Andrei Kristan

Structuralist Semiotics vs. Formal Logic in the Reconstruction of Judical Reasoning

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I. CONCEPTUAL DISPROVAL OF THE TRADITIONAL ACCOUNT

Compared to the semiotic account, which we will get to know in the necessary detail *infra*, the so-called traditional, that is, formal logic model of judicial reasoning has two distinctive features. The first distinctive feature consists in the clear cut this model makes between the analysis of law and the analysis of facts. The other key feature of the traditional account is the claim it makes about the nature of the connection between the law and the facts in the mental process of deciding a case at law. Before I present the structuralist semiotic destruction of the traditional model's mythology **(B)**, we shall recall the theoretical origin of the law/fact distinction in order emphasise the gains of the positivistic method, which the structuralist semiotics put at stake **(A)**.

A. THE THEORETICAL ORIGIN OF THE LAW/FACT DISTINCTION

The necessity of distinguishing the analysis of "the law" and "the fact" was perhaps most prominently exposed in the European continental legal theory of Hans Kelsen (Kelsen, 1911; 1934; 1950; 1960). From Kelsen's work on, this issue has commonly been referred to in Europe as the '*Sein/Sollen*' debate. In Anglo-American ethical writings, on the other hand, the same question has largely been discussed since the late sixties under titles referencing the '*is/ought question*' or the '*naturalistic fallacy*'. This second debate usually does not reflect on earlier Kelsenian thought. Its fundamental references are instead David Hume (Hume, 1777) and George Edward Moore (Moore, 1903). But Kelsen himself cited both Hume and Moore as well (Kelsen, 1960: pp. 5 and 110), and that is why one could regard them as the real spiritual fathers of this positivist disjunction (Sosoë, 1986). Looking at the later developments in the field of (deontic) logic, one should also mention Henri Pointcaré in this regard (Pointcaré, 1910; Gardies, 1987). Nonetheless, we will focus, here, in particular on Kelsen and the legacy he used for his construction.

Some might argue at this point that Kelsen actually followed not Hume but Immanuel Kant in distinguishing between the two categories of existence and of normative relations, namely, the *'Sein'* and the *'Sollen'* as they are named in German. This is partly true (Kelsen, 1960: pp. 74 and 123). However, Kelsen is (at least in the view of the law/fact relation) a positivist who is more rightly to be put in the line of Hume rather than

[1] Doctoral student at the University of Genoa, Faculty of Law, Department of Legal Culture "Giovanni Tarello".

in one of the Kantian naturalistic philosophy (Lloyd, 1972: pp. 269ss). This claim obliges us, first, to point very shortly at the differences between Kant and Hume, before we move to what Kelsen learned from Moore.

While Kant regarded *the knowledge of the physical world* as necessarily imperfect, the *moral truth*, for him, was an absolute which could be directly understood *a priori* by reason, and which could be expressed in the form of a categorical imperative or unshakable natural law (Kant, 1797). Hume, on the other hand, argued that moral or legal rules were merely relative to the subjective opinions of human beings and that the moral order could not be deduced from the physical world – or as he said, 'ought' could not be inferred from 'is' (Hume, 1777). This is also the position of Kelsen, who does not recognise the true/false character of legal or moral assertions.

For Kelsen, legal or moral statements are purely normative and must not be confused with physical facts. Moreover, a norm cannot be derived from facts, but exclusively from that norm's relations to the other norms (Kelsen, 1960: p. 5). That is why he speaks of law as "structure" – pure form that every legal system must take in order to be considered a "legal system" properly so called.

In his purist tendencies, Kelsen therefore cut the form from the content. He cut the world of law from the factual one. His intention was to purify legal science and one may rightly observe that he was, first, virtually imitating the steps of Moore (Sosoë, 1972: p. 72) in order to free the normative sciences from the rest, before he finally cut loose morals from law.[2]

Indeed, Moore (Moore, 1903) wanted to purify his science – namely ethics in his case – making it autonomous from any psychological or sociological elements. Kelsen's exposition of his own project (Kelsen, 1911: in preface) is put in extremely similar terms. They both wanted to have a science cut off from any form of reasoning and justification that is not its own; a science founded exclusively on elements created by that same science itself. For Moore, the element to build on was the intrinsically ethical concept of 'good', for Kelsen the concept of '*Sollen*'.[3]

