1. Thoughts backing speech

1.1 LAW

Talking about law engages in a complex language with plural levels of signification. Consider how the distance between what is said about law by citizens and what law means in the mind of law-makers, judges, politicians or arbiters appears immense. So there is every reason to concentrate on the often-neglected phenomenon we give the name: ‘talking about law’, which is at the borderlines of ‘legal conversation’ and remains a neglected field of meaning and speech in legal semiotics.

1.1.1 Signification Plurals

One notices differentiations. We often acknowledge the specificity of our daily talking about law as a need for each citizen and therefore, perhaps in an indirect manner, as a major contribution to democracy. Citizens experience a huge gap between their talking about law (what they daily do) and the meaning of law (which they cannot master). Both create a different effect and maintain different language patterns in the life of citizens and society. That distance, often a breach, between meaning and saying is always at issue when law is operative. The close connections between saying and meaning are an important theme in all regards: signs are exchanged and significations engender during those processes. Semiotics apparently does not only determine signs and reconstruct meanings: the path from sign towards signification is followed and understood as an important social process: ask the citizen on the street!

Fundamental to the explorations of this book is that law in its entirety is continuously at issue. That is the case in any talking about law of citizens as well as in the process of meaning-making of lawyers in society.

There are several outstanding components that function as a subject in our investigations. We mention the socio-legal position of the judge, the emphasis on speech performances that even characterize legal texts, the
need to master, fixate and generalize meanings that characterize the approach of each lawyer, his many contributions to maintain the uniqueness of law’s discourse, the problematic understanding of the link between words spoken on the street and words uttered in the court or in comparable professional settings.1 Comparable importance must be given to social issues related to law: in the first place citizenship in general, civic participation and street level interpretations subjected to socio-political debates, among other themes of law and modern society. The fact that they all have a dominant linguistic component directs our focus on talking about law towards a semiotic view regarding the predominant law-language relation.

1.1.2 Law-Language

However, the differences or even the breaches between what is uttered on the street and within the professional framework are not solely a matter of a sociology of the street nor solely an issue of the professional activities of lawyers, law-makers or those who otherwise apply the rules of law in our society. Law is in the first place a matter of language. What does this mean? The distance between saying and meaning, articulation and intention, expressivity and mind is a major topic in the philosophy of language since the early years of the Occidental, in particular Anglo-Saxon, twentieth century. And, we must underline, with language goes an interest in the quality of life – law being one its major components.

That broad notion of life energizes any focus on ‘talking about law’. That special type of talk unfolds from sign to signification, and the latter is in itself a rough but rather efficacious indication for life in its many social dimensions. However, laws and legal rules are not signs but are articulated as a sign. They always show ties with more encompassing significations. This dynamic should be mentioned and studied intensely. Lawyers seldom embrace this feature while debating law and its multiple meanings. Any ‘talking about law’ is not their preferred theme: they just do law; they cherish the impression of performing law by means of their own legal activity.

1.1.3 Talking Pre-Semiotic

However, their practice depends on language; their speech is more important than an individual lawyer’s mind is prepared to grasp. All talk

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1 In this book, words denoting the masculine should be taken to include the feminine unless the context otherwise suggests.
is in essence ‘pre-semiotic’ and thus before a person can begin to explain law and its social function in the framework of signs and significance. Our theme: the everyday ‘talking about law’ will for that reason unfold in parallel to the various methodologies of philosophy and social sciences while focusing on the extremely strong relationship between law and language. Any legal-semiotic analysis is based on that special relationship. But the semiotics of law display a heavy accent on ‘law as a system of signs’ (Kevelson2) and not on ‘signs on the move’. The latter are at issue when the concept of legal language is perceived as a term to describe all legal activity. Activity is always combined with the dynamics of signs, which are most prominent in speech performances. Judges judge thanks to their characteristic speech capacity, which is anchored in their socially and institutionally accepted position. To be a judge is the result of his (seldom explicitly considered) specific speech activities, which embrace a semiotic capacity with its shadows in pre-semiotic spheres. Only signs on the move pave the path towards signification. They move, while the talk goes on! A truly legal semiotics does not have the features of system-analysis but of a film: their ever-moving sign-characters fascinate.

1.2 TALKING

Law is in our daily feelings and actions spoken and written as a precious sign, and often unconsciously present in ways we are not aware of – even when signifying occurrences are manifest. The policeman carries his sign-characters publicly, the tax officer hidden – even if he enters an office, we are not able to fully read him. The cabdriver earns his money mainly in a legal world, not only by means of contracting with his passengers, for instance when they board his car or pay for the trip, but also while reading the traffic signs around him and respecting the rules and habits of the town’s traffic. Are those participants aware of the impact of the law? They are normally not, and the use of an additional concept such as ‘sign’ or ‘signification’ is mostly worrisome to the citizens concerned, let alone the encompassing process of ‘signifying’ itself.

One of the major issues might be that once we talk about law, and use such concepts like ‘sign’ or ‘signification’, we almost always produce quite inappropriate reactions and contexts. For instance, we link the use

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of the ‘sign’-word to the police officer or the traffic controller, but also to
the judge or the legal scientist.
Moreover, we have uneasy feelings towards those words because we
know not by reflection but only by daily life experiences in how many
ways the trajectory from ‘sign’ to ‘signification’ is itself a sign of life that
is more encompassing than those simple words suggest. We suggest in
our daily communication and talk that deeply layered ties between law
and life do indeed exist – but they do not belong to the materials of our
daily lives because they seem to belong to thoughts that are not our
everyday life occurrences. They seem primarily important when social
life and its complexities are at stake.
We may experience that there do indeed exist precious ties between
law and life, but we do not normally feel capable of solving the riddle of
their co-existence in the midst of our life situations. Law and discussions
on law are often seen as an important barrier for fully experiencing life
in all its dimensions. But that very same experience of life reminds us,
however, that many times we look for the support a legal keystone might
provide.

1.2.1 Life, a Totality of Signs

Our world often looks like a totality of signs. However, the concept of
‘totality’ is in this context as disputable as the concept ‘world’ and the
concept of ‘sign’ is as dubious as the two former words. We neither know
nor master the multiple significations that guide us in this totality, and we
are never prepared to accept accountability for the many meanings of the
‘world’ we live in. Their multitude is staggering, and deafens us when we
talk about this to our neighbors. Problems and social positions determine
our conversations as well as our exchanges of words, opinions or insights
into reality. And such exchanges become, because of their plurality,
lightweight, spontaneous and more immediately active in provoking
counter-activities. In that context, adverse positions engender and a
vicious striving for fixation in the middle of changes frequently takes
place. All this happens long before ‘significance’ or ‘meaning’ is given
the status of a mark of communication. ‘From sign to significance’ needs
the addition ‘and vice versa’, because of its powerful flow of life –
always, again and again: life is the favored expression.
We must add that our speaking about law, even in the sense of ‘sign’ or
‘signification’, is never identical to delivering a legal judgment, to any
‘saying for law’ or any final word of the judge. Indeed, many meanings
of law’s activity are at stake in a conversation about law. And what
fascinates more: words and functions of the judge belong to the multiple
meanings of any conversation, but they will never represent law in its totality. How is it possible, one should ask, that this remark seems necessary? And how can we understand appropriately that in Occidental legal thinking a judge’s thoughts and words play a decisive role amidst all the uncertainty of signification? He or she often seems the personification of legal meaning as such, and thus the living symbol of all signs in law. The judge appears indeed as a specialist in the game called ‘law’.

