

Chapter 2

Signs, and Signs in Law

Law and semiotics seem worlds apart. The two embrace a different attitude, their practices unfold in a different spirit, and the goals of both discourses differ considerably. Yet *law and semiotics belong together*; the emphasis is on *signs* demonstrates this togetherness. A variety of arguments consider *the place and function of signs in law*. We refer to a scale that spans from abstract philosophical considerations to those who are immediately relevant for legal practice. The keywords of that scale are: the *concept of sign* itself, the importance of *culture*, signs as a power of *merging* law and semiotics, a *community* as precondition for signs, signs in *legal practice*, for example the Cf. citation as a sign in law, and the most needed expansion of knowledge in law.

What is a Sign?

We first consider some peculiarities pertaining to the concept of a *sign* in general. What is a sign? The question seems difficult to answer straightforwardly. There are at least four aspects worth noticing.

First: a sign is not a thing. Signs stand for objects or things, but the “stand for. . .” is predominant. A sign on itself is not a sign; there is always a context, a community, a language or at least another person needed to cause a sign to be a sign! Yet, we all talk about signs as if they were things. Dictionaries and encyclopedias do not give the information to prepare us for the surprises, which this concept has prepared for us. They provide descriptions about a sign *as if* it is an object, a thing to understand via fixed data and properties. A sign is in a Webster “that by which anything is shown, made known, or represented”. It is thus presented to its readers as an expression, an action, a motion or a gesture, a symbol, an emblem, a standard or cognizance in a more general sense. All this does, however, not definitively cover the essence of a sign. We can only be alive when we accept the “as if” fable as the foundation for our thoughts and knowledge, our social contacts and languages: this is in harmony with the fictitious character of legal narratives. Legal fictions are as old as Western culture, Civil Law tells us.

Second, everything can become a sign. Signs unfold amidst *all there is*—not in correspondence to the way *it is*, but rather as a *potential* for *what there is*. In each

process of becoming a sign is *the change from potentiality to reality* involved. That change is not a narration of ‘what is’ but on the contrary of ‘what functions in a change’. The ‘is’ appears in this light as a *sign/name for change*. That has important semiotic consequences. We encounter the making of a particular meaning when we perform a speech act, which indicates an: ‘that is’. That meaning functions as a prescript for, and not only as a description of our behavior, our thoughts and our actions. *The name*: ‘is’ functions in that case as a *sign*, which is decisive in semiotic perspective. It functions in a broader cultural view as a means-in-law, since lawyers tend to determine a ‘what *is*’ as their ultimate purpose: ‘this *is* a breach of contract’ or: ‘this *is* voluntary manslaughter’. A confirmation of this insight is in the thought that there is *nothing* in life that is *not* embedded in what we notice as potentially significant, and here lays the foundation for the many ways in which meaning is generated in law. Peirce wrote 1885 in that context:

A sign is in a conjoint relation to the thing denoted and to the mind. If this triple relation is not of a degenerate species, the sign is related to its object only in consequence of a mental association, and depend upon a habit. Such signs are always abstract and general, because habits are general rules to which the organism has become subjected. They are, for the most part, conventional or arbitrary. They include all general words, the main body of speech, and any mode of conveying a judgment.

So there ‘are’ no signs and there ‘is’ no meaning beyond an omnipresent energy of transformation. Semiotics is therefore in Peirce’s view *a method*, which includes an *attitude* in view of the flow of life’s dynamics, which in its turn regenerates the most essential signifying processes continuously.

Third, things *must act upon one another*—otherwise there is no meaning, no *nothing*. That means for semiotics: signs must be in a relation to other signs, sign systems, and eventually language in its entirety, to bear meaning. Meaning is the result of relations between elements, and those relations—not unlike human relations—are dynamic and differentiating, so that meaning will never be static, neither in social life nor in the sciences. That is essential, and the concept of a sign is only located in the midst of relations, in networks we say today. This tells us that meaning and sign never result from a soloing constitutive power of an individual subject.

Fourth, we should pay attention to two more aspects: (a) *before* a sign could be uttered it had already to be present in a human consciousness. So the thought is itself a sign and should itself find its utterance through encountering an ego in a previous event, and: (b) *after* a sign has been interpreted for a first time, it will remain in the consciousness of its interpreter, where it will also be a sign, which as a sign should have in its turn an interpreter, and so on. Hence another remark of Peirce, saying in 1903:

“A sign is supposed to have an object or meaning, and also to determine an interpretant sign of the same object. It is convenient to speak as if the sign originated with an utterer and determined its interpretant in the mind of an interpreter.” And “. . . every thought proper involves the idea of a triadic relation. For every thought proper involves the idea of a sign. Now a sign is a thing related to an object and determining in the interpreter an interpreting sign of the same object. It involves the relation between sign, interpreting sign, and object.” (See Umberto Eco: *The Role of the Reader*, Indiana UP 1979, Ch. 7: “Peirce and the Semiotic Foundations of Openness”.)

