

Chapter 2

Social Life and Law

Abstract Social life is life spoken. Speech acts appear of central importance in studying law, as semiotics underline. Law is multidimensional, lawyers speak everyday language *and* legal language and the meaning of their words is seldom restricted to one level of significance. Is Law's *discourse* a different manifestation of linguistic expressiveness? Signs in law reinforce and enrich social life while introducing new dimensions of meaning. This was Greimas' important contribution to semiotics, as we understand. It was also the reason why Lyotard unfolded his theory of narratives, once confronted with law in post-modernity. Those insights in what Kevelson named the n-dimensionality of meaning and significance in life widens the forces of freedom to create commonness.

Keyword Speech-act · Discourse · Freedom · Meaning · Narration
Post-modernity

2.1 Social Life

There is no social life without language—no matter what stadium of development a language has reached and no matter whether that language is mainly determined by verbal or by non-verbal articulations. All components of a humanly understood and experienced world are named by means of a language. All activities of humans are qualified by means of names. Those processes create a fundamental *freedom* to understand and act, a freedom to explore life in all its dimensions. The example of the lawyer asking the Court 'to say for law' includes a particular social structure with its predominant level of linguistic expressiveness, which we generally call 'institutional' in the case of law. Such features do *not* relate to the particular language that determines the specific profession in the first place, but to the social structure we qualify as 'legal'. As law students or as lawyers we have to recognize that we belong to that institution. It says *firstly*, that the lawyer asking the Court is and should be *a lawyer like all others*. There is no exception on that rule, and the language in effect before the Court has in that regard only one type of speaker.

Secondly, the meaning of ‘saying/being said for law’ is *not* in the hands of the lawyer or of judges speaking, but more generally in the hands of *others*—possibly also non-lawyers, such as members of a Jury, politicians or specialists in a particular discipline. This indicates that *legal signs refer to a diversity of social meanings* and interpretations of meaning. Lawyers speak as if they utter a natural language but their application of those language suggest at least a parallel realm of meaning, which concerns the law as an institution specifically.

This parallel between natural language and artificial language and the exploration of one in the other has been understood by philosophers of language in the 20th century, such as Russell and Wittgenstein, as well as specialists in research on meaning such as Lady Victoria Welby (1903), De Haan (1916), Ogden and Richards (1923) or Ch. Morris (1946). Their approach to language was in many regards also a philosophy of law and legal discourse. Their interest concerned the foundational dimensions of a lawyer’s activity, with priority given to their specific management of meaning—which includes legal semiotics.

How can one explain the ties between fascination created by law and fascination caused by our perception of signs, which actually function in social life? The question seems overwhelming, new, unanswerable and a task too heavy and elaborate for a legal researcher in any legal system. Yet, the question touches one of the pillars of the actual views in law, which are in speech, in signs and in signification—and: what is more: on the path from sign to significance, in other words: in the semiotics of law. Our considerations should not destroy that fascination of law, which is truly a central social force!

2.2 Legal Discourse

Roberta Kevelson seldom mentioned the concept of a *discourse*, and certainly not of a *legal discourse*. One can only guess why she did not. It is evident that legal semiotics display a complex structure. One of the reasons could be that there is no definitive answer to the question “what is law” and that this lacking definition is in many regards an offense to the models and methods of thinking signs and semiosis. Law is a *process* and its speech acts, its many considerations about language, its uncertainties in text-interpretation and wider hermeneutic dimensions might make the discourse concept disappear from the frontlines and fit to articulations less than to facts, figures and truths. But in contrast, it seems that the latter and their *meaning* are still regarded as the more important legal component. Is law not mainly experienced as a norm, a value or an institutionally qualified set of expectations in social life?

Additional considerations are at stake. First there is the temptation to emphasize the *system*-character of law. That was clearer in the days of the first proposals about legal semiotics than it is to us today. With Friedman’s 1975 *The Legal System* it appeared evident that legal semiotics has many ties with issues of systemic character. And this confirmed in itself the Peircean idea according to which a system is a

continuum, a unified and cohesive pattern of signs constructed of sign relations. In a certain sense were properties of a discourse transferred to the system concept, particularly where Friedman's insight became accepted that law is only one of the many social systems, which give society a meaning. We thus have to keep in mind that the discursive character of legal articulations remains in proximity to what a system character forwarded.