1.2.2 The Judge in Grammar

He or she is the very first person, which does not know a plural. But has law an ‘I’, a first person singular? Is the judge the ‘I’ of the law and its discourse? If that is the case, we understand that his entire psychological condition and his attitude are grounded upon one socially accepted statement: without him, law cannot exist! That is the burden of his existence: without him a debate, discussion or discourse pertaining to law would be impossible. All utterances would be incomplete, not correct and, above all, have no reliable significance! Our legal consciousness is law’s central issue shared by all of us, and that specific central position can never be an empty chair! Law would be senseless without the fulfillment of a judge’s functions. So the persistent question is: what is the core subject of our legal consciousness – the sign-function of the judge, or the signification of law determined by our Occidental culture? One answer will be in everybody’s mind: the question pertains to a lawyer as determined by law’s institutional features. When talking about law, who else determines the subject of our speech? Once on ‘the street’, the question seems senseless.

Who is allowed to participate in that discourse? Of course, we suggest: the so-called ‘ordinary citizen’. He is entitled to vote every few years and determines indirectly (many via a choice for parliament) the laws of the land, which also institute its judges. But what is the exact value and meaning of that civil voice? Is the citizen the user of law, or does the law as an institution use him, the citizen, for its own purposes? Why does each citizen remain silent about the value and signification of law and leaves it as if it were an evidence in se? Does the engenderment of this evidence not end up silencing a large part of public as well as personal life, and with that silencing a loss of understanding of the significance of law in its multiple sign functions? What does the judge contribute to balance signs in social life and what is the sense of his unique grammar position?

All those considerations imply issues colored by philosophical considerations. They are relevant in discussions, dialogues and other forms
Legal conversation as signifier

of talking together, but never in a monologue because subjects of conversation are extremely difficult to change in a monologue. In a monologue no real resonance exists, so that significations lack any guarantee. That is important in the case of law and in particular in our speaking about law. Law is an important signification; it re-enforces powers in the many adjectives one can hear in conversations. They illustrate our awareness of the many dimensions of law. We argue, for instance, in a specific context that law is ‘natural’ and remind our discussion partners that there even exists a ‘natural law’. Or we suggest that specific components of law are in our conversation ‘evident’, or ‘just’.

Many of these conversational activities do clearly depend on our ‘attitude’. Attitudes determine meanings in the exchange of ideas. Think of terms like ‘prejudice’ fulfilling a role in legal judgments; think of ‘disagreement’, ‘dispute’ or ‘conflict’ while discussing a trial – all are possible speech acts that involve law. Law cannot exist without such a treasure of meanings and acts. All touch a wealth of more complex notions and terms. While speaking about law one encounters notions such as (legal) positivism, reference, semiotics, virtual reality and the like – some of them embedded in legal theory, others in social sciences, psychology, economy, physics or in poetry, literary theory and hermeneutics. Those references ultimately find their anchor in words that are spoken and function in our thought formation on law. This observation should guide us: speech activities are our object of analysis and evolving understanding.

1.2.3 Talking About Law

Talking about law is, as far as we concluded, always, and like all conversations, a linguistic issue that focuses on meaning and signification. That specific focus will never result in a fixated determination, but in a contextual event. Meaning and signification are always precious moments of an evolution that is itself enchained to meaning and signification.

Life itself; that means: every aspect of what we humans call life is an unfolding of meaning in which we play an undetermined role. We experience this lack of determination as a problem that reigns over the

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3 The word ‘fixated’ represents in this book a dynamic meaning and should be understood as: ‘concentrating attention for’, to gain a ‘fastening’ or ‘locking up’, ‘determining finally’ or ‘firmly securing’: all at the borderline of everyday discourse and law’s professional discourse.
human mind. Who are we, what are we, what are our thoughts, opinions or attitudes in the process of signification? The question colors our experiences on the path from sign to signification and vice versa. The essence of life is contained in this question; we even expand that notion beyond the cosmos we consider as our home, and are prepared to acknowledge ‘signification’ in the context of a plurality of universes. Can we think about, and can we judge those meanings and create awareness pertaining to that significance?

The challenge to think beyond boundaries of the universe leads sometimes to results, which are difficult to accept seriously. Bennet suggested in 2013 that we could reliably calculate how particles and atoms play a constitutive role in our region of the universe. As a conclusion, the volume of our universe (the part we consider to possibly be known) would be $10^{84}$ cm$^3$! Is this our desired awareness of reality?

Consider that we know only one time scale, so that we observe solely adaptation and renewal. The latter are developed in the dimensions of our universe, which is a construction of the human mind that covers only several billions of years. It surprises and even creates suspicion that we always encounter solely one type of significance. Our concept of science in these contexts is marked by the eventuality of an awakening and emancipation of those latent meanings. The latter illustrates the multiplicity in universes. We find that feature in each human genome: each cell has a copy of itself, so that in the human body itself, its brain included, a constant stream of renewal can be characterized by us as ‘Being’.

1.2.4 Catharsis

While talking about law, we may embrace the role, function and meaning of catharsis in the human mind. The concept was coined by Aristotle in his *Poetica* to reflect the purification of emotions of the audience. Anxiety and fear during performances of drama and tragedy were encountered by empathy with the play’s protagonists. This emotional purification would allow for a renewal and restoration of one’s mind. In his seminal work *The Self Awakened: Pragmatism Unbound*, Roberto M. Unger’s views on self-consciousness suggest that (judged from a pragmatist viewpoint) man’s self-fulfillment should very well do away with human catharsis, or at least be able to transcend catharsis in an almost

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divine fashion. But it is our firm belief that the opposite is true. The need to embrace catharsis is a foundational attribute of human interaction or conflict even within pragmatism.

Catharsis in its most generic sense is implied in the differential dynamics of interaction. To fully understand, accept, and even embrace, change in contemporary society, catharsis functions as a counterpoint of our existential emotions of angst, despair and loss. This seems to include a deep-layered level of meaning: is our talking about law, which we consider as an average daily occurrence unfolding in a natural language, a cathartic event? Is this characterization the reason for the widespread influence of ‘talking about law’ in social life, for it being clearly ‘pre-semiotic’ and thus an almost natural habit, for an excoriation not to be confronted with lawyers, judges and courts? That question is by no means rhetoric. Any articulation of a human consciousness is an enriching activity in the context of meaning fields and significance. Speech, which focuses on reality, is in the first place a component of that activity.

1.2.5 Speech

A fundamental inversion should be noticed of what we naïvely believe: humans are not human because of their speech performance, but speech performance causes humans to be human! Like a little child is given a capacity to unfold speech activity from the very moments in the mother’s womb, a human being unfolds this capacity in a truly plural togetherness, which is ultimately characterized as a culture.