In Kelsen's thought (Kelsen, 1911: p. 8), the facts and the law, or the *Sein* and the *Sollen,* are more than just two *analytically separate* concepts; they are *ontologically distinct* and *epistemologically unrelated* (Paulson, 2000: p. 39). That is, they do not only belong to two separate worlds, but also demarcate the spheres of two different kinds of knowledge: one acquired by natural science (Ger. *Kausalwissenschaft*), the other by normative science (Ger. *Normwissenschaft*). The difference in the analysis of fact and law is due to the structural difference between these objects. The natural sciences are concerned with cause-effect relations in the physical world (facts, Ger. *Sein*), whereas within the normative sciences, such as law or ethics, the concern lies with conduct as it *ought* to take place, according to the world of norms (ought, Ger. *Sollen*) (Kelsen, 1960: pp. 79ss).

Kelsen therefore rejects the old natural law, just like Hume, because it is an illogical attempt to establish the objective, *i.e.* factual, character of what is necessarily normative *and therefore subjective* – since anything that is normative contains value judgements. Values are subjective and relative for they depend only on personal feeling or opinion,

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[2] A (second) step, which is not of our interest in this essay.

[3] For he, in this first step of his, was claiming the autonomy of a larger field than Moore – that is, of all *normative* sciences together. His argument is of course articulated around the standard method of defining *per genus proximum et differentiam specificam.*

and not on objective fact. Consequently, they cannot be proved true or false *in terms of correspondence* to the real world, but only valid or invalid, that is, within a particular conceptual context (*i.e.* structure or system).

Attempts to revive the natural law, by arguing that values do exist in the same way as facts, are therefore spurious (Lloyd, 1972: pp. 269–71). Kelsen thus insists on distinguishing between the principle of causality and the principle of what he calls 'imputation' (Ger. *Zurechnung*). These two principles guide the analysis of the fact and the analysis of the law, respectively (Kelsen, 1934; 1950).

In practice, students at law schools and law faculties have all had to read some passages of Hume or Kelsen. These readings seem to have been an undisputable element of first year's curricula in legal studies for at least the past fifty years. Lloyd's *Jurisprudence* is an obvious example. For decades, young lawyers have thus been taught that there is a difference between the analysis of the law and that of the facts in a particular case as well as in general. On the one hand, this distinction is said to be supported by some truth-certifying procedures of the courts, where the jury is the arbiter of the facts and the judge the arbiter of the law (Jackson, 1988: p. 91). On the other hand, the distinction also manifests itself in what is still a common (normative) account of not only justification in the easy cases (*e.g.* MacCormick, 1979) but sometimes also of decision-making itself: the judicial syllogism. It was the very model of judicial syllogism that, first and foremost, brought legal scholars to engage themselves in the semiotic studies.

B. THE JUDICIAL SYLLOGISM AND THE PROBLEM OF REFERENCE

The judicial syllogism – often metonymically referred to as normative syllogism – is an accommodation of a 'pure' deductive syllogism known in formal logic as *modus ponendo ponens* or, shortly, *modus ponens.* Put in terms of the predicate logic (though slightly simplified), this latter syllogism goes as follows:

1. $\boldsymbol{Px \supset Qx}$	This *general* proposition reads as follows: "For any (that is *x*) given case, when P, Q also".
2. $\boldsymbol{Pa}$	This *individual* proposition reads as follows: "In this (that is *x/a*) case, P".
$\boldsymbol{/.: Qa}$	The conclusion is: "Therefore in this (that is *x/a*) case, Q also".

Before legal semioticians made themselves heard, scholars commonly used this logico-deductive model in order to formalise legal reasoning not only because it lets one separate the analysis of the law (put in the premise of general proposition) and of the facts (put in the premise of individual proposition). In Kelsen's view (Kelsen, 1934: pp. 24–25), it also appears appropriate for law because its conditional form represents the typical structure of legal rules: *If action (P), then sanction (Q) ought to be.*[4]

Above all, scholars adopted this model because it works with the *correspondence theory of truth*[5] – an exigency of the Rule of Law that requires 'reference' (Jackson, 1988: ch. 2) or at least 'instantiation' (MacCormick, 1991). However, certain accommodations had to appear, if the model was to be transplanted into the legal realm. The judicial syllogism now presents itself in the following way:

[4] In fact, even in a case where a legal rule does not expressly evoke sanctions, one could say that an ultimate sanction of legal non-validity is *tacite* implied.

