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The Semiotic Approach to Jurisprudence:

Can it make an original contribution? — Some brief reflections

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Abstract: Legal semiotics offers a critical point of view and attempts a new approach to legal theory, based on a different kind of rationality which appeals to the construction of sense through narrative models, thus reaching the conclusion that there is no conceptual difference between law and fact. Hence, it aims to offer a fresh approach to legal theory, especially in what concerns the way of explaining decision-making and justification of legal decisions – whether the case is easy or hard. Working "*ex post facto*, legal jurisprudence seeks to provide an explanation of how meaning was actually created, not what meaning will or could be created". By doing so, legal semiotics, returning to the private psychological processes in order to understand the sort of sense the decision makes, criticizes the legal syllogism as not being able to accurately account for all the deep structures in which legal discourse is embedded.

1. The broken paradigm

"Un jour cependant se produiront des anomalies – des faits d'observation qui ne cadrent plus avec le modèle explicatif – qui, se elles se multiplient, provoqueront la mise en cause du paradigme dominant". This is the way François Ost and Michel van de Kerchove explain the changing of paradigms (from "pyramide" to "réseau", or from the positivistic paradigm to a new way of conceiving the legal phenomena, through an interdisciplinary approach and the recognition of its complexity), appealing to the theory of Thomas Kuhn (Ost and van de Kerchove, 2002: 13). This is the contribution legal semiotics tries to make, by criticizing the positivistic way of thinking.

Nevertheless, what is so characteristic of this paradigm, which seems to be contested from all sides?

According to Ost and van de Kerchove, in legal positivism "le processus de validation est tout à la fois unilatéral (il ne prend en compte que la seule validité formelle de la règle: sa légalité ou édiction conforme à des critères intrasystémiques), absolu (au sens où il conduit à des résultats sans nuances: pour lui, une règle sera totalement valide ou absolument nulle), et

hiérarchisé (la légalité de la règle s'apprécie toujours, comme dans de schéma pyramidal de Kelsen, par rapport à la norme supérieure habilitante, jusques-et-y-compris la norme fondamentale hypothétique du système)" (Ost and van de Kerchove, 2002: 308).

The positivistic paradigm had the purpose of establishing Law as a science and, as Otto Pfersmann claims, this scientific goal was embedded in the principles of "rationalité, objectivité, neutralité, testabilité d'hypothèses selon une méthodologie à la fois rigoureuse et ouverte à révision" (Pfersmann, 2002: 789/790).

Important in all this discourse is, undoubtedly, the place given to "La Raison". For Stephen Toulmin, "the transition from medieval to modern modes of thought and practice rested on the adoption of rational methods in all serious fields of intellectual inquiry – by Galileo Galilei in physics, by René Descartes in epistemology – with their example soon being followed in political theory by Thomas Hobbes" (Toulmin, 1990: 13).

The core of this positivistic way of reasoning is to be found in the model of the Rule of Law, which "takes as a fundamental assumption that law is a matter of rules and/or norms which are applied to facts by way of the syllogism" (Samuel, 2005: 23). The *modus operandi* of the legal syllogism is described by Alain Papaux in the following way: "l'hétérogénéité du 'général et abstrait' de la loi et du 'singulier et concret' du cas c'est-à-dire leur incommensurabilité initiale y est surmontée par la figure du syllogisme, donc sans le secours d'une subjectivité (en ses convictions) assimilée à l'arbitraire", leading to "déduction à partir de la loi des solutions aux cas pratiques, dans la présupposition de l'univocité du texte légal" (Papaux, 2006: 6-7). As a result, there was, as Geoffrey Samuel puts it, "a *juge automate* acting as a deductive machine applying statutory axioms" (Samuel, 2001: 43). According to Jackson, "there exists an intimate connection between decision-making and interpretation, and […] normally interpretation of the law is determinative of its application to facts", which means that, when it comes to the legal syllogism, "Interpretation is the means (in hard cases) of determining what the major premise is" (Jackson, 1990: 84; 93). Thus, since in epistemological terms the focus is on legal norms or propositions, "the way lawyers handle facts has tended to become of secondary importance" (Samuel, 2005: 27).