This inversion forms the basis on which the phenomenon we called: ‘talking about law’ should be understood. That understanding has far-reaching consequences. The subject of our analysis, an everyday conversation or ‘talking’, leads us to an insight into how deeply the ties between law and language are anchored. That insight is the basis of analyzing law in a semiotic perspective. Its basics are neither the product of a theory or of an appropriate insight into cultural processes, nor the exteriorization of a consciousness about how to articulate law linguistically. The phenomenon we call ‘talking’ is truly pre-semiotic.

But before a semiotic view on talking occurs, language and law (regarded as a subspecies of language) did already unfold! That is not a

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Thoughts backing speech

matter of a strict order or sequence, but a matter of growth and change. Analyzing any ‘talking about law’ is in this regard an attempt to understand law and legal discourse while understanding and interpreting the ‘talking’. ‘Talking’ is: the ‘speech’ component, and solely in ultimo the ‘linguistic’ component.

We underline that the expression ‘talking about law’ focuses in the first place on specific speech acts of specific functionaries in discourse. Language is a lawyer’s professional domain. His talking does not embrace any specificity of legal language as such, or the particularity of legal discourse. Law in general is understood on the street through the various speech performances of lawyers, judges and sometimes also legislators, but also by the conversations that surround the life of the citizens. This has important consequences for legal theory and also for a semiotic approach towards law. The most outstanding of them is that the ‘law-language’ relation (the basis for understanding law) requires a particular emphasis on legal speech acts and the phenomenon of law in its entirety is incorporated in the practice of a speaking lawyer’s, or a judge’s, speech utterance. It is no surprise that this perspective leads above all to questions pertaining to legal thought formation, which are the foundation and social frame of law’s verbal activities.

1.3 THINKING

Each particle of thought formation activates episodes of talk, in other words: fragments of language. There is no thinking without speaking, no possibility to think without a guarantee to be able to speak. The great significian who created the foundations for modern semiotics, Victoria Lady Welby, ventured to formulate already in 1911: ‘Language is Thought in audible activity’.6

1.3.1 Language and Thought

She did not only initiate a turn of philosophy towards language, but she also tried to lay out some of the foundational structures of a philosophy of language, which remain until our days of highest relevance for the study of law. We mention some of their aspects, which will be relevant for our research into the semiotic foundations of law:

(1) The ties between language, linguistic expressivity and thought formation are never determined and forever fixated. They renew continuously and become different in each thought or experience that is formulated in words or speech.

(2) Uncertainties pertaining to the specificity of the language of thinking remain vividly alive despite our multitude of fixated, reliable and positive data in science as well as philosophy.

(3) Words on their own will never form an independent linguistic expression; they are always the product of time and renewal – as the user of dictionaries experiences daily.

(4) The relation: ‘word, signification and text’ is an example of connectivity, which is not fixated or leading to a fixated complexity.

(5) Language fragments switching from ‘observable’ to ‘non-observable’ can never be the basis for any meaning in language. In language exist linguistic fragments that are not expressible in language. That is as important as in life in general: what appears to be identical does not need to be identical!

(6) Our thought formation should be understood as attempting to fiercely embrace an awareness of the fact that all our thoughts are submitted to all possible forms of interactivity. The latter component requires special attention. Emphasis on interactivity as an inspiration for thought will also be interpreted as the ‘management’ of our thought formation. It places a thinking subject in context and reinforces its position in language and particularly in speech performances.

It also enables us to approach an understanding of what it means ‘to be thought’: not a pure passivity but rather a thinking that befalls us in the deepest sense of the word. This form of thought formation, which includes so forcefully the experience that befalls us, is perhaps the reason that we cannot always create distance to our own preconceived opinions. It says: there is no distancing, when distance cannot take place – because there is no place for distancing! But there could be one exception: there is a distance that does not create distance but gives distance. An expectation seems embedded in this consideration as such: an attempt to view our own prejudices could lead to a meaningful thinking. But that process is in no way objective! It only widens the grip of the subject while thinking.

Is the latter a veritable possibility? Should it not mean that one could think beyond one’s proper thought process, while exactly the inverse should take place: you have to let your thoughts think themselves! Your thoughts are the subject and you are the object. That is a challenge within
the more or less ‘safe’ subject–object relationship – it promises in any case much more than the idea of thought formation without a thinking subject!

The question is, however, whether there is any moment of thought that can withdraw from some form of interactivity and – what is more – inter-subjectivity. This seems circular. The ‘You-think’ cannot create sufficient distance from the ‘I-think’. One cannot do without the other. Interactivity and inter-subjectivity are like the sea in which we swim/are adrift/live: we continuously engage in a form of ‘thinking beyond thinking’; our thought formations are never the same; they are never identical but are rather like unfinished circles!

Those circles express a despair, which arises when we think and when we hope to be saved by language and in particular our speech activity. Thinking is also a matter of time, of phases, of attitudinal seconds that are deleted in the deep structure of speech and language because life itself moves on. That insight is a major issue in the philosophy of Ludwig Klages. Life unfolds beyond boundaries of a human consciousness, he said, and that causes prejudices to be ridiculous and the pronouncement of interactivity a vulnerable political slogan. The sense of meaning and of signification is like a hand extended to all who talk and all who are endangered to remain empty. Do we grasp the hand?

The question ‘what is …’ seems a trap to catch the being, and subsequently fixate it. Being and life both hesitate to choose the right direction for avoiding the trap: for each of them a ‘going forwards’ is identical to a ‘going backwards’; the trap seems omnipresent. What is our thinking, when and under what conditions would that thinking be prepared to think: law?

1.3.2 To Think is to Change

Edmund Husserl, the founder of phenomenology, included in his considerations about thinking two fascinating aspects: (1) thinking always includes a change of attitude, and (2) that change always includes a mode of distancing oneself from the omnipresent ‘naïve-natural’ attitude. Each thought formation of an individual/subject is primarily a form of exploration of the wealth of possibilities of the subject, and thus embraces many attitudes in innumerable moments of time.

The essence of thinking is apparently in the words ‘other’ or ‘different’, which is exactly not ‘ego’ but ‘alter’, meaning change, always becoming an alter, always being different. Any becoming different is a matter of being altered; the change which is the engine of our thought formation causes a change of our being that we experience in our own
thinking. It means that this change always touches its own status, which is streaming rather than being fixated. Our being cannot be thought or articulated as fixated.

1.3.3 Alteration

The power of the logos reaches beyond language and thought. The latter are obviously too limited, especially in legal practice. But take into consideration that subject and object change their limits continuously. Their striving for change is a vital force and should also characterize legal functionaries. This is why the famous linguist F. de Saussure defined his semiotic approach as ‘the study of the life of signs in the bosom of social life’. Meaning and signification change with what is signified and meant to be. They are therefore never the only and once determined. If a philosophy needs a subject and/or an object, than we must bring the dynamics of change deeply into their innermost changing selves. The consequences for our forms of linguistic articulation are immense. The value of a word will be deepened. A word is never an elementary particle of language. The latter is a process of changing and repeatedly intertwining relations, which seldom touches the dimensions of being but just approaches an articulation of being. It means that each form of interactivity is basically a change, and – above all – an alteration. That alteration is sometimes an inclusion and at other moments an exclusion; the one cannot exist without the other, but both are always different, so that other alterations are engendered.