[5] For *Px* already implies all instances of *P,* and therefore also *Pa.*

(time 1/ normative legal proposition)	1. For any (x) given case, when **P**, **Q** also *ought to be applied*.
(time 2/ factual event after time 1)	2. In this case (x/a), **P**.
(time 3/ judicial application of the law)	/.: Therefore **Q** also *ought to be applied.*

First, as one can see, the judicial syllogism distinguishes itself from its logical model in that its *premises are of different types*: one is normative (*when P, Q also ought to be*), and the other factual, that is descriptive (*P*).

Moreover, the judicial syllogism is not a 'pure' syllogism. Unlike its true logical archetype *modus poniendo ponens*, the judicial syllogism involves a crucial *temporal dimension* (Jackson, 1988: p. 2), which follows from yet another exigency of the Rule of Law – namely, the one saying that the law should be (at least in general) prospective (*e.g.* Fuller, 1964).

Both of these accommodations are far from being non-problematic. Whereas the *heterogeneity of the premises* directly provoked some major contributions to the developments in logic (*e.g. v*on Wright, 1951) and the philosophy of language (*e.g.* Searle, 1969), the *prospectivity in time* called attention of legal scholars to concepts best developed in linguistics and semiotics – namely those regarding communication and reference. It is this problem of temporality that I have to discuss more thoroughly, for it is this very problem that actually opened a way for semiotics to legal analysis at large.

The temporal dimension of the judicial syllogism, as we have already mentioned, was supposed to accommodate the logical model to particular requirements of the Rule of Law – namely, the prospectivity of legal rules, connected with the possibility "to predict in advance what the meaning of future acts will be in relation to them" (Jackson, 1988: p. 40). Quite paradoxically, however, the introduction of this temporal dimension changes the original model in a way that clearly shows why the Rule of Law requirements are unattainable.

The first criticism comes almost intuitively. Indeed, in legal practice the problem appears as self-evident in all the 'hard' cases, where the meaning assigned to a legal disposition by the court is controverted either by an earlier case-law or a part of the public. The existence of such controversial cases proves that the normative premise does not really pre-exist the factual one, for the particular (authoritative) meaning of a legal disposition has to be constructed (or chosen, at the most, from a polysemic ordinary language as we will see *infra* on a practical example) in the process of decision-making (Jackson, 1995: pp. 22–31).

In his scholarly analysis, Bernard S. Jackson shows how the reconstruction of the decision-making process in terms of judicial syllogism goes totally against the Rule of Law – and this not only in the 'hard' cases; it is so even in the 'easy' cases (Jackson, 1988: ch. 2). Indeed, one either has to renounce the prospectivity of legal norms or the referential character – that is, a characteristic for which the logico-deductive model as such was adopted for reconstruction of judicial reasoning in the first place. The intuitive criticism, just mentioned in the previous paragraph, is fortified by a grammatical analysis of the relationship of tenses of the verbs used in the syllogism. To be more picturesque, we will use the case of *Athenians v. Socrates,* just like Jackson did (Jackson, 1988: pp. 39–40). Here is the argument:

> *If one blasphemes the gods one is liable to be executed.*
> *Socrates has blasphemed the gods.*
> *Therefore Socrates is liable to be executed.*

In fact, the models strictly based on logic provide no way for connecting the verbal form "has blasphemed" – used to refer to a specific instance of blaspheming (namely that of Socrates) which happened in the past – to the verbal form "blasphemes" in present – used in the general rule, stating that if one blasphemes the gods, then one is liable to be executed. The classical logic does not provide specific facilities for expressing time because it is a-temporal. On the contrary, natural language and common sense reasoning embed various ways for dealing with time and change, which have not yet been captured even in most advanced studies in logic and language (Sartor, 2005: pp. 430–1).

This is why the temporal values in both of the premises have to be precisely aligned – that is *put in the same tense* – if the judicial syllogism is to derive benefit from the original characteristics of its logical structure providing for 'correspondence'.

