

Considerations regarding law as an instrument of communication

Associate researcher **Claudiu Ramon BUTCULESCU**, Ph.D.¹

Abstract

This paper tackles the possibility of envisioning law as an instrument of communication, using systemic and informational models. The effects of legal communication have a profound influence on the evolution of the system of law and also on national legal cultures. The means through which law is communicated, as well as the analysis of the information that is transmitted, along with the legal noise generated by the poor understanding of legal norms, are briefly discussed in the paper. In this direction, legal linguistics are analyzed, especially the phrasing of legal norms, with regard to syntax, morphology, phonetics and semantics, as well as their influence on the Romanian legal system. Beside legal linguistics, the analysis of legal semiotics within the communication of law is also discussed, as the system of law is considered an abstract and analytical normative system, which uses texts and codes. Careful analysis of legal communication, using the concepts of legal linguistics and legal semiotics could help alleviate the effects of the faulty communication of law and enhance the understanding of legal norms by the general public.

Keywords: communication, law, legal linguistics, legal semiotics.

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1. Introduction

Communication represents a process of transmitting information, such as thoughts or messages whose usual forms of communication are signs and sounds². Legal communication involves the transmission of information that has a legal significance. Such a process of communication may take place in two circuits, namely the communication of information from the society, based on the material sources of law and a reverse process, communication of legal information, from the system of law to the society. In this regard, we appreciate that the system of law may be analyzed as a communication tool. Within information theory, there have been proposed and analyzed several models of communication, of which the constructivist model seems to have a concrete application of the system of law. In this regard, the constructivist model of communication appears as a variant of the transactional model, in which between the emitter and the receiver there are mutual communication streams, with the difference that the constructivist model of information places great emphasis on the significance of the message, as well as its

¹ Claudiu Ramon Butculescu – "Acad. Andrei Rădulescu" Legal Research Institute of Romanian Academy, butculescu@yahoo.com

² *The Colombia Encyclopedia*, 6th ed. (Colombia University Press, 2014), s.v. "Communication," <https://www.questia.com/read/1E1-communicatn>.

interpretation. Communication processes were also envisioned in legal literature, most notably by Jurgen Habermas, Niklas Luhmann and Mark van Hoecke. In this paper, two fundamental components that can help clarify the basis on which the law can be envisioned as a tool for communication, namely: legal linguistics and legal semiotics, are presented. Analysis of the way in which the legal message is structured, both in material terms and formal terms, could be approached through the prism of legal linguistics and legal semiotics. These two concepts certainly allow legal formulation of hypotheses and proposals for the future to improve the system of law. Related to how messages are communicated to the system of law and society, the present paper addresses this issues through the sources of law. In this respect, in all types of communication there is a source of information. We believe that by applying models of communication, whether it be linear models (a single message sent from the emitter to the receiver), convergence models (sequential and asymmetrical communication, each participant being equally emitter and receiver), transactional models (between the emitter and receiver there is mutual communication streams and symmetrical) or constructivist models (between emitter and receiver there are symmetrical communication flows, in which the interpretation of the message is essential) to the system of law, the role of the source, in communication, can only be related to the sources of law. Legal theory shows that the source of law includes the legal regulations, customary law, case law and doctrine³. Clearly, however, legal communication is today based on a legal norms, which makes it different from customary laws, which were based on a particular usages⁴. Moreover, customary law is often characterized by a significant opacity, while transparency is essential in the communication of official regulations. Moreover, a critical issue that requires a detailed analysis in legal communication is precisely the differentiation between continental legal systems, grounded on the written rules and regulations, as an essential pillar of the system of law and common-law systems, based on the notion of common-law and judicial precedent as its principal sources of law. According to one author, the system of law has specific, systemic properties, which belong to the law or to a legal system in its entirety, properties which are different from the properties of the components of that specific system⁵.