1.4 JUDGING

The French Revolution placed the power of legal decision in the hands of parliament because it did not seem appropriate to have individuals (i.e. judges) in that position. That was a problematic action in itself and an inherent danger for democracy.

1.4.1 Individuality and Education

This action, and the inherent problem of having a single individual in the position of the final decision-maker, resounds in daily talks about the law.

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One can hear the protests in many of the talks about law on the street. A judge’s position and function, his freedom and limitations are a theme of citizens in many conversations – despite the various considerations in legal theory during the twentieth century and later. The idea of a judge being ‘bouche de la loi’ (mouth/speaker of the law) and the fear for ‘le gouvernement des juges’ (the government of judges) appears outdated and counterproductive today. The slogan ‘summa ius, summa iniuria’ is valid for laws and not for judges – unless we see them solely as legal applicators, as ‘bouche de la loi’, and we do not like that view, so one never hears such opinions in talks about law on the street.

It is, all in all, true that the master of the legal discourse is subordinated to, and servant of that discourse. That need not be problematic. Why should we try to be ‘objective’ here? The apple is falling down anyway. Darwin was also right. But human, ethical and legal activities are not completely subjected to laws. And it makes no apparent sense to submit or to analyze human activities in accordance. As was said: the master of the legal discourse is an essential component of that discourse while he actualizes it. Yet the position and structure of discourse in itself has to be revisited in many of the following pages. References to internal or external positions in view of the totality of law do not work in legal analyses. The question, whether ‘matter is ontologically given’ cannot be articulated by the judge; the solution of such a philosophical question is not within his institutional power. His checking is not a way of finding the truth. The Central-European term ‘finding the law’ is in that context also not acceptable. It would be better to introduce terms such as: ‘generation of law’ in parallel to ‘generation of sense’ or ‘generation (eventually “engenderment”) of significance’ – underlining the feature of an ‘always again’ and the desire to keep perpetually ‘a new case’ in mind.

We touch here as an example on the difference between Anglo-Saxon precedent law and the Civil Law view on precedent. Most lawyers refer to the former in order to obtain a better understanding of case law. But they are not aware of the fact that bounds with cases and case law will never be the solution for Civil Law cases. But both types of law compare and qualify the case as if a case were a static substrate of its reality. Both apparently do not provide the possibility to differentiate and thus appreciate the dynamic character of a case. However, consider: what is a purely static case?

Is that also valid for our ideas about legal certainty? That idea is as difficult to understand and to apply to social life as ‘social security’ or ‘security in a love-affair’. Only ‘affective’, which is perhaps even ‘insecure’ legal certainty’ makes sense. It is in this context that the judge demonstrates how he is subject and object, and that his position is
in and beyond the legal discourse. Consider that classical thought patterns abiding objective thinking cannot explore or forward thoughts that have to do with an ‘insecure security’. Relate to someone who is able to embrace and think interactive practices, and a new world will appear!

1.4.2 Educate Judges

Think of the many attempts to focus on the so-called human and social image of the judge. There are many doubts about the homogeneity of such an image in the mind of the judge. But they do not touch the essence of the problem. They demonstrate perhaps an enduring uncertainty when cases are decided on the basis of the judge’s mind. Mind you: that image can never become explicit in any type of reasoning and will never contribute to any explication in the words of the judge. Empirical sociological analyses may suggest the existence of such an image, but the real effects are never demonstrated. So, have a new judge function, and let us educate him appropriately! But: how? By intruding in his speech activity? Or will we be successful by teaching him a different language, which includes many more and really different meanings of the street?

The judge is essential in our ‘talking about law’ and he fulfills roles of which we are not aware and cannot master. Not only the ways we think about law, but also in our conversations about law on the street and in other public places; also in talks on TV, the social media and at many other occasions there is the judge in a primordial role. It is hardly possible to understand the task of the judge anymore as ‘thinking’ and ‘judging’ in those many patterns of communication and representation. The Common Law claims therefore that a judge should in many cases only function as a mediator in social conflicts, whereas all other solutions are solely a matter of correctness regarding the application of the laws. In the Civil Law (as far as this distinction has a sense in our modern day) the application of laws is still understood as an integral component of the legal discourse, so that the judge remains focused.

Applied laws speak in the legal discourse like lawyers or judges, politicians or citizens. But the speech activity of a law is decidedly different from the activity of a person, and remains confined to the discourse as institutionally fixated. This way of speaking of laws is predominantly rhetorical, in so far as it confirms the perfection of a fixated and institutionally bound discourse. That creates a disputable relation with reality. Judges order reality facts in categories, events in rules, ethical issues in strict contexts – and all those moves are named ‘legal’. What is individual will thus be ordered in what is general, and
any inverse move is strictly forbidden. That is how the judge produces a policy, which ultimately leads to ‘the dynamics of difference’ of reality. But those dynamics do not always belong to the institutional boundaries of his discourse, and a judge will not be prepared to provoke any change because of this discursive limitation. How can an education encourage a judge to cope with the strength that binds him or her to fixated patterns of speech and behavior?

1.4.3 A Judge’s Discourse

These observations underline the coherence among the many components of a legal discourse. But at the same time they make clear how limited this discourse is. It is limited because this discourse is a discourse tied up with a professional – and thus an artificial language. One always uses words that are made valid and words that control significances, such as ‘norm’ or ‘judgment’ or ‘reality’ or ‘case’. That is most challenging: the master of the legal discourse is subjected to – and a servant of – the discourse, its signs and its signification. Consider the comparison: our physicists are able and are allowed to think in nano-dimensions as well as in macro-dimensions mixed with dimensions of our daily routine. Their point of tangency with ontological and even metaphysical issues is rich and complex. The question whether matter is a metaphysical datum can be posed by them and directed to them. A judge is never in that position because his discourse is far more limited. A reference to inter-subjectivity or even interactivity will seldom solve the problems and it may not even be qualified as an appropriate approach. Will a judge ever enjoy the freedom of thought a physicist has? Can a lawyer ever cooperate with a physicist? In that case, he has to leave the boundaries of his profession and step outside the legal discourse – or have the physicist acquire access to the legal discourse by qualifying his specialism as legally necessary. So, can a lawyer ever see his image and his task from another side of his discourse? Quod non: that would be classified as creating ‘legal uncertainty’!

A judge is in all situations and talks the subject of the legal discourse. This remains the case even apart from any analysis of the specific properties of that discourse. His position is and will be understood as a particular subject-position. The question is whether any new type of education will change that position or take that manner of understanding away. As such, lawyers and citizens are being spoken to before they speak! Even more so, while speaking, they are the object, not a mere subject, of legal speech. Ortega y Gasset once wrote: ‘the term “subject”
… stands for radical instability of the human person’. Is that not the case in our considerations pertaining to the judge and his or her legal discourse?