However, it is this point of view on decision-making and interpretation (and justification, as well) that legal semiotics criticizes,[1] for "semiotics provides grounds for

[1] Actually, it should be said that, according to Jackson, "legal semiotics, because it adopts a necessarily sceptical stance towards the truth-claims made in the discourse it studies, has […] [something in] common with legal realism and critical legal studies" (1988c: 65).

concluding that the distinction between interpretation and decision-making is conceptual, and not merely contingent" (Jackson, 1990: 93-94).

2. Legal semiotics: a fresh approach

According to Jackson, "semiotics is the study of how sense – in principle, any kind of sense – is constructed" (Jackson, 2005).[2]

The intent of legal semiotics is to give a new perspective on how Law is perceived. For Eric Landowski, legal semiotics "aims to develop a unified principle of intelligibility regarding all the aspects of the legal phenomenon, including not only the rules of positive law, but also a whole spectrum of legal 'facts', generating legal effects, of legal 'acts', creating law, and of legal 'practices', notably of the interpretative kind" (Landowski, 1988: 79). Thus, legal semiotics tries to understand and render more intelligible "a complex entity composed of meaningful elements" made of "an amalgam of discourses, institutions and concrete social practices" (Landowski, 1988: 80-81).

If we are talking about the construction of sense,[3] of rendering intelligible the legal phenomena, it means that we are dealing with communication, and "in communication in general, words, sentences, signs, etc, are a way of communicating a message from a sender to a receiver", resulting that we have to "distinguish between the message as such, the forms used for communicating the message, the person(s) who send the message, and the person(s) who receive it" (Van Hoecke, 2002: 80). In the case of legislation, the sender is the legislator, the receiver is the one who will give meaning to the message conveyed in the legal statutes, which usually is the judge adjudicating on a concrete case (we can also think of legal officials; or the citizen, who has to conform his/her behaviour according to the statute).

Important here is the role of language, especially legal language, that has to be seen as a "particular code" (for Greimas, "natural languages develop within themselves secondary semiotic systems[4]" (qtd by Jackson, 1985: 143), law being one of those secondary systems).

[2] For Jackson, "la sémiotique n'a aucune raison de principe de privilégier les textes par rapport à d'autres manifestations signifiantes (gestuelles, iconiques, proxémiques, spatiales, musicales, etc.), les unes et les autres susceptibles d'être impliquées à divers degrés, et souvent en syncrétisme, dans les processus sémiotiques d'interaction sociale" (1988c: 68).

[3] One must draw the distinction between 'sense', on one hand, and 'reference', on the other, a distinction that will be made further on.

[4] Here, we should mention the importance of developing from a system orally structured towards a system based upon writing, for both have different cognitive effects (writing allows what the authors call "backwards scanning", which facilitates the processing of sense).

When talking about a specific code, i.e., the technical language of law, one has to bear in mind the importance of classification or taxonomy. In the words of Geoffrey Samuel, taxonomy "has an important epistemological role in as much as it helps us think about the relationship between words and things in a way that it shows that one is included in the other", which results in the fact that "our understanding of the world of fact is as much dependent upon taxonomy as is our understanding of language" (Samuel, 2000: 300). According to Ost and Van Hoecke, "the development of legal systems generally goes together with a higher level of systematisation and abstraction" (Ost and Van Hoecke, 1998: 81).

All the same, what is truly interesting about legal semiotics is the claim that "law, as a language, is structured like a narrative" (Landowski, 1988: 84).

2.1. Law as narrative

As Landowski explains, a narrative is "a discourse which relates events, real or imaginary", meaning it "must in some way succeed in accounting *de jure* for what it reports to have happened *de facto*" (Landowski, 1989: 29).

Legal semiotics develops its conception of narrative based on the "narrative syntagm" of Greimas. This "narrative syntagm" is composed of three elements: "the setting of goals ('contract'), the achievement (or non-achievement) of those goals ('performance') and the acknowledgement of the performance (or non-performance) of those goals ('recognition')" (Jackson, 1988a: 232). And, as in any other communicational process, in this syntagm are involved "a set of *actants*, subject-object, sender-receiver, helper-opponent", who "may perform different actantial roles at different times" (Jackson, 1988a: 232).