Signs, then, are both fixed and contingent—the fixity and contingency itself serves as a sign. Complexity and meaning arises from the inter-relations of aggregations of signs, their objects and the shifting community, which functions as the hotbed for interpretants around which signs arise. This is, in other words, an apt description of law and its system. Inter-relation speaks to communication, a point taken up next.

Communication

Speakers, voices, mediators, interpreters change position in their communication. All communication between human individuals depends on a sign-activity, which is embodied in what we call a speaker-interpreter relationship. Signs without an actual speaker or interpreter are by no means beyond human relation: they are often perceived as signals, symbols and the like. These are signs that (other) signs exist! Signs thus convey human intelligence—an intelligence that cannot otherwise be conveyed. This underlines the cultural character of semiotics and highlights legal semiotics as one of the most important features among them. Do not forget how legal cases and other constitutive elements of law's discourse and institution function as a main speaker in a modern society. Lacan characterized in that context law as a master discourse because of law's specific character perceivable in its discourse, texts and institutions.

It fascinates that Peirce was not the only thinker who underlined the specific meaning and function of signs. He was in agreement with highly esteemed colleagues like William James, but his ideas had also remarkable forerunners. The Italian philosopher Giorgio Agamben¹ published in 2008 a study *on method* (not unlike Peirce), which referred to such a forerunner, named Paracelsus (1493–1541), a Renaissance physician, botanist, alchemist, astrologer, and general occultist. He wrote in Book 9 of his *De natura rerum* “Nichts ist ohn ein Zeichen” [nothing is without a sign]. Paracelsus argues how “nature does not release anything in which it has not marked what is to be found within that thing”. Man can thus know by means of signs what has been marked in each thing. Signs reveal in this regard the qualities, forms and figures of that which is in them. Are lawyers for that very same reason fascinated by signs?

Culture, Law and Medicine

One remembers how medicine and semiotics were intertwined since the Ancient Greek, because one could not imagine symptoms of illness without noticing (even reading) its signs. And our medical practitioners followed until half a century ago a

¹ Giorgio Agamben: *The Signature of all Things. On Method*. (Engl. Ed.) New York 2009.

course in *medical semiology*, which provided the basis for their diagnostic skills.² The medical attention for signs was in that ancient tradition accompanied by the philosophical and the linguistic—the three demonstrate that an interdisciplinary approach is an inherently feature of semiotics because of the universal function of the sign. Law and legal discourse have—in contrast to medicine—never incorporated a course on semiotics in legal education, although the relation between law and semiotics was and still is important.³

Roland Barthes mentioned in a 1985 essay that semiotics has been part of our occidental culture for a long time, and in particular in medicine. Signs were once used to direct troops in the battlefield, so that they apparently emerged beyond language. That was also the case in medicine: signs of the patient were not produced in a well-articulated language, but they became elements of a sign-related context, which had to make the understanding and treatment of an underlying illness possible. ‘Semiotics’ and ‘illness defined by a clinical picture’ unfolded a corresponding scientific basis, which was also the basis for medicine as a social institution. An illness was in that approach the expression of a scientific rather than an existential experience. Social problems in need of a legal solution are today in parallel with this change from existential to scientific experience. Ethics forms a field of intermediate understanding between law and medicine, and is therefore in constant danger to perform either in a purely scientific or in a purely existential spirit.

Signs, Symptoms, Names

A central theme is the relation between *sign* and *symptom*. The theme refers to the status of facts in medicine and law. Both are *institutional* discourses, and their facts are solely recognized as facts within discourses of their institutional frameworks. A symptom is generally understood as the form in which the illness presents itself—so what is the status of an illness when we ask ‘are you ill?’ What ‘being’ is involved here? That is also the form within which legal problems present themselves to lawyers, judges and courts—so what is the status of a legal issue as symptom? What is the relation between facts, as symptom, their aggregation (as sign) and their consequence (given a construction and consequence by the interpretant)? Foucault⁴ often refers to symptoms as the form in which an illness or a social problem presents itself. However, medical and legal literature locates symptoms in the frame

² Roland Barthes: “Sémiologie et médecine”, in: *L’aventure sémiologique*, Paris 1985, Jan M. Broekman: “Semiology and medical discourse” in; *Methodology and Science*, International Journal for the Empirical Study of the Foundations of Science and their Methodology, 1988, -Id.-: *Intertwinements of Law and Medicine*, Leuven UP 1996.