These insights are not solely theoretical—they are immediately directed towards the reality that *social life is a speaking life!* Human lives in contemporary cultures are filled with speech acts and discourses. That may have been different in earlier times where hominids lived in closer and different relations with nature and in different patterns of relation among themselves, but today's life is marked by lingual utterances, which embrace verbal as well as non-verbal dimensions.¹ They appear to have properties that are far beyond strictly determined and precisely circumscribed goals. With the recognition of the latter returns the question pertaining to a more profiled understanding of the discourse concept.

A discourse is more evidently at distance to the large majority of utterances one encounters in ordinary life experiences than any systemic articulation. Our daily utterances often suggest such a system, but that is treacherous and simply incorrect. That incorrectness can, however, not be controlled because there are no methodical and sufficiently reliable data for any controlling performance. The idea itself, that our speech activity should be a performance of reliable 1:1 relations between reality and utterance, is a fairytale.

Everyday-language is a language on itself, a natural, non-artificial, non-professional language, which rather conceals meanings than uses well-determined meanings as building blocks for walls or cells called 'elementary particles'. What is expressed in natural language embraces various and often completely opposite meanings, paradoxes, impossibilities, mirages, pitfalls, jokes, choices, alternatives or fluid alterations without any hesitation. The concealment of meaning hides the enormous power of change and its dynamics, which is so effective in human articulation.

Peirce remarked that a natural language is an example for the study of semiotics in its entirety: the latter must from the very beginning relinquish any desire of having systems at work. Are we psychologically able to accept paradoxes and pitfalls without accompanying feelings of uncertainty? They are altogether *things said* and their property of being said makes them to an utterance, or what Foucault famously called 'enunciation'. That concerns any thought pattern focusing on *signs* and on *law* as an axial discourse in modern life. Do not forget in how many ways the two are tied together.

All human forms of communication need symbols and signs, and all human activities need meanings to become attached to those symbols and signs. Participating in a common discourse is a means of passing those signs and their meanings on from individual to individual—that's what we use to call 'culture'.

¹Broekman (2017).

During this mostly concealed process, our attention has changed from the *content* of articulation (what was said) to the structure and essence of that *articulation itself* (how and under what condition it was said). Legal discourse has in this dynamic view a central role to play. Kevelson once remarked that "... 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."²

Her observation is correct for law, and it is correct for daily discourse. Both discourses are more than an ongoing talk, a simple conversation or an innocent report of feelings and thoughts about the world around us. What we say is never solely the registration of what is, and that is true in everyday life as well as in law. In life, a culture that formatted us is repeated, confirmed and stabilized with every articulation we exchange.

In law, a social power is repeated, confirmed and stabilized with concepts and values that lawyers prepare for our community in which we proliferate our culture. In doing so, lawyers experience the need to speak a discourse beyond their mother tongue. They thus experience that any meaning formation affects cultural dimensions, which form multiple layers of public life. In other words: laymen and lawyers experience their existence as 'being in the sign pool of today's culture.'³ Discourses tell us about our being in the sign pool, their collected utterances form an encyclopedia of the culture we all are while we convey its basic elements in all our speech activities.

2.3 Signs, Practice and Theory

The suggestion that a discourse should combine numerous fixed entities like small building blocks, and confirm stability prepared by samples of fixed properties, is tragically false. That idea just damages law's discourse, and while doing so it creates a deeply dysfunctional understanding of law in society—as happens often in critical times of the Occidental culture. The heart of this matter is, that neither law or society or culture evolves in a static mode. On the contrary: legal discourse moves continuously, and its creations are only valid for a specific period of time. The entire architecture of law's discourse is a matter of fluidity, of change, of anti-fixation, of incidental judgment and temporary insight as well as a matter of its own time-determination in the crossings of cultures. Law is like our culture: a *film*. Its discourse shows pictures, it mirrors values, it enlarges public opinions or scales them down, it stabilizes what changes too fast to function, it continuously refers to itself in the context of other discourses, it mirrors its culture and cultural ideals.