Furthermore, fitting in this narrative model is also the fact that "laws may be regarded as a particular form of narrative representation of human behaviour, a form peculiar – above all – for the manner in which social approval or disapproval[5] […] is expressed, and by the institutionalised form in which the 'sanction' […] is conveyed" (Jackson, 1988b: 91).

From this conception stems the claim that "there is no conceptual distinction between law and fact" (Jackson, 2005). Moreover, if narratives are, as Baldwin claims, "more or less accurate representations of 'what really happened' and our understandings of that reality", there can be drawn a parallel between the narrative and the trial for "the judicial process is one that hears, tests and evaluates claims to factuality to determine what really happened" (Baldwin, 2005: 219).

[5] We are thinking of the Western deontic modalities of 'permitted', 'required' and 'prohibited' (to which can be added the modalities of 'encouraged' and 'discouraged', from the Islamic system).

2.2. The relation between law and fact

As Jackson puts it, "the distinction between 'fact' and 'law' is neither necessary nor universal" and, actually, it is "grounded in the […] truth-certifying procedures of the courts, which claim to 'prove' fact and law in different ways" (Jackson, 1988b: 88-89).

The author presents this argument in the following way: "a fact is a claim constructed within language that a certain state of affairs in the real world is true; a law is a claim constructed within language about the normative significance of particular behaviour, linked to a claim that such a rule is 'valid'", which means that "truth and validity (like the normative significance of the behaviour) are 'modalities', qualifications which we use (and whose precise meaning are themselves constructed within our discourse) in order to make claims about the status of the propositions we advance" (Jackson, 2005). Thus, both fact and law are constructed within language and their *difference* resides in the qualification attributed to the different narratives which they are made of, or, in other words, the modality that is being communicated: in the case of law, it can be valid or not valid, while in the case of fact, we are talking about it being true or not true.[6] However, from a positivistic point of view, there is the idea of "construction of 'legal fact'" in a way that what is being made is "shaping reality so as to make it convenient and meaningful in the eyes of the law" (Landowski, 1989: 34). Nevertheless, as the author concludes, if fact is linked to the modality of 'truth', it may happen that "what is true in the eyes of the law is not directly linked to what may be true in 'fact'" (Landowski, 1989: 35).

Moreover, if one takes a mere glimpse at the ancient laws, one can easily perceive that "the sense first made of written laws […] was a 'narrative' rather than a 'semantic' sense", for the kind of sense they evoked "was a function of the stereotypical images […] rooted in knowledge of social context, and often incompletely represented by the verbal formulation" (Jackson, 1996: 240). In fact, the difference between the "modern, abstract rule" and the "ancient, narrative model" resides in this: while the abstract rule "requires specialisation and training", for it is important to know "how and what to abstract, before one can deduce", in the narrative model "each narrativised pattern of behaviour is accompanied by some tacit social evaluation" and, when comparing different narratives, the one "which most resembles that which we observe renders our observation not only intelligible", but also "provides an evaluation for it" (Jackson, 1988a: 237-238). And that is why Jackson talks about "narrative typifications of action".

[6] Here we should mention the so-called 'semiotic square', a structure that works with oppositional relationships (that can be contradictories and contraries) – see B.S. Jackson, especially *Making Sense in Law* (1995).

This brings us to another point: the application of law to fact and the way the latter is 'found' in the courtroom.

2.3. The legal syllogism[7] as a possibly 'defected software'

"Judicial application of law requires a decision of evidence because the court decides the case on the basis of proven facts of the case" and, as Wróblewski goes on, "the language in which evidence is presented ought to be translated into legal language" (Wróblewski, 1992: 33). Therefore, before deciding a case, i.e., before applying a rule to a certain factuality, first of all, the judge must reconstruct that specific factuality and only then, the judge, resorting to the model of the syllogism (according to which he subsumes the particular case into the abstract rule) and by the justification he uses, endorses that particular subsumption. Still, how is the reconstruction of fact made?

> No one could understand so many strange coincidences. The criminal judge that came from Riohacha must have felt them without thinking of admitting them, for his interest in giving them a rational explanation was patent in the file.