³ Jan M. Broekman & Francis J. Mootz III (Eds): *The Semiotics of Law in Legal Education*. Springer 2011.

⁴ Michel Foucault: *Naissance de la Clinique – Une Archéologie du regard medical*. Paris PUF 1963 (*The Birth of the Clinic*)

of *causality* and thus determines a symptom as the *cause* of an illness or a social/legal problem—a problematic determination in semiotic context.

Medical doctors often conclude that a symptom is in a given case not clear or even contradictory. This feeling is not alien to lawyers; they experience the same, which often is the source for their alerted attention for (legal) interpretation. Legal thought patterns coagulate with medical: the interpretation of the illness or the clinical picture is abandoned in favor of a contractual bond between doctor and patient. That leads every semiotic analysis into depth structures of speech, text and action, which are juridical in essence, as the ‘bond’ or ‘contract’ between physician and patient shows. The founding schema of such legal/medical knowledge is in this case: (1) there is a particular impression of an *x*, which (2) impresses a physician or another person who observes the patient, and this (3) refers to a particular *something* that forms the material basis for (4) the medical, the psychopathological or/and the scientific examination. It interests to observe how (1), (2) and (3) deliver scientific certainty and the justification for (4). Be aware: there is a circular relationship between (1), (2) and (3) on the one hand and (4) on the other, since medical practice is unthinkable without the first three steps. The legal analogue follows a similar path. A bundle of facts is discovered as privileged by lawyers who observe these facts and derive a particular *something* from them that forms a basis for their examination and treatment. Again circularity, since legal practice is incomprehensible in the absence of the excavation of facts, their investment in symbol and the interpretation of the complex of object and symbol within a system that is itself a cluster of pathways (legal rules and processes) of object-symbol interpretation.

However, in cases of unclear symptoms in law and/or medicine, facts do not always receive full attention for their sign-function. It shows how fundamental *the transition from facts to signs* is for law and medicine, if not for lawyers. Barthes formulates: “(. . .) the confusion of symptoms (. . .) does not mean that there is an obscurity of signs, but on the contrary that the obscurity of facts did not yet reach the nature of signs.” That definition is important, because if she is correct, “it says that the word ‘symptom’ did not immediately express the idea of signification, whereas the connotation of that word in its metaphorical sense already did—when we speak metaphorically of a ‘symptom’ we are already in the field of semantics.”⁵

Does illness, or socio-legal conflict (or for that matter: love) ever “reach the high nature of a sign”? It seems difficult to answer straightforwardly. First, there are the circumstances, but then there is the culture and then there is the mirror stage in the development of each of us, and finally there is the metaphysical embedding of it all. Indeed, the circumstances are always there. They are never totally clear, because there are concealed issues in each situation so that we live in parts and in a light that hardly breaks through darkness, leaving shadows that never completely disappear. We encounter these features in Eugenides’ novel, which focuses on the sign-symptom issue, so typical for most human circumstances.

⁵ Roland Barthes: *Sémiologie et Médecine*, Op. Cit., p. 275 f.

Barthes' considerations on the latter are by no means irrelevant. They face the interpretation of signs in all inter-human situations. In order to be someone somewhere, one has always to read signs—however, the character of the intertwinements of sign and symptom is a matter of concern. Leonard, a major personage in the novel, is manic-depressive. When the depression is flooding once again, he ends his relationship with Madeleine who does not know or suspect anything about his genetic predisposition. When studying semiotics, one would conclude that his symptoms did for her not even become a sign! She lived with the idea that Leonard enjoyed himself elsewhere with someone else although he was in a psychiatric hospital. Objectivity is apparently beyond any circumstance. Barthes, as well as the *Eugenides* novel, shows us that this determines even (romantic) love! Barthes' 1977 book plays a crucial role in the minds of 1980 US University students, circles of broken-hearted youngsters. His words echoed all around among the semio-grads of those days⁶: in love, I am a fool, I even cannot say that because I cannot de-double my own image; I am crazy in my own eyes, senseless when I talk about it to others: "every lover is mad, we are told. But can we imagine a madman in love?"⁷ Those ideas were captivated without understanding their semiotic weight. They show how symptoms of a state of mind are like all other symptoms: once they become a sign, they reach out to others who interpret them accordingly in a sense of inter-subjectivity and even objectivity—just the way cultural constructions are! This move seems to be one of the fascinating features of the semiotic attitude, resulting in a form of bewilderment from which we have to become emancipated.