The consequence of that insight leads to a bewildering conclusion: *law's discourse is never alone* or unassailable in its being detached. On the contrary, it is

²Kevelson (1988), p. 7.

³Broekman (2016), p. 9ff, 193.

always in context; its contexts are most often specific social signs, no law is created outside of culture and the human mind. No legal regulation can exist or become effective as a single human articulation. Lawyers thus notice the relevance and the limits of their professional articulation when they are confronted with the unfolding of their own language: there is always a theory behind them and the requirements of a practice to follow obediently.

That situation is beyond doubt an emotional burden: for the practicing lawyer on the street as well as for the judge in Court. Each fragment of any engagement in law's discourse includes a confrontation with the major features of that discourse: the existence and powerful influence of encircling discourses, the specificities of a natural language in which features of law's discourse have to be communicated far beyond it's own limits, the fact that a legal discourse will always be evaluated according to its representation at the surface of its verbal (in particular textual) or non-verbal (in moments of violent behavior) appearances.

So there is an urgent need to remember the research of Greimas who combined his analysis of *sign* with the *discourse* and suggested, that each *text* has at least three levels of essence: a *surface* level, an *in-depth* level and a level of *representation*. This differentiation is a central issue in semiotics, which did not receive enough attention of social scientists, linguists or philosophers. It means, that not only a discourse, but also that a sign is never appropriately understood in the traditional speaker-hearer model. This insight is the consequence of the dynamic character of every lingual utterance or sign of a human individual. Greimas mentions:

- *deep structures*, which define the fundamental mode of existence of an individual or a society, and subsequently the conditions of existence of semiotic objects. As far as we know, the elementary constituents of deep structures have a definable logical status.
- *superficial structures* constitute a semiotics grammar system which arranges into discursive forms the contents susceptible of manifestation. The products of this grammar system are independent of the expression, which reveals them, in as far as they can theoretically appear in any substance, and, in the case of linguistic objects, in any language.
- *the structures of manifestation* produce and organize the significances.”⁴

One should read this outline in relation with two important aspects:

- (a) The *dynamic* character of all linguistic observations about human utterances is in effect within this pattern of development. Greimas suggested “that out of desire of intelligibility, we imagine that the human mind, in order to achieve the construction of a cultural object (literary, mythical, pictorial etc.) starts with simple elements and follows a complex course, encountering on its way constraints to which it must submit, as well as choices which it can make”. It means that any author's view on the construction of a semiotics (sub)system goes hand in hand with elementary structures of meaning. From kernels of meaning to an exaltation of liberty unfolds the path from sign to signification.

⁴Greimas and Rastier (1968), 80f. Broekman and Backer (2015), p. 125ff.

- (b) The *sign* as basic element of semiotics receives a *multidimensional meaning* through this observation. First, it is never alone. Second, it is present at most of the levels of lingual articulation, and third, it is just changing all the time in those various contexts. Fourth, Peirce was well aware of this dynamic variety of signs, when he differentiated between signs, sign-signs and other types, which were all present at various levels of texts, discourses and other layers of culture. Fifth, the riddle of those dynamics is for most semioticians (especially for those who study *legal* semiotics): when, how and where signs come to the surface and begin to unfold their representational (often institution-bound) life.

One should discern a particular feature: sign and discourse are both enveloped in an *unending dynamics* and therefore never caught and fixed forever, and they are both fundamentally *multi-layered* phenomena. Signs are, like discourses, in principle linked with other signs and discourses. The links between discourses are studied; Lyotard laid down their foundations in his theory about narratives and his insight that specific master–narratives format specific patterns of culture. A parallel theory about signs is not yet developed. The layered character of lingual utterances in which signs are evolved, the dynamics with surface and depth as their indications (signs) of limits, Greimas’ metaphor of ‘play’ or Kevelson’s ‘film’ are altogether issues of a future in-depth research program to understand legal semiotics in theory and its practices.