This is a quotation from the novel[8] *Chronicle of a Death Foretold*[9] (original Spanish title: *Crónica de una muerte anunciada)*, by Colombian writer Gabriel García Márquez, in which he tells the story of a murder and all the unusual circumstances surrounding it. The first chapter starts with the recounting of the morning of the assassination of Santiago Nasar by the twin brothers Pedro and Pablo Vicario. However, throughout the book, the reader is confronted with the fact that versions of that morning are retold from various different viewpoints. Interesting is also the fact that the narrator often highlights the several reports on what the weather was like on the day of Santiago Nasar's murder, for some people think it was nice and others believe that it had rained. The purpose of mentioning this novel has to do with

[7] "Le syllogisme constitue le modèle classique du raisonnement juridique, dont les référentiels (prémisses) sont la loi et le cas et les ressorts la démarche déductive et la subsomption" – Alain Papaux, in his article *Un Modèle Dynamique de Catégorisation Juridique*: *l'"encyclopédie" sémiotique de U. Eco*, in Internationl Journal for the Semiotics of Law, Vol. 17, 2004.

[8] As Jackson puts it, "the construction of 'fact' […] is in principle no different from our judgement as to the credibility of a novel", exception made to the point that "facts do claim to be true (and not merely credible); events in novels do not" (1988a: 246).

[9] This is my translation of the original version that I here reproduce: "Nadie podía entender tantas coincidencias funestas. El juez instructor que vino de Riohacha debió sentirlas sin atreverse a admitirlas, pues su interés de darles una explicación racional era evidente en el sumario" (Márquez, 1981: 19). For more information, please go to www.sparknotes.com.

the reconstruction of fact, since it shows the intricacy of understanding events as they are experienced and the arbitrary ways that the mind chooses to shape events in retrospective.

'Positivistically' Vs 'narratively' speaking

If one considers the syllogism, "the major premise states the legal rule: in all cases *p*, consequences *q* ought to follow". Thus, the minor premise is considered to be a "categorization of the facts of the particular case being adjudicated: this is a case of *p*", and the conclusion that "consequence *q* ought here to be applied" stems from that (Jackson, 1988a: 239). Therefore, what happens is that "even though the convictions which form the basis for the judge's decision stem from his own freedom of appreciation of alleged facts […] it is necessary that what it was originally a mere 'personal conviction' should turn into a discourse of certainty, independent from its enunciator" (Landowski, 1989: 37). And this shows that the syllogism appeals to the use of logic, to a rationality that reconstructs evidence through a process of "formal validity" (Landowski, 1989: 39).

Nonetheless, what legal semiotics claims is quite the opposite, for, as Landowski puts it, the "concrete judicial practice – judge's reasoning and discourse – obeys for the most part rules that are different from those of a 'purely' logical axiomatic" (Landowski, 1989: 40). Actually, what this author asserts, as well as Jackson, is that we have to take into account two different, yet complementary, levels: the "story in the trial" and the "story of the trial", so that it is "possible to view the court as a stage upon which one may witness the progressive construction – or […] reconstruction – of a referential narrative, […] made of successive versions, often contradictory […] referring to a recent or far past", as well as the "story which is being played out before our eyes, here and now, just as a theatrical play in which we are the spectators" (Landowski, 1989: 46).

The position that legal semiotics adopts is linked to an "intensional model of the discourse which constructs the facts in cases" (Jackson, 1988a: 239). This "story in the trial" is reconstructed from the testimony of witnesses, which, according to Jerome Frank (qtd in Jackson, 1996: 152), "is fallible for several reasons", the first being "erroneous original perception" and then "erroneous recall". It may also happen that "even if original perception and subsequent recall are accurate, the witness does not always accurately report that subsequent recollection of the original observation" (Jackson, 1996: 152).