However, as Jackson makes clear with his examples, the use of *future tense* does not come into account for law, for judges do not adjudicate future, that is to say non-existing, cases. The use of *present tense,* as another possibility, would appear to create an offence whose action takes place in the indefinite present – and this is quite atypical of law as well. Finally, the use of *past tense* is ambiguous, "unless we know whether the utterance of the major premise precedes or succeeds that of the minor one" (Jackson, 1988: pp. 39–40). In the first case, our Socrates cannot be rightly executed, because the major premise refers only to acts committed before its enunciation. In fact, the 'referring' of the major premise to the minor one can only be saved, if the legal proposition of the major premise (put in past tense) is posterior to the facts claimed in the minor premise. In other words, the reference character is actually saved in cases where the judge makes law – just like in those pointed out by the intuitive criticism mentioned a minute ago. But then, again, the traditional understanding of the Rule of Law is infringed twice: first, because the law is in this case entirely retrospective (*cf.* Fuller, 1964); secondly, because there is no separation of powers, according to which (*cf.* Wróblewsky, 1974) the power of judiciary is to be in application rather than creation of norms.

This argument (presented here in simple terms) reveals an internal inconsistency of the traditional account of legal reasoning. According to Jackson, the syllogistic model is unable to establish 'correspondence' on which its use is based.[6] It should therefore be rejected.

But where must one look for an alternative account? On the one hand, scholars could not go back into history of jurisprudence and derive the legal ought from divergent moral truths. On the other hand, semiotics proposes a theory of truth not based on correspondence but coherence. Some semiotic theories even give a non-referential account of meaning construction! This is why their works were able to attract the attention of legal scholars, who could no longer operate neither with reference nor with correspondence.

Different orientations in semiotic studies (for a short review see Ducrout, Schaffer: pp. 213–227) result in not one, but a range of semiotic accounts of legal reasoning (see Jackson, 1990b). Some of them are built on the Charles S. Peircean tradition, proposing a referential view of meaning – although not necessarily one which adopts a corre-

[6] *Contra* MacCormick, claiming that 'sameness of sense' in which the predicates are used in premises, rather than 'reference', is what a judge actually needs in order to fulfil the Rule of Law (MacCormick, 1991). But this, again, is quite at odds with predictability of legal rules. As Jackson puts it: "Inherent in the law's claim to prospectivity is the more particular one that the majority of legal rules are expressed in language which allows us to predict in advance what the meaning of future acts will be in relation to them" (Jackson, 1988: p. 40). See also the response made to MacCormick in Jackson, 1991.

spondence theory of truth (Jackson, 1988: pp. 27 and 32); others are built on the works of Umberto Eco (Papaux, 2003; 2004). We are going to work here with a third orientation: that is Jackson's structuralist semiotics of law, building on the Saussure-Greimasian tradition.

II. PRACTICAL ADVANTAGE OVER LOGICAL ANALYSIS

I will first present the basic elements of the narrative model **(C)**. This will finally allow us to test the explanatory power of the structuralist strand of semiotics in the reconstruction of judicial reasoning in a practical case **(D)**.

C. THE BASIC ELEMENTS OF THE NARRATIVE MODEL

Bernard S. Jackson's account of judicial reasoning (Jackson, 1985; 1988; 1995; 1996) moves away from the strict logical articulation of the traditional model. A 'coherence' notion of truth is substituted here for the lost 'correspondence' variety presupposed before (Jackson 1988: p. 41). Moreover, Jackson insists on distinguishing decision-making from justification. He does not deny the use of judicial syllogism for justification in the 'easy' cases, but characterises this use as a purely pragmatic means of persuasion. In decision-making, on the other hand, the major (legal) and the minor (factual) premise of the reasoning schema change their nature.

Both law and facts are reduced to the same level, that is, of *narrative structures*. The concept of the narrative structure is borrowed from the Greimasian semiotics. For Algirdas Julien Greimas, human action appears meaningful in terms of a basic narrative sequence, which consists in an intentional setting of goals interpreted as "contract", "performance" (or non-performance) of these goals, and finally a sanction as "recognition" of that performance or non-performance (Jackson, 1988: p. 28).