2. Legal Linguistics

The formation and structuring of language dramatically affects the way a collectivity thinks and behaves. As evidenced by the specialized literature, the way people talk and perceive words affect significantly their actions and

³ Sofia Popescu, *Teoria generală a dreptului*, Bucharest, Lumina Lex Publishing House, p. 147

⁴ Emilian Ciongaru, *Usages – the legal regime in new civil code*, in volume of The International Conference – CKS 2013 –Challenges of the Knowledge Society, Nicolae Titulescu University Bucharest, Prouniversitaria Publishing house, 2013, pp. 206-207

⁵ Alexandru F. Măgureanu, *Principiile generale ale dreptului*, Legal Universe Publishing House, Bucharest, 2011, p. 188

behaviors. Even more so, in the legal field, where the structuring of legal texts presents a special importance, both in normative acts, as well as in the jurisprudential content. For example: some legislative acts are drafted in one language only, while others are written in multiple languages, as is the case of normative acts of the European Union. The decisions of international courts may be written in many languages. If we analyze the national legal cultures through a systemic perspective, we must take into account the degree of resistance that national cultures have, to external influences such as these. In this case, the language factor constitutes a fundamental element of the legal culture, which determines the behavior of the legal culture system, in relation to other legal systems.

Spoken language is particularly important in the implementation and realization of the law. Bearing in mind its eminently communicative function, by means of the spoken and written language, the abstract concepts of law are operationalized at the level of legal culture of law operators and brought to the attention of the general public.

In this study, we consider it necessary to take into consideration four components of legal linguistics: a) *syntactic component*; b) *morphological component*; c) *phonetic component*; d) *phonation component*.

The syntax is defined as the way in which linguistic elements, namely the words are put together to form phrases or sentences⁶. The syntax has a particular importance in the construction of legal language, because the law is disseminated through written rules, which adds to its complexity, because it combines both optical and auditory perception, as was showing the reputed scholar N. Luhmann. Moreover, the syntax can encapsulate and structure the legal information so that it may be intelligible to the receiver, although the same researcher indicated that in addition to understanding, the information has to be accepted, and there is a likelihood that this may not be always accepted⁷. Structuring information is very important, considering that this element is essential in the process of communication, along with expression and understanding⁸. From a syntactic point of view the second element of Luhmann's theory is also relevant, namely the expression because it is the way in which the information is made available to the receiver. In order to assess properly the importance of communication in the legal syntax, it is necessary to analyze the source of this information. According to the theory of communication, communication process consists of a source, a message encoder, a decoder and a recipient. Regarding the source, we must take into consideration that within legal theory there is the notion of source of law, which has been defined in the doctrine as a form of expression of the law, i.e. setting up or recognition by the State authority of legal rules in the process of creating the

⁶ <http://www.merriam-webster.com/dictionary/syntax>

⁷ Niklas Luhmann, *Theory of Society*, trans. Rhodes Barrett, vol. 1, Stanford, CA, Stanford University Press, 2012, p. 118

⁸ Kathrin Maurer, *Communication and Language*, Pandemonium germanicum, 16/2010.2, p. 5

law⁹. The sources of law have been classified in the doctrine as material sources of law, which include configuration factors of law, natural law, human rationality and legal conscience¹⁰. On the other hand, formal sources of law are ways of formation of legal norms and constitute the positive law of a country¹¹. Thus, material sources of law imply communicating to the State Authority the social needs and requirements of the society itself. Formal sources imply, in reverse, the communication of structured rules of the system of law back to the society. The information that is communicated, is however pre-existing to the formation of the legal communication process itself, which gives an especially important role to legal syntax, bearing in mind that this information is given a legal form, and as such is structured and becomes comprehensible for the recipient.