The explanation for this can be found in the fact that expectations affect perception, meaning that "we may see what we expect to see" and this process of "wrongful encoding of

what has been perceived", as well as "the belief that something has been perceived which did not occur" is termed 'confabulation' (Jackson, 1995). Another event, which is considered opposite to 'confabulation', happens when "information actually available to the senses may be ignored, because it does not fit with already-existing expectations" (Jackson, 1995). Perception can also be affected by expectations "of an unjustified character in the process of encoding", what is termed 'prejudice'. Therefore, semiotics plainly explains that the "mood of the perceiver influences the choice of 'tacit social evaluation' used in making sense of the situation" (Jackson, 1995). Another aspect to be taken into account is that, when trying to make sense of all the data, usually one remembers the facts that were of more significance to him/herself. The consequence is that 'salience' operates a "selection mechanism" (and here the example that can be given, referring to García Márquez's novel, is that on the day of the murder, the arrival of the bishop would have been the greatest event of the day; however, when thinking retrospectively, for all the people, the memory of the murder blurred every other memory). In addition, one has also to think about the "story of the trial", for the problems of perception occur "within the trial itself".[10] Therefore, "we cannot take it for granted that the judge's judgement accurately represents the real findings of fact" (Jackson, 1996: 154-155).

Therefore, as Jackson puts it, "the presence of unconscious as well as conscious elements in both decision-making and interpretation […] undermines the positivist view of the autonomy of legal reasoning" (Jackson, 1990: 97).

Another problem attached to the legal syllogism has to do with the element time. What happens is that, within the structure of the syllogism, the judge "applies to the particular case a general rule already stated in advance"[11] (Jackson, 1996: 247). Therefore, the syllogism denies the temporal gap between the enactment of the rule, the occurrence of the facts and the decision of the case. Actually, if the question legal semiotics asks is "do the facts here in dispute fall within the meaning of the statute?", then a different account of time has to be made.

In order to do so, some concepts have to be mentioned. Legal semiotics works with intelligibility, with meaning, and, when talking of meaning, a distinction between 'sense', on

[10] Jerome Frank says that "the facts as they actually happened are therefore twice refracted – first by the witnesses, and second by those who must 'find' the facts. The reactions of the trial judges or juries to the testimony are shot through with subjectivity. Thus we have subjectivity piled on subjectivity" (qtd in Jackson, 1996: 153).

[11] The model of the Rule of Law justifies this through legal certainty, i.e., the subject of the rule has to be capable of clearly foreseeing what will be the (legal) consequences of his/her action.

one hand, and 'reference', on the other, has to be made. For Jackson, "'sense' is a function of the relationships within a system of meaning of individual sense-bearing elements (sometimes called signs), while 'reference' is something that human beings do with that already-established 'sense' of the signs (including, modifying it)" (Jackson, 1996: 248). Another point is the theory of denotation, that states that from the moment a statute is enacted, its words have a 'denotation' (or reference), i.e., "a class of objects or events in the real world which is capable of being referred to by the use of this language" (Jackson, 1996: 250).

According to these elements, the position defended by legal semiotics is that, first of all, no matter the words of the norm, the function of the court is to perform justice and it cannot operate in a "mechanical fashion", for "we always have to wait and see whether, in the case itself, the decision will be made to make the potential referent (the denotatum) an actual referent". Secondly, although the "discourse of the legislator is expressed in entirely abstract language […] when the sense of the statute is constructed in the courtroom, in the context of adjudication, it is impossible to isolate the question of the sense of the legislation from the sense of the evidence"[12] (Jackson, 1996: 251). If we work with narrative, time is taken into account, for "temporality is one of the primary dimensions of our understanding" (Jackson, 1988a: 244).

If, as legal semiotics suggests, "the particular form in which subconscious rationality informs both decision-making and interpretation appears to be narrative", then this means that the "process of 'applying' rules to facts may therefore be a matter of comparison of narratives, rather than the formalist conception of the normative syllogism". From this results a "model of subconscious rationality" that allows us to ask "what makes a problem appear hard?" and "what makes the solution to a problem appear more or less plausible?" (Jackson, 1990: 97-102).

1.4. Easy or hard? A matter of intelligibility

According to a traditional legal philosophy viewpoint, a case will be found easy[13] if "the justified answer to it appears unproblematic, and it is this answer which determines the

[12] It must be mentioned that Neil MacCormick tried to reformulate the syllogism by proposing that "the judge uses the words of the legislator to refer to the facts now proved in court", so that the "sense of these words is indeed the original legislative sense" (Jackson, 1996: 250).