Illness or conflict as a text need more than oppositions and differences of meaning in order to be appropriately read. That text needs a determinate place in the semiotics of meaning-oppositions; the physician needs the body as the place of meaning as the lawyer needs society as such a place to embed fact and meaning. Is legal or medical discourse a body of knowledge in themselves, with a specific practice that is able to show such signs and to elucidate this appearance? Body and society successively seem to be the only place for medicine and law where such processes of reading could be meaningful. A circular access to legal and medical knowledge comes to the fore: how the body thinks itself, so the medical discourse; how medical discourse thinks/defines the body, so the body itself; how a society thinks itself (for instance as discordant), so the legal discourse; how legal discourse thinks/defines itself, so a society itself. The essential question does not pertain to the essence of facts but whether facts-symptoms-meanings can be transformed or transited.⁸ Understanding a medical or a legal symptom is in the light of semiotics a self-interpretation of a conceptual system called 'medicine' or 'law'.⁹ That is one of the foundational issues of modern society as unfolded by legal semiotics.

⁶ Paul Greenberg: "The Semio-grads" in: *The Boston Globe*, 2004 (May 16).

⁷ R. Barthes: *Fragments d'un discours amoureux*, Paris Du Seuil 1977. p. 141 [First Engl. Ed. 1987]

⁸ Jan M. Broekman: "Semiology and the Medical Discourse" in: *Methodology & Science. Op. Cit.*, 1988.

⁹ Jan M. Broekman: *Intertwinements of Law and Medicine*, Leuven UP, 1996, p. 159 f.

Symptoms seem to find only a place in legal discourse when they belong to the totality of legal concepts represented in jurisprudence, law or legal discourse. The relation between sign and symptom is *additional* in that case. Legal institutions decide whether the concept that articulates such a symptom will be accepted or not. Their decision belongs to the corpus of jurisprudence itself, is strongly anchored in a lawyer's mind and is incorporated in all legal articulations that function as precedent.

If this circularity between symbol and sign refers to foundations of science and society, what function gives semiotics then to the *name*? Connections between sign, symbol and name have already been put on record. Judgments, precedents or cases in law do indeed also function as names in society. Moreover, there is a strong articulation at hand when the verb 'is' seemed a name for *change*: a name in its own right also called '*sign*'. Is this a confusion of concepts? No, there is no confusion at hand but perhaps a specific secrecy. What is the secret in law's maintaining terms such as symptom, sign and name? Various elements of a possible answer are possible. Consider that *signs in law* are *names* for a conceptually conceived social reality—names, which are carefully admitted in the discourse concerned and systematized in the Common Law's jurisprudence and equally well in the Civil Law's legal doctrinal body. It is clear: without those names, there exists no legal reality. And without them, there exist no legal facts.

Lawyers do not apply rules to facts in a neutral and detached manner. They *create* legal facts by means of applying a precisely defined game of differentiation of rule and application of principles. Their 'name-giving' is a substantial part of the legal process.¹⁰ Lawyers tend to consider the connection between facts and rules as a linguistic relation. If law creates its facts, then such a creation is the result of law's language, of its speech activity as well as logical reasoning. So there exists no legal reality without institutionally recognized names. Legal thought formation as influenced by linguistic expressiveness, legal action as influenced by causality and legal speech acts as influenced by institutions lead to the lawman's job. He or she has to interpret facts by means of creating their legal names and thus, via this name giving, to appropriate legal interpretation. This is again quite circular because it resembles the reading of a self-conceived text. Brute facts and institutional facts cooperate in secrecy: they do not make publicly clear that brute facts are solely called 'brute facts' as the result of a *qualification performed by the institution*. The suggestion of Roland Barthes could in this perspective be the opinion of a lawyer. He tells us, that the medical doctor is the one who transforms by means of a mediating language (...) the symptom into a sign. But neither medical doctors nor lawyers transform symptoms as if they were natural data into signs, which now appear as a natural datum, as a purely descriptive authority. Legal issues receive their identity not from a pure description but through an explicit *making* of meaning.

¹⁰ Jan M. Broekman: "Legal Discourse and Legal Facts" in: *EYSL—European Yearbook in the Sociology of Law*, Giuffrè, Milan 1996, p. 181 f.