But there is a huge difference between a philosophical and a legal argument. The first is all too often apodictic and tends to contrast concepts without providing solutions for those tensions. Notice the adverse in what seems the same, in Bach’s ‘Parodieverfahren’ (procedure of parody) and his contra-punctual movements. The latter allow him to repeat the same again and again without saying the same all the time – always slightly different, at another moment and in a somewhat different context. Here one encounters ‘interaction’ between word and context, although the idea of interaction itself becomes vague. It is difficult to find appropriate expressions: ‘respective’, ‘communal’ or ‘inter-mutual’ will hardly do!

We should perhaps find a specific lemma in this context for ‘interaction’ or ‘interactivity’, and for that reason the term ‘affect’ could become a description of those determinants which specifically effect the position and the behavior of an actor. Bach’s counterpoint should be remembered here. It seems evident that the judge is not simply a subject of the legal discourse, but on the other hand one cannot claim the opposite and tell that he is not!

Re-read Ortega y Gasset: both counterpoint positions (subject/non-subject) are useful to approach that instability. Describing or fixating is not! The ‘Parodieverfahren’, perhaps the only way to unfold a philosophical activity, continuously initiates a form of interactivity with counterpoint character. It is useful to experience the difficulties that are inherent in all attempts to articulate. But here one focuses ultimately on the o/other or someone else, or other human abilities.

1.5 INTERACTIVITY

The question has been posed several times: is interactivity a valuable and acceptable term to discuss a judge’s social position and reflexive standing? Should judges no longer work, speak, consider, and decide solo? In the framework of such a generalization, it must be researched whether interactivity among judges is better for legal judgments. Or do we have to differentiate between collegiality and interactivity, mutual respect and cooperation? This does not only pertain to civil or management lawyers and not only to alternative forms of conflict resolution, but to judges, above all to magistrates.
A philosophical remark embraces the idea that interactivity is mainly understood as a preferred form of togetherness (Latin: *inter-esse*) of acting subjects. But how can interactivity exist without the predominance of the subject? Any view on the position and socio-legal structure of the judge produces solely a repetition of this difficult question. It relates to the legal thought patterns dominated by cases, which raises the question how a legal understanding of a case evolves, and how important that insight is for the personal view of the judge. It could be illustrated that active panel participation creates distance to personal prejudices. That emphasizes a concordant functioning in, for instance, Courts of Appeal and at lower levels where appeal cases could be reduced. A quote seems important here: In order to deliver a highly valuable judgment, the judge should conclude in cooperation with other judges, so that prejudices are reduced or less effective. If three judges do not accord, they vote by majority. That is interactive jurisdiction.

**1.5.1 Interactive Jurisdiction**

We are, like the majority of readers, victims of a centuries-old tradition to see the judge, as the crown of legal thought formation and legal power in society, as an individual. Is that correct? What then about the law-maker, what about the parliamentarian, his political party and his citizens? A legal discourse does not provide a clear profile in that regard. It only reinforces the pinnacle position of the judge and focuses on his or her extraordinary function, position, role, name or fame in legal practice as reflected in legal theory! That has many implications. They relate to *interactivity* among themselves as well as with citizens on the basis of a subject-centered thought pattern. The question is how far that offers a new profile for the professional behavior of judges, and relates in that light to law’s discourse as a basic concept in the study of law and jurisprudence. In the end, the question ‘what is, and how does talking about law function?’ seems at stake. Hence the following remarks on interactivity, despite its limited meaning and subject-driven approach in law:

(1) *A New Dogma?* If interactivity becomes the new dogma in law and jurisprudence, one should critically research in connection with that proposal how far the ‘*super subject-position*’ of the judge can still be accepted within the legal discourse.

Of essence is the consideration, whether a discourse supports such a position within its own boundaries and philosophical profile. In other
words: is a super speaker in a discourse acceptable, and is such a speaker position tolerable in our everyday talking about law? The answer is to be found at various levels of a theory of spoken language and of speech acts. Those theories are somewhere on the path from sign to signification, and vice versa, as we explained above. It implies that the acceptance and understanding of the role of the judge is ultimately a legal-semiotic issue. But semioticians will agree that their discipline does not unfold once a sign is produced (a word spoken) but only while outlining the entire path from sign to signification. It is clear that we already begin to outline a signification once we determine the sign-function of the judge. The semiotic dynamics of the two interfere with the interactivity requirement pertaining to a third component. There is no other answer possible than this triadic answer, which just outlines the structure of meeting the suggestion to accept interactivity as a decisive feature of the judge.

(2) Sharing v. Power. The interactivity proposal is not without consequences for our socio-political thought formation and is in fact not solely a proposal for the functioning of judges. That concerns the downgrading of the majority of thought patterns in which the subject plays a decisive role.

Keep in mind: it does not concern our subjective thinking and speaking, but rather the power position of all thought formation, which centralizes a subject. That position is in its highest degree specific for law and legal discourse. Legal power is in the maintaining of the subject: the subject as speaker, as judge, as thinker, is always engaged in producing power. The interactivity proposal downplays the power position law mirrors in its discourse. It is therefore to remind that the legal discourse is generally understood as the discourse of the legal profession, of law and jurisprudence, of legal practice and legal theory – not the discourse we are engaged in when we ‘talk about law’. In essence should interactivity replace subjectivity: sharing should replace power! That is in law only possible under the condition that interactivity remains a legally valid and thus a legitimate position. Interactivity will be a feature under the command of the continuous structuring of legal discourse itself and will therefore fulfill the role of a legal term. Only under that condition will a judge be able to perform interactively. Does that performance bring him to any outside position of the powerful discourse we call ‘law’?

(3) Multiple Languages. There is an important feature to consider in the case of interactivity among judges: the latter should be studied as a specific form of behavior and thought formation.
Lawyers or judges do not play soccer together, they are not interactively gardening but they must speak and write together. Their interactivity is above all: a textual affair; their attitudes and knowledge will be expressed in exclusive words, sentences and texts which all belong to their professional language – even when those expressions are sometimes commentated in daily language. They are not comrades but colleagues and thus are obliged to restrict their means of communication to their professional language.

Any interactivity proposal is a matter of language. In this light, one should understand the earlier remark that outlining the role of the judge is in essence a semiotic affair. So we highlight the distance between the language on which that interactivity focuses and the everyday act of ‘talking about law’. One of the major characteristics is not in the grammar or vocabulary of those two languages (the daily and the professional language) but in the necessity to understand the function of the judge as a speaker-function and not as a listener. Even legal theoreticians do not pay attention to what messages a judge has to receive but solely to his utterances resulting from his professional speaker’s viewpoint. That illustrates in what regard speaking law embraces another language than speaking about law – despite all the interactivity between citizen and lawyer or judge.

1.5.2 Dimensions in Legal Discourse

The multiplicity of language and its related social patterning seems of central interest here. Interactivity unfolds in a professional language, which must combine the language of the law/jurisprudence with the language of everyday. Both types of language describe reality, and its consequences are of interest.

Predominant is the fact that language (a) can be described, commented, outlined and structurally analyzed in language (b), but that the inverse is impossible: (b) can never be described in (a). This is a problem, because functionaries are supposed and want to be able to present ‘reality’ (language (b)) in their own language (a) – and cannot. For the sake of clarity: lawyers and in particular judges have their conversations in a mixture of languages (a) and (b) but their final conclusions and judgments are entirely in (a) and thus difficult to translate in (b), which are levels of language we characterize as ‘talking about law’.

