

In soft law, the question of what makes people obey and conform to rules that do not trigger sanctions as laws do has an affective coloration, too. Moral, virtue, compassion are variable cultural expressions and play important roles in the soft law decision-making process. This relatively new area of law is underpinned by emotions such as respect for authority (the one advocating for ecology), fear (of a trial), shame (naming and shaming procedures), joy (incentives as prizes), empathy (with animal species, populations, organ donors, etc.) As A. Früllicker puts it, “in some instances, compliance with non-binding norms and instruments is extremely good and probably would not have been better if the norms were contained in a binding text.” (Früllicker 2009). Thus, emotional reactions trigger respect of concepts and acts that are not legally binding. Given that emotions have different cultural expressions, one can easily grasp the whole difficulty underlying the definition of the legal syntagm *exotic species* in different countries (Shine et al. 2000). Exotic species have different legal definitions in each country, combining spatial, temporal and modification criteria. In Costa Rica the territorial criterion is predominant, which does not correspond to national territory, in the USA the definition is related to a specific ecosystem, while in South-Africa it concerns species that are introduced by people deliberately or accidentally, in New Zealand being about

a new organism, and Germany about a species that is non-local. The semantic characteristics are different in each country: [+nation], [+ecosystem], [+human action], [+accident], [+intention], [+newness], [+non-local], and speak about the different perceptions of this element of reality by different people, belonging to different cultures, speaking different languages and living together in societies that function according to different legal systems.

IV. Conclusion

To conclude, this brief overview of the aims and methods of affective jurilinguistics introduces it as a new way of making sense of the intricate relation established between language, law and society. We grasp the world through our brain and thanks to the perceptions that get transformed by it. We perceive things differently depending on a wide variety of factors. We organize our lives and the lives of the social groups we belong to in situations of communication and speech acts, basing ourselves on our perceptions, and aiming at an agreement. Each social organization, envisaged as a legal system, depicts a different perception of the world. Our survival, well-being and further perceptions of ‘reality’ depend on the way we understand, voice and master our emotions, organize ourselves and function as groups. Legal borrowings carry with them their specific history, which means that deep analysis and agreement are needed in order to alter the structure of a society. From *pathos* to *noumikos*, the social contract appears to be also a linguistic and emotional one, as we all agree to feeling and defining reality in similar ways. Law is a discipline characterized by rigidity in terms of content and form, but at the same time it is also the expression of public consent relative to living together in a social group and, as such, it expresses the way the public sees the world and its common sense. Law is tributary to words and wording, which, in turn, are expressions of perceptions of reality and self to which the members of a group adhere at a certain moment in time. Beyond the arbitrary nature of the linguistic sign, the legal terms that organize our life together are triggered by sensations transformed into affects and emotions which make us frame reality in a certain way. As A. Supiot put it in his inaugural lesson at Collège de France on November 29th 2012, « in the texture of the law is imprinted what societies are up against, that which they dream of and that which they fear », echoing Montesquieu’s belief that the legal systems are dependent upon the social and political circumstances of the societies that create them, and evolve with the passing of time. Our affects and emotions shape us as individuals (Cyrułnik 2016), while “affect and emotion shape the structure and texture of society at its various levels, from the family group, through to organizations and beyond to the wider social movements in civil society.” (Thompson, Hoggett 2012).

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