[13] For Hart, easy cases and hard cases can be distinguished according to those that can be seen as 'core' or as 'penumbral', respectively. The 'core' cases stem from following unreflectively a rule (a concept derived from Wittgenstein), while the 'penumbral' ones require interpretation, which is a "conscious cognitive activity" (Jackson, 1996: 237).

decision". On the contrary, it will seem hard "if either there is no apparent answer to it, or that answer is conceded as problematic, in the sense of admitting rational dissent" (Jackson, 1996: 237). However, this conception is based on the sort of rational justification attributed to the case *sub judice*. But, as we have seen before, the legal syllogism does not give a proper account of how the judge processes decision-making.

The claim made by legal semiotics is that in decision-making there is a comparison between narratives (facts of the case plus narrative pattern of the rule). Narratives are constructed upon what is termed binary oppositional categories, associated to each other. As explained by Jackson, these "networks of correlated oppositions […] lie behind the stereotypical cases we associate with particular legal rules" or what is called "narrative typifications of action". Therefore, whenever the "associations are realised, the situation which manifests them strikes us as intuitively clear", and we can construct it as being an easy case. On the contrary, "when some of the associations are reversed, we have a mixture of categories which produces confusion or difficulty" – or a hard case (Jackson, 1996: 239-240). Instead of a logic-axiomatic rationality, we have a "narrative rationality" (Jackson, 1988b: 107): by evaluating the different situations through comparison, it is possible to render intelligible, resorting to the "pertinent narrative distinctions", the cases that, at first sight, strike us as being unclear.[14] That is why it is possible to say that legal semiotics can, through the use of narrative, give sense to the decisions that, at a doctrinal level, seem 'strange', for it takes into account forms of social reasoning that are irrelevant in legal terms but, at a social level, are seen as making sense. It accounts for the non-legal elements in which the decisions are embedded.

However, the judges use the legal syllogism because they need to justify their decisions in a way that they can be perceived and understood, not only by the parties involved, but also by the community to which the judge belongs (what is called 'semiotic group'), as a rational and autonomous convention, approved by the legal institutions. In other words, "fulfilment of socially accepted typifications of what judges look like and how they behave creates the appearance of legality and establishes the expectations that the rules of the game are being followed" (Jackson, 1996: 277).

[14] The examples are the cases where fraud occurred and the decisions were different (void or merely voidable contract), although, apparently, the situations seemed similar.

3. Conclusion.

Legal semiotics does, indeed, provide a critical approach to the way traditional jurisprudence, pervaded by a logic-axiomatic rationality, inherited from positivism, accounts for the relations between law and fact.

Through a narrative rationality it is possible to give sense to decisions that seem strange or unusual, as well as understand why some cases seem easy or hard – through the comparison of narrative patterns.

Moreover, one of the features of positivism, the neat distinction between rule and fact (the latter being only perceived when, due to a process of legal construction by using classification or taxonomy, it turns into legal fact), becomes 'obsolete', for both are constructed within language and make sense in narrative terms. The 'difference' thus resides in the kind of modality being expressed.

Through what Jackson calls 'narrativisation of pragmatics', it is possible to understand the narratives behind the 'story *in* the trial' and the 'story *of* the trial'.

In the case of decision-making and justification, legal semiotics draws attention to the statement that in the first process we are facing a private method of thinking – in which the judge cannot isolate him/herself from the values and considerations of the professional community ('semiotic group') he internalized, nor from the general community of which he/she is part and where non-legal considerations play an important role (social tacit influence). In what concerns justification, the judge is at a public level, since he/she is communicating his/her decision – and, at this level, the legally relevant issues operate.

Legal semiotics works "*ex post facto*: it seeks to provide an explanation of how meaning was actually created, not what meaning will or could be created" (Jackson, 1996: 260). It goes back to the private psychological processes in order to understand the sort of sense the decision makes – at a social level, even if it may not make sense at a legal level. By doing so, it criticizes the legal syllogism for not being able to accurately account for all the deep structures in which legal discourse is embedded.

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