What judges say and write is ultimately determined by standards of jurisprudence, which are prescribed in handbooks, special websites, precedents and specific sections of legal language that remain under
control by internal system requirements, procedures and possibilities of appeal. The *interactivity* among judges is linguistic, safeguarded, obligatory and preformatted, not knowing of any crisis of meaning that reaches beyond a court decision or judgmental conclusion.

Legal speaking and writing does not embrace any risk of an unexpected confrontation with an existential abyss of meaning or societal signification. That only happens in language (b), a language in which *interactivity* has definitively other dimensions. One should be aware of those differentiations. The effect of prejudices can be reduced through clarifying exchanges in the parts of language (b) that play a constitutive role in language (a). We often call that ‘interpretation’, ‘weighing’, ‘hermeneutics’ and the like. They cannot, however, be grasped in the heart of language (a) and interactivity cannot for that reason find a place in the linguistic framework of institutional legal language (b). Everyday language (b) seems the most important means of communication to transfer and effectuate professional language concepts, views and judgments (a) – prejudices and related views of the professional included. The standardized and controlled terminology of the latter makes the language of the judge inaccessible for interactivity. The latter finds a place in a natural language (b), but not in a profile of legal concepts that characterizes law’s discourse (a). The two languages remain separated even if they do occasionally intertwine. Their separation forms a *social* problem of legal discourse.

Law as a discourse that exercises an immense influence in social life can only continue its existence thanks to a rigid pattern of prescribed, repeated and continuously refined terms and concepts. But how free is the language of such a discourse? How free is its speaker? Is a mutual expressivity of language and social function possible? Those questions mirror a complication: can words, concepts, texts, laws, procedures, functions, and roles fit to a stable social pattern of narrowly described, fixated, precisely determined functions and residences? They might enable and stimulate us to analyze the implications of a socially desired discourse. The suggestion that interactivity is a reality within the boundaries of that discourse has extreme relevance in that regard.

That is, however, determined by *limits of law* itself. Introducing interactivity as a behavioral feature in the case of judges creates the impression that issues, which are in essence *philosophical* issues, can be tackled by means of an *organization* of legal functions and institutions. Can interactivity in law be *organized*? The question implies particular views pertaining to language and knowledge. Major elements are:
specificity of the legal discourse and its institutional anchors, which result in attempts to define that discourse; subject-directedness of all law and the questionable ideal of interactivity; relations between language and sociability; and relations between philosophical views and socio-organizational measures.

Those elements not only characterize the complexity of relations between law, language and knowledge, but their presence in this complexity is also a sign for the urgent need to focus on the concept of discourse itself when legal discourse is mentioned. Ideas on interaction and interactivity appear to relate to qualities of law’s discourse – an observation that should be appreciated correctly.

1.6 LANGUAGE

It appears that emphasis is on the pragmatic character of a legal discourse. It is a discourse serving specific practices (legal practices in social life) by means of a language that embraces a mainly fixated terminology. But there does not exist only one language! Practice and terminology are both major features of a professional language, and there is no discussion about the contrast between the language of everyday (mostly a natural language) and the language of law – itself the proof of the plural character of language. A legal discourse is not exceptional. There are many professional languages that function in Occidental culture: the physician, the historian, the linguist, the chemist, the archeologist or the astronomer, illustrate this function when they articulate their observations via words and texts. One particular situation in legal discourse should, however, be seen as an exception. In law’s professional discourse a special position is foreseen for a non-legal specialist to contribute to the legal discourse (referring in his own language to opinions, providing data, etc.) within legally defined procedural limits as if they spoke legal language. The outcome of such a contribution is important and can influence the totality of a final judgment. That position can be a lively presence of another specialist in law’s discourse, either in words spoken or by means of quotations of important non-legal texts.
1.6.1 Language of the Profession

There is often an identification of law’s professional language and legal education. Students should in the first place ‘learn the legal language’: they are taught to think, speak and articulate professional meanings of specific expressions. They perform that in their mother tongue and are trained to harbor legal meanings in the everyday language of their social life. This process of positioning meanings in a significant context seems dominant. To ‘be a lawyer’ is often identified with a perfect mastering of law’s language.

A philosophical analysis of the features of the legal profession unveils, however, much more than just this mastering of the specialized language. It means that the philosophical view on language appears to be rooted in other philosophical dimensions than language alone. These focus on the speaker activity and the speaker (social) position in discourse and – more generally – on those for whom the language of a discourse is an important sign that refers to articulation (speech) processes entwined with language as such. All lead to transcend a solely linguistic expressivity and embrace the process of signification in its cultural and even ‘life’-context. At the end, reality as such is at stake. The discourse of law colors an outstanding form of social life. Such coloring is a matter of total attitude embraced by subject and object alike. The term total ‘attitude’ has to be explained.

1.6.2 Attitudes

A mother tongue, at home in our everyday life-world, has been characterized as different from a professional language, and that is basic in legal discourse. The natural language/mother tongue, in which the professional language is articulated, conceals the difference. It may be helpful to refer to a fundamental distinction between two positions or attitudes, introduced by Edmund Husserl, founder of phenomenology, in the first decades of the twentieth century. His primordial qualification pertains to the difference between a naïve-natural and a non-naïve-natural attitude/position. In each of those two positions, reality is constituted. That seems a true challenge for law and for lawyers: how

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does a lawyer reach my reality? And: all this includes a distance to psychological as well as other types of interpretation of this world-changing position of each individual.

Views on reality are at stake in law and legal judgments, and they are often understood too narrowly as prejudice, lack of neutrality and objectivity, deviant or asocial behaviors and the like. Those classifications of attitude do not meet the challenge of our understanding of reality: a key argument for us as it already was in the days of Husserl’s phenomenological approaches. In law’s language reality is already interpreted before any legal position or judgment is taken. There exists no point of reference in view of which a prejudice can be profiled: all reality is ‘interpreted reality’, and law’s share in this is overwhelming in Occidental culture. It implies that every legal interpretation is the interpretation of an interpretation. This motive challenges us (who live a life of observations) to search for the touchstone of a lawyer’s epistemological position, for his or her point of exploration and understanding of the range from sign to signification, which is a range that is in itself a continuous sign of life.

Husserl introduced two concepts, which are until our days underestimated in phenomenology and Continental philosophy: one that indicates the entirety of life as a whole, and one that establishes distinguished and various positions in life. The common denominator is called naturalness and the distinctive denominator brings a difference between the naïve and the non-naïve position/attitude to the fore. A mother tongue, the language of everyday life, is, as was already said in this context, a naïve-natural language whereas legal discourse is non-naïve-natural. The breach between the two, important in all regards, is difficult to grasp. If a mother tongue is a language articulated naïve-naturally, the language of the lawyer is the mother tongue (indicated as (b) in the above pages) entwined with the professional language (which was indicated (a) in those pages). Notice that any professional language needs a mother tongue as its contextual discourse. Also law cannot do without a native, or naïve-natural, language! But is that very special awareness the result of considerations within our mother tongue, or do we in that case appeal to a professional language (such as philosophy, psychology or any other)? A naïve-natural attitude hardly provides reflective power. How then do we know about its character?