Signs Merge Law and Semiotics

What emerges, then, is the systemic quality of semiotic analysis, one beyond its application within a particular body or conflict to one that embeds that action within the universe in which *semiosis* attains its form. Returning to our *Bourgeois Gentleman*, systemicity is embodied in the Philosophy Master, who both mocks and structures the semiotic universe within which Jourdain may become both self-aware and produce contingent meaning. Kevelson's suggests that *law is a system of signs* in terms of legal semiotics, so that law can be broadly (and not solely technically) understood as a "process of communication or message exchange by means of signs and sign systems".¹¹ Kevelson highlights several fundamental issues in this context.

The *first* is, that there is no legal argumentation with a purely formal character. Premises of legal arguments, she writes, are neither true nor false, but hypothetical. So it was believed for a long time that analysis of legal discourse must necessarily be much looser and less conclusive than discourses proceeding from truth propositions.

The *second* is in Kevelson's discussion with O.W. Holmes' famous essay *The Path of Law*, that in each legal case is a legal event, in which legal discourse is one kind of legal act among others, and that legal procedures are exchanges of official messages by means of *signs*.

The *third* is that semiotic perspectives incorporate hitherto unattended views on law, as Kevelson notices¹², because with semiotics

one has introduced for further inquiry the strong possibility that should our social system of law, economics, and politics . . . be understood against the theoretical background of a dynamic, "motion-picture" universe that is continually becoming, that is infinitely developing and changing in response to genuinely novel elements that emerge as existent, *then the basic concepts of rights, resources, and reality take on new dimensions of meaning in correspondence with n-dimensional, infinite value judgments or truth-like beliefs which one holds.*

In the second half of the twentieth century, semiotics became appreciated as one of the most sophisticated and complex theories of human communication—as Eugenides' novel *The Marriage Plot* underlined. Apart from its legal/technical vocabulary and its doctrinal engineering, law is also (in approximately the same period) recognized as a special means to communicate social meaning. Emphasis is here on meaning. The novel shows that a large variety of circumstances in life can be highlighted through semiotics only because that approach clarifies their *meaning*. However, to focus meaning one must focus expressivity, and in doing so, understand how words are always in need of an addressee. Words incorporate meanings destined to others. Words of the law (especially those, which are spoken by an authority first and then read in the specialized discourse) are strongly marked by the presence of the *other*, and that is an essential feature of semiotics.

¹¹ Roberta Kevelson: *The Law as a System of Signs*, Plenum Pres, New York and London, 1988.

¹² Kevelson, -Id.- p. vii.

Community

A further confrontation with the *sign* as a constitutive element in law and legal discourse finds again a foundation in the philosophy of Peirce. As long as things do not act upon one another, there is no meaning, he wrote. Signs must be in a relation to other signs, sign systems and eventually language in order to be meaningful, so that meanings result from relations. Peirce writes 1905:

A sign is plainly a species of medium of communication

The position of an active semiotic subject is an issue of special consideration in Peirce's philosophy. It teaches us how to perceive a lawyer's activity¹³:

When we think, then, we ourselves, as we are at that moment, appear as a sign. Now a sign has, as such, three references: first, it is a sign to some thought which interprets it; second, it is a sign for some object to which in that thought it is equivalent; third, it is a sign, in some respect or quality, which brings it into connection with its object.

Signs are, generally spoken, a something that represents for someone something else within the framework of a view or a quality. Peirce's words are more precise in his well known and often quoted formulation:

A sign, or representamen, is something, which stands to somebody for something in some respect or capacity. It addresses somebody, that is, creates in the mind of that person an equivalent sign, or perhaps a more developed sign. That sign which it creates I call the interpretant of the first sign. The sign stands for something, its object. It stands for that object, not in all respects, but in reference to a sort of idea, which I have sometimes called the ground of the representamen. (Peirce, CP. 2. 228)

The impact of signs forms the foundation for lawyers' activities and their discourses: if ever signs represent reality, if ever signs are agreed upon, then humans within the boundaries of their cultural pattern confirm not only those individual issues, but all possible judgments of mankind as for instance expressed in concepts of justice or—more modern—human rights. It means, that concrete knowledge is always based upon semiotic transformations, which in their turn cannot function without community:

... The real, then, is that which, sooner or later, information and reasoning would finally result in, and which is therefore independent of the vagaries of 'me' and 'you'. Thus, the very origin of the conception of reality shows that this conception essentially involves the notion of a COMMUNITY, without definite limits, and capable of a definite increase of knowledge. (Peirce, CP. 5. 311)