2.4 Semiotics, Linguistics and Language

Kevelson’s ideas about the law being a system of signs do not touch the strong semiotic connections between *text* and *sign*. These ties focus especially in law on the traditional questions about interpretation and meaning of texts. But it is clear, that an understanding of texts does not lead to an equivalent understanding of signs. That insight forms a challenge in its own right. It is absolutely correct and generally understandable if one states that a sign needs a person or a subject that presents the sign and another subject that understands this presentation. That is the normal speaker–hearer model applied to the sign situation. It is sufficiently general and also quite understandable that a sign is in need of those two subjects, of which one fulfills the role of the sender and the other of the receiver. Can one understand a receiver without having a notion of a sender as its origin? One can decidedly *not!*

One remark should be clear and omnipresent: each understanding of a sign is like the understanding of an utterance. So, one asks: what is happening, when we articulate a word? What is the act of a speech act? What is its speech? Therefore: consider how proximate word and sign are in the framework of our discourse. Is that a new path to walk in linguistics whereby our daily notions of language play a hitherto unexplored role?

Let us go back to earlier observations. Peirce described in his 1873 manuscript *On the Nature of Signs* somewhat hesitatingly what we normally divide for the sake

of our analysis in two parts. He wrote: (A) "...it is necessary for a sign to be a sign that it should be regarded as a sign for it is only a sign to that mind which so considers and if it is not a sign to any mind it is not a sign at all. It must be known to the mind first in its material qualities but also in its pure demonstrative application. That mind must conceive it to be connected with its object so that it is possible to reason from the sign to the thing". And (B) "Let us now see what the appeal of a sign to the mind amounts to. It produces a certain idea in the mind which is the idea that it is a sign of the thing it signifies and an idea is itself a sign, for an idea is an object and it represents an object."⁵

In (A) as well as in (B), there is the question of the mind as a conceiving instance. Semiotics is broadly understood as the science that deals with signs and the use of them by (mostly human) creatures, and that is an often too broadly conceived version of all human beings as sign-using creatures. Peirce refers not to such a definition of *a human being*, but to *the mind*—not considering whether other than human minds are forces that could be characterized as sign-related. Peirce's reference is to *a sign-related Self*. All that is sustained by his words, which focus on *relations*, not on fixed concepts regarding *beings*. And all that is a matter of the *mind of a Self*.

Here is again a subtle reference to the *dynamic* character, which embraces the sign. It puts the sign into a pattern of relations, because each element in the Cosmos should be understood in its interaction with and interdependence from every other element. Whenever the question arises whether man discovered the sign, the idea that signs belong to a humane evolution plays a role. The issue is, that a sign is not completely dependent on a sign-giver. The sign transcends any fixed relational patterns between sign-utterer and sign-receiver. Indeed, one could raise the question whether a sign can be uttered and received as if it were identical to a lingual utterance that is marked by the infamous 'speaker–hearer' relationship. Hence the words in (B): the sign appeals to the mind, and produces the idea in the mind that it is a sign. That does *not* relate to an idealistic theory of knowledge, which regards the sign as the pure product of the mind.

The mind, Peirce suggests, is stimulated to produce the idea (that itself is a sign) that it conceives relations between itself and reality in terms of signs. *That occurrence does in modern Occidental culture primarily take place in texts and discourses*. Peirce's notes described what occurs in phenomena, which are characterized by their surface structure and their deep structures, whereby a level of representation plays a unique role. Indeed: a sign is only a sign when *it works*, i.e.: when it is a sign. The 'it works' is the sign of that sign-in-effect. Texts and discourses are two important regions in which we can observe signs-at-work. It does not mean that in other regions of human experience and culture signs do not work, but in those two they are most obvious. But: how? The answer is as simple as it is difficult: dynamically. That is, through being involved in changes. Those changes constitute the flow of meaning, which is so characteristic for semiosis in

⁵Peirce (1873).

general, although we do not fully grasp the meaning of it all. Modern semiotics is challenged to unfold this secret.