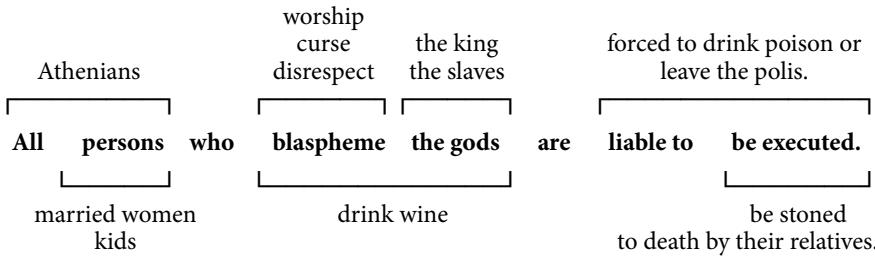
Jackson's legal semiotics considers law (*contra* naturalistic and positivistic accounts) as a communicative phenomenon rather than as a set of reified norms that a judge is to discover and apply. In this sense, he builds on a non-referential theory of meaning – holding that meaning consists in relations *within* a particular system of signification, and does not depend upon a correspondence to the outside world (Jackson, 1988: p. 28). In other words, meaning does not pre-exist the structure through which it is represented, but is rather *constituted* by that structure. The linguistic reality is therefore, following the teaching of Ferdinand de Saussure (Saussure, 1916), not in terms, but in opposition of terms (Ducrot, Schaffer, 1999: pp. 34–41 and 479).

This construction of meaning articulates itself around two levels of discourse: the 'deep level' of signification and the 'surface level' also known as a level of manifestation. An example might clarify the difference very simply: if the deep level is well structured, one can understand the discourse even though the surface level was not perfectly comprehended (*e.g.* I missed a word or a phrase, or I misspelled it). This is due to the 'elementary structures of signification' (sometimes claimed to be universal), located at the deep level. These structures explain the minimum conditions for a discourse to bear any meaning at all, and they consist in the interplay of two axes: the syntagmatic and the paradigmatic.

We can represent the syntagmatic axis on a horizontal line as a *semio-narrative* association of two or more successive linguistic units – capable of appearing separately in other contexts as well:

All --- persons --- who --- blaspheme --- the gods --- are --- liable to --- be executed.

There are choices to be made at every point on this syntagmatic axis of discourse. Instead of 'blaspheme', one could say 'curse' or 'idolize' etc. Such choices are however limited to elements which are substitutable for each other, that is, without altering the meaning or intelligibility of *other* elements in the syntagm. We therefore cannot substitute (the noun) 'history' for (the verb) 'blaspheme', since this would break the minimum constraints of intelligibility. We can neither substitute (the verb) 'swim' for (the verb) 'blaspheme'. In fact, there exist conventionally-defined semiotic constraints as to what elements are substitutable. These constraints may reflect binary oppositions or larger groups as in relations of hyponymy. A group of possible substitutes is what constitutes the paradigmatic axis, commonly presented in a vertical line attached to every unit of a syntagm:



Even though the scope of possibilities is larger than our examples show, it is enough to focus on these groups of semantically related terms to see that a unit does not necessarily consist of one word; neither do substitutes have to consist of the same number of words. Substitution may occur in only one of these units or in all of them. On the syntagmatic axis, all such changes would be perfectly intelligible and would not alternate the meaning of other elements. However, certain combinations of changes could result in a socially unacceptable alternative narrative: "Athenians who drink wine are liable to be executed" is such an example, whereas in Greek times the proposition "Married women who drink wine are liable to be executed" was perfectly acceptable. In fact, as Jackson shows on the analysis of four English cases (Jackson, 1988: pp. 101–106), decision-making reflects the *tacit social evaluation* of the case. A similar case-analysis in a comparative law study would, moreover, demonstrate the impact of hyponymies of different 'groupes sémiotique' (*e.g.* Polish or French or English legal culture), whereas a comparison of separate judicial opinions on the same case could manifest the role of 'binary oppositions' formed in a person's *life-experience*. This is also where the semiotic analysis might prove to be the most useful for practitioners (not always preoccupied with the theoretical merits), as compared to the logical analysis.

D. AN ANALYSIS OF DISSENTING OPINIONS

Indeed, one can appreciate the merits of semiotic analysis, based on narrative coherence, against the logical one, based on correspondence, in a practical case. Here, we will use a case from a statutory-law country. In Slovenia, where I come from, there has been an ongoing debate about the meaning of the Article 103 of the Constitution stating:

A President of the Republic is elected for a term of five years, at the most twice in a row.
Predsednik Republike je izvoljen za dobo petih let, vendar največ dvakrat zaporedoma.