The idea of community is fundamental, but brings problems of order and logic with it, as Peirce notices in the context of his outline of pragmatism:

A medium of communication is something, A, which being acted upon by something else, N, in its turn acts upon something, I, in a manner involving its determination by N, so that I

¹³ Charles Sanders Peirce (1931–1935, Charles Hartshorne and Paul Weiss, Eds.) *The Collected Papers of Charles Sanders Pierce I–VI*, Cambridge Mass, Harvard University Press. (Abridged as C.P.) CP. 5. 238.

shall thereby, through A and only through A, be acted upon by N. [. . .] A Sign, on the other hand, just in so far as it fulfills the function of a sign, and none other, perfectly conforms to the definition of a medium of communication. It is determined by the object, but in no other respect than goes to enable it to act upon the interpreting quasi mind; and the more perfectly it fulfills its function as a sign, the less effect it has upon that quasi-mind other than that of determining it as if the object itself had acted upon it.

A community demonstrates semiotic relevance through its unity of interpretation and experience¹⁴. Peirce speaks about the central issue that is contained in the word “community”: whoever speaks about *words*, speaks about ‘*Together*’ the word ‘community’ points on the one hand to *semiotics* because of its social practice to engender consistency in interpretation of signs and meanings, and on the other to *logic* because of the structure of its experiences.

Peirce defined *semiotics*—his name for any form of activity, conduct, or process that involves signs, including the production of meaning, which is a sign process—as specifically determined by a triad: *signs*, their *object* and their *interpretants*;

this tri-relative influence not being in any way resolvable into actions between pairs. . . . *Semeiosis*, if I remember rightly, meant the action of almost any kind of sign; and my definition confers on anything that so acts the title of “sign”. (Charles S. Peirce: *The Essential Peirce, Selected Philosophical Writings*, The Peirce Edition Project (Ed.) Indiana UP 1998, Vol. 2, p. 411.)

Modern semiotics analyzes structures of communication, which are complex systems of sign relationships. The system of law is such a system, and this leads to a more profound understanding of law and legal discourse—the ultimate goal of each law student focusing on semiotics. Indeed, communicating is in terms of legal acts a communication within law as a system of signs. The idea that semiotics in legal discourse also counts for a semiotic analysis of legal discourse, follows consequently but is seldom mentioned in the observations of lawyers. As if Peirce focuses on the social activities of lawyers, he describes 1909 how

A Sign is anything, which represents something else (so far as it is complete) and if it represents itself it is as a part of another sign, which represents something other than itself, and it represents itself in other circumstances, in other connections. A man may talk and he is a sign of that he relates, he may tell about himself as he was at another time. He cannot tell exactly what he is doing at that very moment. Yes, he may confess he is lying, but he must be a false sign, then. A sign, then, would seem to profess to represent something else. Either a sign is to be defined as something, which truly represents something or else as something, which professes to represent something.

We exemplify this by means of Ira Robbins’¹⁵ observations on the semiotic implications of the “Cf.” citation in legal texts. They are altogether a concrete example for signs in legal discourse, a subject to which we turn to next.

¹⁴ Marcel Danesi: *Messages, Signs, and Meanings*. Toronto UP 2004.

¹⁵ Ira P. Robbins: “Semiotics, Analogical Legal Reasoning and the Cf. citation”, in: *Duke Law Journal*, Vol. 48, 1043, 1999.

The Cf. Citation as a Sign

The major thesis is, that the Bluebook's introductory citation signals are essential for any subtype of legal discourse. The choice of signal can influence not only the interpretation of cited cases, but also the path of the law as imagined by the players in context. However, what is called *signal* appears to be precisely a *sign* in the Peircean and general semiotic sense of the word. It becomes clear that Cf. formulas are instrumental in constructing cohesion and rationality in legal discourse. Semiotic interest in discourse precedes semiotic interest in speech acts, because the latter always unfold in the context of the first. Hence Robbins:

This notion of closeness is also inherent in legal citation practice, for introductory signals indicate the purposes for which the citations are made and the degree of support the citations give. In this way, citation signals help to pave the path of the law.

Paving the path of law is a respectable goal, but it needs instrumental support that fits with the linguistic character of law's discourse: words, and signs.

By helping to assign the degree of support and the strength of distinctions and reconciliations, they help to articulate the degree of departure from existing law. If the signposts are bad, so too may be the destination. We must therefore take utmost care to be true to the intended development of the law. Put differently, careless citation practice can lead to haphazard consequences that should be controlled to the extent desired and to the extent possible. Despite the laudable goals of citation practice, the cf signal is viewed with skepticism. One reason is that practical definitions and uses of the signal vary widely.