Morphology in Linguistics is the study of the internal construction of the words¹². Although less important than the syntax, in the elaboration of the legal rules, morphology may have a special importance, especially in relation to the attributes of legislative techniques. More than once, the construction of a word used a legal norm may give rise to ambiguity and to systemic and informational entropy. In such cases, the judicial system is being expected to compensate for such uncertainties. Thus, the jurisprudence and the doctrine act as derived sources of law, which are designed to decrease the entropy caused by the faulty construction of the words. In this case, we cannot talk about faulty communication, bearing in mind that the information has been correctly transmitted to the receiver, but rather the failure to correctly decoding it, as the construction was incorrect at source. Moreover, in the evolution of legal systems, there is a permanent legal mimicry, meaning that there are various rules that have emerged in a system, and later they were borrowed to other legal systems. Imports include elements of both legal substance and of legal form. Thus, it is not only an import of legal principles, norms and rules, but also an import of legal words, whose meaning must be adapted to the specific nature of the legal system which imports such rules.

Phonetics involves the study of language sounds from three perspectives: speech produced by the vocal organs, namely the articulatory phonetics, the physical properties of speech, named acoustic phonetics, and their effect on the human ear, respectively auditory Phonetics¹³. Phonetics is of particular importance in the communication of law. For example, an important consideration in the conduct of judicial processes is represented by the principle of orality. But there are other aspects that indicate phonetics as an important component in the study of law as an instrument of communication. The significance of the message in the communication is that determined by the receiver, not the emitter, and a good deal of legal communication can also be done through verbal communication. Phonation is a sub-branch of phonetics, which is studying voice sounds through the

⁹ Mihai Bădescu, *Teoria generală a dreptului*, Sitech Publishing House, Craiova, p. 108

¹⁰ *Idem*, p. 108

¹¹ Mihail Niemesch, *Teoria generală a dreptului*, Hamangiu Publishing House, Bucharest, 2014, p. 92

¹² <http://www.britannica.com/EBchecked/topic/392807/morphology>

¹³ <http://www.encyclopedia.com/topic/phonetics.aspx>

production of vocal cord vibration of the larynx. Although the inclusion of this branch in the study of law as a tool of communication seems exaggerated, we must remember that with this method we can analyze the influence of the phonemes and vowel in Romanian legal language, in relation to the international legal language, dominated by English language. We mentioned above that in communicating the message, the receiver must understand and to accept the message, in that order. The recipient of the formal legal communication, the society, generally and the individual in particular, must be able to understand the message, bearing in mind that the message is a legal norm, and the subject is part of a legal relation of compliance, which if not respected, determines the birth of a conflict relation, between the state authority and the individual. The method by which legal Linguistics can be used to improve the communication of law is found within legislative techniques, which represent the totality of means, procedures, methods and techniques used by State authorities with attributions in the process of elaborating the normative and regulatory acts enforcement¹⁴.

3. Legal semiotics

Generally, semiotics is defined as a philosophical theory of signs and symbols that explain their function in artificially constructed languages and in natural languages, including syntactic, semantic and pragmatic features¹⁵. Legal semiotics applies this definition in the field of law. All legislative and judicial emanations consist of complex elements, which contain words and signs with specific meanings, and to understand the development of the system of law from this perspective, it is necessary to define a system of signs that may analyze it as such¹⁶.

Normative systems are analytical systems, abstract, and non-material. A system can be material, when it is constituted of matter or energy. Legal systems are by definition abstract systems. Communication between these systems is achieved by information streams. For that reason, we must envision also the structural semiotics of these systems.

If we look at the system of law from a semiotic point of view, we can see that within it, modeling may present the following forms¹⁷: signs (words, gestures); texts (theories, arguments, concepts by); codes (languages, music, etc.) and figurative assembles (metaphors, metonyms, etc.)

Law is an abstract system that uses primarily texts and also codes. Signs and figurative assemblies are not specific to the system of law. The same situation is found in the system of the technical rules. The latter system has a high degree of

¹⁴ Mihai Bădescu, *Teoria generală a dreptului*, Sitech Publishing House, Craiova, 2013

¹⁵ <http://www.merriam-webster.com/dictionary/semiotics>

¹⁶ Jeffrey A. Ellsworth, *Semiotics in Legal Theory Design*, in *The Semiotics of Law in Legal Education*, ed. Jan M. Broekman, Francis J. Mootz, New York, Springer, 2011, p. 136

¹⁷ Thomas A. Sebeok, Marcel Danesi, *The Forms of Meaning: Modeling Systems Theory and Semiotic Analysis* New York: Mouton de Gruyter, 2000, pp. 3-5

specificity which does not allow simple formulations, as signs or questionable statements. Morality, religion, customary systems and social rules of conduct systems are instead composed of all categories of forms shown above.