Our next presidential elections are supposed to take place in October 2012. Now already a former president of the Republic held in the past that position twice in a row. The question is: Can he run again?

The meaning of the Article 103 is a hypothetically controversial matter and two people from a small group of scholars who actually wrote the constitutional draft (later on adopted by the Parliament) were interviewed on the question. Both of them are also former constitutional court judges, which makes their answers even more suitable examples for an analysis of a 'judicial' reasoning. Their answers, however, seem contradictory. Logically speaking, contradictory means that they cannot both be true at the same time, though at least one of them has to be true.

The first interviewee stated that one could be a president of the Republic *twice*, but only if his or her second term is consecutive to the first. The other interviewee argued, on the contrary, that *consecutively* one can only be a president for two terms, but non-consecutively s/he can be a president as many times as s/he is elected. They both agreed that, deontically speaking, the constitutional proposition of the Article 103 is a prohibition.

A logical analysis, focusing on a possibility to *deduce* their claims from the constitutional proposition (in order to tell who is right), would proceed as follows.

First, we have to translate the ordinary language proposition of the Article 103 into the formal language. Any formal language reduces the complexity of ordinary languages. A proper translation should not, however, change the meaning nor should it reduce the spectre of meanings, which the ordinary language proposition covers. Having this important fact in mind, we call here q the constitutional proposition of the Article 103; we name its two existing ordinary language meanings as m_1 and m_2 respectively for "yes, one can be elected a president more then twice" and "no, one cannot be elected a president more then twice".

Stating the obvious, namely that $m_2 \equiv \sim m_1$, one has to admit that m_1 and m_2 cannot both be true at the same time. The ordinary language proposition that communicates both meanings can therefore only be translated into the formal language by the use of an exclusive disjunction. The proper formula is therefore: $q \equiv (m_1 \vee m_2) \,.\, \sim(m_1 \,.\, m_2)$. The logical analysis will tell that this is by definition not a prohibition but permission. Proof?

In formal logic a permission is defined as $m_1 \vee \sim m_1$. This is also exactly what deductively follows from the premises in this case:

1. $(m_1 \vee m_2) \,.\, \sim(m_1 \,.\, m_2)$
2. $m_2 \equiv \sim m_1$

$/\!\therefore m_1 \vee \sim m_1$

The formal proof would go like this:

3. $(m_1 \vee \sim m_1) \,.\, \sim(m_1 \,.\, \sim m_1)$	1, 2
4. $(m_1 \vee \sim m_1) \,.\, (\sim m_1 \vee m_1)$	3, *De Morgan*
5. $(m_1 \vee \sim m_1) \,.\, (m_1 \vee \sim m_1)$	4, *Commutation*
6. $m_1 \vee \sim m_1$	5, *Tautology*; or 3, *Simplification*

This logical analysis shows that a judge has a choice here. Of course, a judge may find *another* premise that would eliminate this choice, but based only on the article 103 – since a choice of premises is also not a matter of logic – he simply has an alternative. Both of the former judges were therefore partly correct and partly wrong. Logically speaking, they were both wrong in saying it is a prohibition. They were both right in whatever their decision on the case would be; whether one says 'yes' or 'no', in this case, one's decision follows deductively form the premises and formal logic can serve very well in justification of this legal reasoning.

Formal logic, however, cannot explain the *choice* one makes. An explication, I have to add, formal logic never pretended to give, for "rationality seems to be absent at the very point where a choice is possible" (Soeteman, 1989: p. 248).

Semiotic analysis, on the other hand, can explain this choice and is therefore useful for reconstruction (and elucidation) of decision-making itself. The case we have in front of us is a typically 'hard' case, for the law in it is a controversial matter; one way or the other, it will be controverted. Moreover, the judge, for the sake of her/his legitimacy, cannot say what logical analysis permits to say – that is, my hands are free, as regards Article 103 of the Constitution (this article establishes a permission), and since I sympathise (or not sympathise) with the candidate, I will let (or not let) him/her run for the third term. Legal reasoning of the two former judges does not follow logical constraints. In fact, they were both claiming there is but one answer in this case.