That challenge concerns another understanding of the *sign pool*: the most appropriate description and understanding of what texts and discourses are. Semiotics concerns the fact that “Two-way directions become multiple, various crossings among meanings are made possible, a patterning of meanings instead of one-to-one relationships appear realistic. Interdependency needs to provide a more precise knowledge of WHAT is interdependent with WHAT: ‘particle’ and ‘total’ are only two answers to those manifold ‘what’s’ in question. Insightful knowledge of components seems therefore necessary. ... The concept of a ‘text’ and of an interdependent ‘word-meaning’ complex are differently defined but treated as equal. It means that the semiotics of a text and the semiotics of meaning-holistic entities are considered equal and treated in parallel. ... This reaches further than explaining meaning and meaning-holism by referring exclusively to words in a word-language. Meaning is more that words can say or can connect with.”⁶

These remarks concern the theoretical dimensions of the new insights and fascination of the semiotics, which Kelson initiated. A renewed focus on the *sign* might deepen our understanding and clarify the depth and width of that challenge. Greimas supported an understanding of the fact that signs are almost exclusively perceived and experienced when they are phenomena of the surface structure of the level of manifestation of texts and discourses. We seldom consider that this is not all! Signs are everywhere and it is difficult to acquire a reliable grip on texts and discourses as a totality in this approach. Signs are everywhere and, as Peirce noticed: everything. That does *not* concern solely signs at the surface, but also signs in signs below the surface of what we say or write. And in deep structures, signs are seldom already signs, but rather elements which are packed in broader sub-surface regions such as norms, values, expectations, social motives and the like, struggling to reach representation. Signs are born below surface, and only a social mechanism of selection allows them to be operational at the surface. Our interactive communication is therefore mostly about *what signs are going to be*, rather than about signs as fixed entities. Hence Peirce’s dally to find the appropriate denomination of signs and the more than seventy proposals he left us as his heritage. This is the dynamics of semiotics: *the becoming is more important than the being*—and that is the crux of signs on every step at the path from sign to signification.

Is this important for legal semiotics? It is, and that forms a great challenge. The perhaps most important field of analysis and forthcoming research in legal semiotics concerns the traditional legal hermeneutics. Do not forget, that the hermeneutic approach is omnipresent in law, in philosophy, theory and practices of law, and it has a longstanding tradition with a well-determined pattern of searching the consequences of particular meanings laid down in words and speech. Texts and discourses are not static patterns or fixed fields of regulated verbal as well as

⁶On “sign pool”: Broekman (2016), (OpCit), pp. 9, 208.

non-verbal behavior. This is what they often seem to be in traditional views and uses of law and legal practice.

A law text invites, so to say, to find one's way in authoritarian patterns of behavior. Hence Kevelson's repeated remarks in which she expresses her appreciation of a non-authoritarian attitude, which is forwarded in the semiotic approach to law. Other features of great importance evidently color texts and discourses because both are like plazas of a culture, fields in which subjects encounter. The "I say-v-You say" pattern is not experienced as a clash between opinions and powers but as an invitation to commonness in consideration and thought formation. The search for the originator of a law text, which should one literally follow in interpretation and application (in U.S. jurisprudence called 'originalism') is an example. In that view is the originator the dictatorial master of meaning rather than the host of consultation on situation-bound meanings. The contrast is clear, and the direction semiotics would favor is also clear. A fixed and obligated rule following of meaning is only possible with regard to surface concepts—signs included. But if one considers the wealth of spaces in which signs are in signs and related components which will- or will not appear to the surface of text and discourse, then one embraces an experience and attitude in which semiotics is a matter of *freedom* rather than of strict *rule following*. That freedom, in essence the freedom to create commonness, is the fascinating challenge if one unfolds the semiotic approach specifically in law and legal discourse. It forms the foundation for this Brief's plea to initiate further research into the Kevelson heritage.

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<http://www.springer.com/978-3-319-69519-8>

Legal Signs Fascinate

Kevelson's Research on Semiotics

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2018, VIII, 74 p., Softcover

ISBN: 978-3-319-69519-8