Thus, the system of law is a system that is characterized by symbolism. Analysis of legal semiotics in this context is of particular importance, given the fact that there can be no equivalence between allegations and expression meanings in different languages, so the representation of reality in the language can be considered as a process of translation¹⁸. Other authors have shown that an aspect of legal semiotics is the ideology of the time, as a principle of legal validity, through repetition and sowing repeated words and contributing to the dissolution of the distinction between custom and rule¹⁹.

Moreover, legal semiotics is relevant from the perspective of the study of law as a tool for communication, especially since the specialized literature has shown that the communication of law should not have necessarily mean transmitting information²⁰. Moreover, it is important to analyze whether the perception of the receiver which receives the information allows the analysis of symbolic legal information in order to be able to decode its meaning correctly. Legal semiotics study may also help identify additional causes of poor communication.

To this end, legal semiotics allows the transformation of non-specialized information in specialized information. These interpretations are the attribute of legal culture which comprises specialized operators and specialists of the system of law.

Legal semiotics has acquired an increasing importance in the research of communication of law. The same was shown by the tripartite model of communication language proposed by Jurgen Habermas²¹. Thus, in a certain way signs and symbols are perceived in the outside world, as a complex of facts, in a different way may the signs be perceived in the individual's own social world, in which there are regulated and interpersonal rules considered legitimate and completely different meanings may have the same symbols in the internal world of the emitter, in which his or her inner experiences are essential.

4. Conclusions

Legal communication constitutes an important aspect in the analysis of the system of law. The way in which the message emanating from the legal authorities is perceived by the subjects of law who are the recipients of those rules presents a

¹⁸ Bernard S. Jackson, Bentham, *Truth and the Semiotics of Law*, in *Legal Theory at the End of the Millennium*, ed. M. D. A. Freeman, Oxford, Oxford University Press, 1998, p. 529

¹⁹ Christopher Hutton, *Language, Meaning and the Law*, Edinburgh: Edinburgh University Press, 2009, p. 66

²⁰ Niklas Luhmann, *Theory of Society*, trans. Rhodes Barrett, vol. 1, Stanford, CA, Stanford University Press, 2012, pp. 116-117

²¹ Jurgen Habermas, *Communication and the Evolution of Society*, trans. Thomas McCarthy, Beacon Press, Boston, 1979, pp. 66-68

special relevance. In addition to abstract constructions and hypotheses, which were developed in the specialized literature, in which the information circuit of law was theorized, we should also consider a practical approach. In this case, the present work deals with the construction of the message from the perspective of legal linguistics and legal semiotics. Recognition of the importance of the two components referred to above is significant for setting up a legal message to ensure a high level of perception, especially on the part of the general public. Legal regulations involve transparency, accessibility and performance. In the event that the subject of law fails to comply with mandatory legal rules, the compliance relation, in which the individual is a passive subject, and as such, holder of obligations, becomes a conflict relation, and its effects are put into practice through sanctions ranging from financial penalties to the more severe punishments, such as those found within the field of criminal law. It is also necessary to provide a method of use of legal linguistics and legal semiotics in developing fiscal rules, which in turn are characterized by a very high level of entropy, generated on one side by the rapid succession and legislative dynamics, and on the other hand by the use of phrases and concepts particularly specialized that make it difficult to understand legal texts in this field. The scientific approach in the case of this paper aims to highlight the advantages and contributions of legal linguistics and legal semiotics, to legal communication, seeing also that law is closely related to the concept of communication.

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