The Bluebook authors explicitly grant the cf. signal the terrain of analogical legal reasoning. Other writers implicitly do the same, reserving cf. for cited authorities that involve substantially different facts, law, or both. Black's Law Dictionary effectively portrays the cf. as a catchall for any point the author wishes to make.' Cf. might be short for "cipher"-it is a nebulous introductory signal, practically devoid of meaning without further explanation by the authors Or cf. might simply mean "can't find": aware that a particular proposition requires support, the author, unable to locate anything close, just cites a book, article, or case that is "close enough.

The semiotic dimensions of a citation sign are difficult to determine. The form of legal discourse is at stake rather than the substance. Is the substance of that discourse identical to what lawyers gave the name 'law'? This becomes more important if one considers how

... few would contend that analogical thinking is not essential to the development of law. If the function of the cf signal relates to analogical reasoning, then the use of the signal must be accepted as an integral, organic part of legal discourse. This relationship may be conveyed in terms of semiotics, the study of systems of symbols and signs that have communicative value.

That legal semiotics must, moreover, explain what role specific meanings fulfill as a *sign* in law's discourse along the lines of legal thinking in general. The sign-role appears essential in law, and defines the events and circumstances in which legal rules should be applied. There is no legal semiotics without focus on signs in law, and there is no law without institutionally embedded sign functions. The many varieties

of the Cf. citation as a legal sign indicate the truth of this conclusion. Important is therefore Robbins' remark:

When the nation's highest court fails to explain cryptic cf. citations, the clarity and predictability of American law suffers profoundly.

An example that completes this remark is in *Stone v. Powell*¹⁶, which is

... a case that many lower federal courts and commentators have analyzed extensively. Perhaps the Court deliberately utilized a cf. citation in order to avoid having to define its terms, to provide needed flexibility to lower court decision makers, or to avoid expansion of the Fourth Amendment. It is impossible to know. The result has been time-consuming construction, deconstruction, and extrapolation of re-inventive analogies.

Important for any judgment about the function and importance of a legal semiotic sign as constituent of law is Robbins' suggestion:

The *Stone* Court limited the relief available to prisoners asserting Fourth Amendment violations on collateral review of their convictions. It stated: "[W]here the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." Footnote thirty-six, which followed this assertion, contained only a cf. citation to the entire case of *Townsend v. Sain*. The Court thus failed to clarify the significance of the *Townsend* opinion to *Stone*. Nor did the concurring opinion or either of the two dissenting opinions include any discussion of the inscrutable reference to *Townsend*.

One perceives here the embedding of a legal sign in the total construction of legal discourse. Various Courts, judges and legal commentators underlined furthermore, how the use of a sign, in this exemplary case a Cf. citation, showed that the citation was an example for the hermeneutic dimensions at work in the course of constructing legal discourse. That is a truly legal semiotic observation.

Signs exercise important social functions in a large diversity of discourses. Their meaning depends on their context in which they unfold a meaning and create social bonds. This general observation is very concrete in law and legal discourse. The logic of signs, not in the sense of a formal logic but rather of legal rhetoric¹⁷, is essential for lawyers, which they tend to master constantly. Especially in a Civil Law discourse, signs with the character of "general principles" are important as a source of law. Legal standards are signs that have been set for all participants in the discourse. The same importance of the sign-character of law is in the Common Law world, where "precedent" fulfills a comparable function. The discussion about legal rules, developing at both sides of the Atlantic and thus uniting Civil and Common Law, focuses on the application of signs with rule character. The logic of signs, which support law's institutional hierarchy, is particularly important for the construction of the legal narrative, as James Boyd White explained in many publications.

¹⁶ 428 US, 465 (1976).

¹⁷ Ch. Perelman & L. Olbrechts-Tyteca: *The New Rhetoric: A Treatise on Argumentation*. Notre Dame UP 1969. Also: Francis J. Mootz III: *Rhetorical Knowledge in Legal Practice and Critical Legal Theory*, Alabama UP 2006.

It is in its sign-character, one could add to White's observations, that the logic of narrative codification is clarified. This semiotic chain of arguments and language uses has direct practical effect, since lawyers are supposed and educated to master their profession of words and to control and influence their meanings in view of their social effects. They do this by institutionally accepting the uses of words, word clusters etc, up to cases, which are given a specific name, as well as of principles. All these activities focus the coherence of legal signs, which has to be adopted by any legal practitioner. The acceptance of the specifically legal practice based on the use of words makes it possible for lawyers to fathom the problem that everyday language and legal language are no identical but belong together functionally.