That question brings us to the stage of reflection/knowledge and its limits. A naïve-natural language can be performed but apparently not lead to knowledge about all components of that performance. It means that awareness of any feature of linguistic performance never equals the use of a language, as many analytical philosophers of language fail to consider. If one reflects upon the naïve-natural character of one’s mother tongue, one has already changed attitude, and unwittingly encapsulated a non-naïve dimension. In such cases, one really explores ‘another language’. It is as if a naïve-natural position exists beyond any possibility of articulation. That particular naturalness exists but cannot be formulated in any language, word or expression. What we know is expanded wider than we articulate! One conclusion is far-reaching: there can never be a secure 1:1 relationship between word and thing, language and reality, or mind and matter! That is the basis for a pre-semiotic approach of law, and of reality tout court.

That sounds radical and mysterious at the same time. It focuses quite intensively on our concept of ‘knowledge’ and our activity of ‘knowing’. Should one not consider the mystery of reflection as a preferred form of legal thought formation, which one can call ‘bending back’? Is legal practice not a form of ‘responsible bending back’ to earlier words, considerations, laws and decisions? How far does law, and strict legal thought formation, reject your view and its 1:1 implication?

1.6.3 Reflect and Bend Back

All considerations pertaining to language and law, to reflective dimensions and the human mind, are important in our considerations about law’s practices. They are altogether involved in a continuous looking-back, a repetition, mirroring and bending back. It is clear that the above-described naïve-natural is not solely the reality of everyday in which law is bringing order and perhaps even justice. And legal discourse as well as jurisprudence are not exclusively non-naïve-natural issues. That contrast would be too simple, and we underlined therefore already their contrast in the light of their intertwining: opposition and intertwine-ment belong together – is that indeed a riddle at the basis of our knowledge?

Mind you: this consideration is already a proof of the unacceptability to see a fixated contrast between the two positions. It appears that the awareness of the two embraces a gradation of intensity of knowledge. Legal thought formations could not exist on a sole naïve-natural or on a sole non-naïve-natural level. ‘Being’ can be experienced on each of them but is never articulated at only one of these two levels. Any judgment
pertaining to a specific life-quality requires an intertwining of the two. For instance the concept of ‘justice’ is for that reason never qualified as a strict legal term. Practitioners at any level of law’s exploration and application do not talk about justice as a technical term. The concept belongs to an intertwined position of thoughts and practices accepted as legal, not to any specific level of legal technical knowledge or to a level of naïve-natural language.

It is important to underline that only different levels of intertwining can be effective as a means of articulation. In other words: a professional language cannot represent a profession on its own but is always needs to be entwined in an everyday language. That gives the citizen a feeling that law belongs to her/him and should be spoken on the street. However, the street can, as already often formulated, talk about law but not speak law, nor make any judgment legally valid in its proper language. The speaking on the street is only a part of language as a human reality in its entirety. A legal semiotic approach can only unfold when the intertwining of everyday language (the so-called ‘natural’ language) with a level of specific legal expressivity (the artificial, or professional language) has taken place – semiotics never concerns a professional/artificial language separated from daily language, but it cannot concern solely a natural language either. We have to come back to this observation in other contexts. There are different levels of signification in the simple advice: ‘reflect and bend back’, especially where the relation between language and law is concerned. The ‘talking about law’ is indeed an issue to ‘reflect’ upon without certainty whether a ‘bend back’ will ever be possible or useful!

1.7 CONSCIOUSNESS

How can an exposé of the main semiotic components of ‘talking about law’ as a pre-semiotic field of events, introduce the theme ‘consciousness’ after the ‘language’ issue? Does that not lacerate the observation about legal conversation as signifying power? In other words; should consciousness not be mentioned first because it is the source of language, and would the order of this chapter not better be reconsidered in that sense? The question is heavily burdened in philosophy and certainly more than solely a basis for understanding law. The concept of legal consciousness is very particular and incomparable with, for instance, psychological, physical or physiological consciousness. It is an outstanding theme in Occidental culture, although not many legal theoreticians embrace the theme.
But one should understand that the problem is absolutely not reduced to decisions about the level of articulation of legal consciousness. It is an illusion that citizens in a specific period of Occidental culture possess a specific consciousness about law while they speak, act or reflect. This exceptional and specific type of consciousness changed in the course of European history in various directions and socio-political contexts. Law remained the major component of that consciousness without, however, precisely defining or describing its properties and social determinations. The theme changed considerably; it was in the center of political and legal interest during the last decades of the nineteenth century, whereas a very different image was connected with it in the twentieth century. Whether it is equally important in the twenty-first century is difficult to decide.

1.7.1 Socio-Legal Consciousness

The twentieth century in Western Europe displayed indeed a worrisome image of legal consciousness. One can roughly say that this type of consciousness was, approximately since 1933 until the final days of the Second World War in 1945, dominated by the idea that law represented a reality created to conform to the will of the people. De Haan’s problem about the gap between a lawyer’s words and those that were audible on the street changed into the predominance of a political party, which was said to be acting on behalf of the volition of the people. A party thus decided the character of law and ultimately destined the features of reality. The same political forces were in effect in Eastern Europe in the aftermath of the Bolshevist revolution and the years of the Soviet Union deeply into the Second World War and until the fall of the Berlin Wall in 1989. A Marxist legal philosophy was already in the 1920s the servant of political views of the party, and legal consciousness was determined by that dictatorial interpretation of law and reality. The latter was in hindsight and roughly speaking effective from the Bolshevist revolution until 1989: a dark period in European culture in which a differentiation between facts of daily life and facts of law was suppressed. In that period an eventual distinction between legal facts and facts of reality/everyday life was an exclusively political issue. One of the consequences is that the distinction between those two is not without memories of a political dictatorship and war when it is introduced as a theme of legal theory.

It does not surprise that after the Second World War in Western Europe and before the fall of the Berlin Wall the concept of freedom dominated in discussion about law and reality. That was the case in the many
attempts to renew the pre-war designs of a (transcendental) phenomenology, in later drafts of structuralism and in attempts to outline deconstructivism. A citizen’s experience of freedom, or the concept of freedom as such, was in the forefront of all those considerations. The latter became the context of studying the role of consciousness and in particular of legal consciousness as the source of constructing reality.

This short outline indicates an important problem. It illustrates that the relation between law and reality belongs to the most important factors in our understanding of our consciousness pertaining to the real in its totality. That relation becomes clearly visible in the patterns of behavior of our citizenship. It remains important in all considerations pertaining to Law, State and Society to keep an eye on citizen opinion and behavior as a major component of social life. In that light is De Haan’s view on the gap between legal and citizen speech of utmost importance for us today. The concepts of freedom and consciousness fulfill a primordial role while no longer under a twentieth century political pressure.