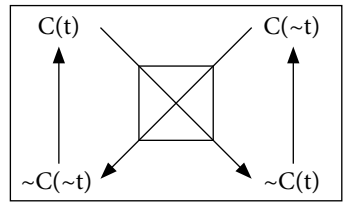
A reconstruction through the semiotic square (presented *infra*) can elucidate what happened. This is possible, because we know from other writings and actions of the two, what their tacit evaluations of the candidate are. We know, for a fact, that one clearly sympathizes with the opposite political clan, whereas the other does not particularly like either of the clans, but takes politics as a necessary evil. However, he likes to stand up and contradict whatever of the clans when he thinks they temporarily grew too strong. That is what happened.

The first interviewee, let us call him the Non-sympathizer, was afraid that the former president would run again. He therefore started his analysis, looking if the right to run for the third term is in the Constitution. Article 103 puts certain limitations on re-election, and does not mention 'third term'. Consequently, he concluded, the Constitution says one cannot run for the third term.

The second interviewee, let us call him the Critic, wanted to react. He was thinking in the same 'binary opposition' as the first one, that is, 'third term' and 'no third term'. However, since the Non-sympathizer already presented his opinion, the Critic started his reasoning from the opposite side. He wanted to know whether the Non-sympathizer has explicit basis for his claim: "no third term". Since there are none, he concluded, a non-consecutive third term is possible.

This can be presented in the Greimasian *semiotic square* (Jackson, 1985: pp. 86–99) as follows:

C	Constitution says
~C	Constitution does NOT say
t	a non-consecutive third term is possible
~t	a non-consecutive third term is NOT possible



The four corners of the semiotic square represent the four possibilities of which there are two pairs of *contrary* propositions (1 and 2, 3 and 4) and two pairs of *contradictory* propositions (1 and 3, 2 and 4):

1. Constitution says a non-consecutive third term is possible.
2. Constitution says a non-consecutive third term is not possible.
3. Constitution does not say a non-consecutive third term is possible.
4. Constitution does not say a non-consecutive third term is not possible.

Since the Non-sympathizer started with C(t) and could only state ~C(t), he concluded to C(~t) even though there is no logical necessity for that. The Critic who, on the other hand, started with C(~t) and could only state ~C(~t), finally concluded to C(t) even though, logically speaking, ~C(~t) can as well be linked with ~C(t) as with C(t).

This is only one (the shortest) semiotic explanation of why two different opinions from two competent judges. It shows the importance of the starting-point one chooses for his or her decision-making (intuitively or not), for human reasoning follows certain *semiotic constraints* (namely, *concluding from contradictory to contrary*) that are not absolute logical constraints. Moreover, semiotic analysis can also give a more complex account of how the two protagonists came to their conclusions.

Indeed, if we take into account the reasons each of these two judges gave for their opinions, the reconstruction gets a bit more complicated, but still explicable through the semiotic analysis, focusing on differences in binary oppositions, depending on personal experience and tacit evaluations of the Non-sympathizer and the Critic.

The semiotic tradition, on which Jackson builds his model, is based on the Saussurian *'principe d'opposivité'*. In other words, one term only has a meaning of what opposes it to another term (Ducrot, Schaeffer, 1999: p. 40) – that is why binary oppositions operate as basic steps in reasoning.

Let us presume that the two former judges asked themselves what the limitation of a re-election means, or what it intends. Consequently, they asked themselves what non-limitation connotates. In the historically conditioned cultural experience of these two judges, non-limitation is associated with no democratic alternation as well as with personification of powers (since in Yugoslavia Tito had a lifelong presidency). In fact, these are the exact two reasons each of the judges gave in order to support their diverging arguments. In the binary opposition 'limitation – non-limitation', one substituted "personification of powers" for non-limitation, whereas the other put in the place of the latter "no democratic alternation". As we know, all these options belong to the same culturally conditioned group of substitutes that one finds on the paradigmatic axis of the proposition analysed in these very lines. But why did they (intuitively) pick different possibilities?

Here might have come into play the factual premises already *narrated* in the heads of the two 'decision-makers' in our case at hand. In fact, legal semiotics claims that the law/fact relation is not one of application but of comparison or pattern-matching, as we have mentioned before. So, what are these narratives on the factual premise like? The Non-sympathizer belongs to a political clan, reproaching to the former president his communist legacy (he was the president of the Slovenian Communist Party). They claim that despite of the democratic reforms the former president holds informal strings of power, permitting him to have an intolerable personal influence in economics, politics and the media. The Critic, on the other hand, as openly states his confidence that the former president is a real democrat; he actually brought the Communist Party under his presidency to step off peacefully and give way to democratic reforms.