General Considerations

Legal semiotics is repeatedly defined as the study of law focusing on signs and symbols as well as the construction of meaning in law in legal discourse. Law's communicative structures are essential in that context. Recent large-scale economic, political and social developments in the Western hemisphere have increased the need to expand our knowledge about law, and semiotic studies sustain that need. That has various implications for legal semiotics.

- a. There are today intensive and varied theoretical discussions and debates on *changing patterns of legal knowledge* implied in law and its practices (Posner, Dworkin, Fisch, Summers, Sunstein, Luhmann, Teubner, Hart, McCormick). They contribute ultimately to a new general knowledge about law rather than to new laws or legal techniques.
- b. The social relevance of legal knowledge is furthermore challenged by the rapid growth of multicultural contexts in which Western law has to function. This adds to new perspectives on law rather than to new components of existing law.
- c. Those implications are reinforced by the fact that the expansion of legal knowledge is paralleled by a host of fundamental changes in general knowledge. Lawyers confronted with semiotics must also consider patterns of knowledge in the emerging e-communication (which is a new field of human communication), or in cyberspace and nanotechnology, where not only hitherto unknown signs and symbols, but also new meaning processes are created.
- d. Consequences of expansion and change in legal knowledge should not only be registered in view of actual practices of law, but also in legal education. Education introduces new forms of knowledge, and lawyers are particularly targeted where education relates to changing forms of knowledge. Legal practitioners acquire an awakened awareness of their influence on the lives of citizens and the profiles of a newly emerging social self, which result from those changes. Semiotics, the study of signs, symbols and meanings in legal discourse appears to be of essence in legal education. Law students study how law and lawyers function in fields that exploit legal terms such as ownership, privacy, constitutionality or Human Rights and policies such as care, consent or lawful allocation of social means.

What sign-characters are used here, and could one venture the idea that a diversity of signs and their subsequent ideologies are favored in lawyers' practices?

- e. The relation between law and semiotics as part of academic disciplines and as sociopolitical practices is a central theme. It is the cornerstone of a society that protects the lives of its citizens. Students must acquire sufficient material knowledge to understand and debate those questions, in particular pertaining to views on men and society as well as on justice and knowledge as developed in the course of the last decades of the twentieth century and the first of the twenty-first century. This directs their attention (emotional, professional, cultural and pertaining to their individual pattern of knowledge) to at least two issues, which will determine their position of a lawyer in our society: (a) what is a sign and what is a sign's meaning in the context of law and legal discourse; (b) explanations about a sign in legal discourse as a strong unity—a system, as a legal system, perceived as a unity, or a fragmented whole, or a social construct of different nature.

The latter is particularly important for law, because the *unity* of a legal system relates to the problem of *reference*. The thesis about unity claims that a legal *system* fits to law and its language/expressiveness, and functions as a structured discourse of a nation-state, including all manifestations of an ideological nature. Such a system embraces the paradigm called *legal positivism* and is the basis for safe acts of reference. Are all lawyers positivists when they perform their legal task? But legal positivism itself is suffused with semiotic ambiguity—grounded in symbolic constructs ranging from command, compulsion, authority and hierarchy within norm structures that may be more or less resistant to distinct styles of interpretation;¹⁸ “difference or slippage between the textually affirmed determinacy of the rule as signifier and the signified—a particular instance of rule application – is inevitable”.¹⁹ Positivism, thus understood, would deny the differences between the multiple types of signs in law, and such denial functions when one considers legal discourse as constructed in accordance with means of (formal) logic—an issue Peirce, Husserl and others, lawyers as well as philosophers, have been wrestling with. It is interesting to research whether they did have an eye for the inherently *semiotic* dimensions²⁰.

¹⁸ Candace J. Groudine: “Authority: H.L.A. Hart and the Problem of Legal Positivism,” IV *The Journal of Libertarian Studies* 273 (1980) (considering law as a system of command or of social rules in the context of authority and H.L.A. Hart: *The Concept of Law* (Oxford 1961); David Richards, *The Moral Criticism of Law* (Encino, California: Dickenson 1977).

¹⁹ Duncan Kennedy: “A Semiotics of Legal argument,” Op. Cit., p. 87.

²⁰ Frederik Stjernfelt: *Diagrammatology – An Investigation on the Borderlines of Phenomenology, Ontology, and Semiotics*. Synthese Library, Vol. 336, Springer, Dordrecht 2007.



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