Now, adopting the semiotic claim about the law/fact relation, one can actually explain why and how the Non-sympathizer and the Critic came to different conclusions, not noticing the (logical) possibility of choice here. The fact of constitutional limitation brings the Non-sympathizer to understand the constitutional limitation as oriented against 'personification of powers' – since personal influence is an important negative element he finds in his narration of the factual premise. For him the possibility of re-election has to be as narrow as possible, and that is why he *reads in* a limitation of possible re-election *to* a consecutive term. The Critic's narration of the factual premise, on the other hand, pictures a positive democratic figure. The limitation is therefore linked to 'democratic alternation' and not to personification of powers. In conclusion, the limitation does not need to be stronger than necessary, which gives him intuitive reasons to 'read in' a *limitation of* a consecutive term and not a *limitation to* (only) one consecutive term.

Through this analysis, one could practically appreciate the merits of the structuralist semiotics, which is capable of *explaining and elucidating* the decision-making process in law. Nevertheless, one should also be aware of some possibly problematic assumptions of the narrative model. I will only mention them briefly in order to conclude.

III. CONCLUSION

As we have seen, legal semiotics changes the traditional model of legal reasoning, formalized in terms of judicial syllogism separating the analysis of law and of facts. On Jackson's narrative account, law and fact are reduced to the same level – of narrative syntagm, which eliminates the difference in their analysis. A fact is considered a (truth) claim *constructed within language* (about a state of affairs in the real world). A law is a (validity) claim *constructed within language* (about a normative significance of particular behaviour). Since they are both language claims, the process of application can therefore become one of comparison or pattern-matching (Jackson, 1988: pp. 3 and 58). The epistemological problem of passage from general to particular is consequently gone. The reference is not needed. The 'coherence' theory of truth substitutes the 'correspondence' theory of truth, and semio-narrative tools may well be applied to both, the law and the facts. The two narratives are said to be structured around a very simple semantic core that may be elucidated with a formal device, named the semiotic square.

However small the number of presuppositions in this theory, they may sometimes be contested. It is therefore good to point at some of them, in order to evaluate the model on firm grounds.

One of these assumptions postulates the validity of the Greimasian transposition of semiotic analysis to elements larger that a sentence. This transposition is not unanimously accepted (see Ducrot, Schaeffer, 1999). Another contested assumption (Pavel, 1988) is the existence of the 'basic structures of signification'. It seems in fact questionable whether binary oppositions, analysed in the semiotic square, are capable of reconstructing every human reasoning or every step of it.

Nevertheless, as we have seen, the narrative model is able to give a quite better account of judicial decision-making than the traditional analysis is. The price for this is to be paid at Feuerabend's currency, for one is seemed to be forced to say *Farewell to Rule of Law!* But does one have to say goodbye? Could we not save the 'reference' in

the judicial syllogism, if we included *verbatim* the temporal dimension in the premises? It could look like this:

(time 1) | 1. For any (x) case occurred after time 1,
if **P** is proven, consequences **Q** ought to be applied.
(time 2) | 2. For this (x/a) case occurred at time after time 1, **P** is proven.
(time 3) | /.: Consequences **Q** ought here to be applied.

Secondly, could we not distinguish and express two temporal values in the normative premise – one fulfilling the prospectivity demand of the Rule of Law, the other providing for reference to the facts of the case?

If I understand correctly, ordinary English, French, German, Slovenian and Spanish all have a future tense that is able to account for *the past in the future*:

"All persons who *will have blasphemed* the gods…"

Could we not transpose here Keith S. Donnellan's distinction of referential and attributive use of language (Donnellan, 1966; on Searle/Donnellan debate see also Jackson, 1988: pp. 45–52) and say that "*will*" provides for prospectivity, whereas the *past participle* ("have blasphemed") assures the 'referring' to facts posterior of legislators attributive speech act, but anterior to the judges referential use of the statute provision? Kelsen distinguished two forms of meaning; one referring to validity, the other to the propositional content (Jackson, 1985: pp. 235–238). Could we not in a similar way distinguish two temporal values of a legal proposition? If this is true, the Rule of Law mythology would still not be as strong as it pretends to be, nevertheless, we might be able to preserve its right to exist.

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