1.7.2 The Historical School of Law

The two concepts were essential in the works and political decisions of Friedrich Karl von Savigny (1779–1861)9 and his inspirations during the unfolding of the German ‘Historical School of Law’. Von Savigny, impressed by the discussions and views of Immanuel Kant on law and citizenship, focused in particular on the foundation of the practice of a lawyer. His opinion was just the opposite of the social and political situations that occurred nearly a century later in Central Europe. The practices of a lawyer, he states, should never be based on political and ideological constructs of the mind. Law should unfold as an important social phenomenon that embraces values, norms and goals of a society and its citizens as profiled in the ‘Volksgeist’ (the spirit of the people).

Von Savigny does not envisage law as the work of social specialists but rather as a system inherited from our ancestors and their culture. It is clear that his attitude did not concern law in its empirical quality but emphasized its signification. That semiotic reference culminated in understanding law in parallel to the existence and actual worth of the classical Roman law: a system in its uniqueness. It will be clear that the name ‘Historical School of Law’ was based on that reference, and not on eventual applications of Roman law during his days in his society.

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His appeal to Roman law includes a variety of constitutive elements. The Historical School emphasized that law should always and under all circumstances be understood as an event. It means that law is for Von Savigny an evolutionary process. Our entire history should be understood as evolution and the law one encounters in every moment of that evolution is always the result of a becoming and never of a political or economic decision. Commentaries pertaining to the Historical School portray Von Savigny for that reason as a ‘social Darwinist before Darwin’. But whoever envisages law as an evolutionary process, will also underline that law aims at articulation. In the ‘becoming’ is the semiotic component, the flow from sign to significiation. In that regard has the Historical School a unique function in Occidental legal thought formation. Whoever understands significiation or meaning as the product of a historical evolution, interprets at the same time consciousness as a meaningful evolvement.

This view causes a distance between the empirical reality of law and the idea of a real law. This was documented in his famous 1814 essay Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft (Of the Vocation of our Age for Legislation and Jurisprudence) when he suggested that ‘the real law is not the same as the empirical reality of law’. We cannot read that line as if it concerned a historical fact far beyond our world of today! It means the opposite that the meaning of law should be expressed according to its full evolution – a task that is truly difficult to accomplish!

The Historical School appeals for that reason to the ‘Volk’ (people) as the preferred partner to create such a process of meaning-making. Its role is exquisite: being a concept of important economic and political signification, it is now given a new role through the creation of a new field of meaning, called ‘law’. ‘Volk’ implies that a human consciousness is challenged to unfold new constitutive powers, no matter whether they pertain to an individual or a collective consciousness. ‘Volk’ indicates a will to create a meaning, which empowers law to be effective in all regards.

1.7.3 Legal Consciousness

A very special aspect of the philosophy of the Historical School of Law is that the ‘Volk’ (the people) is understood as the ‘bearer of a legal consciousness’. That is inherent to the expression ‘Volksgeist’ (spirit of the people), an expression that was given a central position in the semiotics of law, which was explored in the work of Von Savigny. This expression gave the German jurisprudence in the midst of the nineteenth
Thoughts backing speech

century its flavor, its power and its cultural significance. Since that period, the term ‘legal consciousness’ acquired a key position, until it was oppressed by totally opposite political practices. That key position was not only important in Western Europe, but also in Eastern Europe. One must conclude that the understanding and use of the term ‘legal consciousness’ was for some decades at the end of the nineteenth and the beginning of the twentieth century a common basis for German and Russian jurists.

Hegel already observed that a well-understood concept of consciousness would solely be effective on the basis of a capacity to move in our conceptualizing mind from the individual towards the general and from there back to the individual. Neither of the two prevails in any thought formation pertaining to consciousness. An example is in the majority of European languages: in German, French, Italian, Spanish and Dutch, one can distinguish between ‘Recht’ (law) and ‘Gesetz’ (laws) but not in English. This had its consequences in English and US jurisprudence. The links between law(s) as a scientific/empirical concept on the one hand and law as justice or an ideal situation, in which law can flourish, is essential. An insight in legal consciousness is only possible on the basis of convergences. The concept of ‘legal consciousness’ remains dubious in meaning but also actual in politics, even in our days of semiotic approaches and analyses of consequences of what is said about them on the street!

Von Savigny understood this when he claimed that each right became acceptable and understandable by means of its fixation in language sustained by the life styles of the people, the community or the street – to mention more recent denominations of the German expression ‘Volk’. Do not forget, he would have said, that people need that fixation, that unity of language and life style, to find an expression for its many ways of life. Three different aspects come together in the life of people: the German expression mentions ‘Volksrecht’ (legal consciousness of people) expressing directly the feelings of citizens, the law of laws, the prescriptions of the law-makers, and the lawyers’ laws (German: Juristenrecht) that originate in legal science. This triad was the most important in the days between Von Savigny and the outbreak of the First World War in 1914. The idea of legal semiotics, under the guise of what then was called ‘legal significs’, was formulated only a few years before that catastrophic 1914 war.
1.7.4 Russian Legal Philosophy

The concept of a legal consciousness was widely spread in Europe by the Historical School, but its influence also reached far to the East and a Russian philosophy of law. We mention in this context the work of the Russian philosopher and lawyer Ivan A. Il’in (1883–1954) that dominated the Eastern-European legal world. He not only underlined the importance of the concept ‘legal consciousness’ but also tried to acquire access to law in its entire semiotic relevance via this notion.\(^{10}\) He therefore did not give any meaning to the differentiation between law of the people (Volk), law of the lawyers and law of the law-makers, because law should be understood in its totality, which is a cultural domain of first order importance and signification. One can understand that this approach became very near to the centuries-old concept of natural law. The latter does, however, suggest universality, which is a contrast to the reality of law in every cultural setting one can observe. The human mind, even expressing itself in a legal consciousness, is never a universal datum and never unfolding beyond boundaries of understanding and interpreting reality. This viewpoint brought Il’in to distance himself from natural law and yet recognized that law often strives for power and articulation beyond boundaries.

A background issue here is whether an individual or a collective consciousness should be regarded as the ultimate constitutive power. This was a most important consideration until the beginnings of the First World War. Its inner dynamics were expressed in the almost omnipresent question whether one can determine the notion of ‘people’ on the basis of the individual citizen. No wonder that in Il’in’s days of the Bolshevist revolution, Socialism, Marxism and the Communist Party regime around the 1920s, the relation between individual and society was the central issue for understanding the signification of law and legal discourse.

But what individual was envisaged? Does this focus the individual as a participant of ‘the people’ or the individual which functions as a legal subject, the individual that empowers the law? The years after 1924 in Russia, evolving towards the Soviet Union, and after 1933 in Germany, gave a clear insight. We remember the German slogan in the 1930s and 1940s: ‘Du Bist Nichts, Dein Volk ist Alles’ (You are Nothing, your People is Everything). This emphasis on the people has been a leading

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political principle in European culture. But Il’in’s texts aimed at the law and a legal system with individuals after the Soviet State and the Nazi German State in a later period of the twentieth century. It may be regretted, in the light of today’s European Union life, that Il’in’s words were not judged relevant when the foundations of the Union were formulated. EU law was outlined in treaties which embraced forms of legislation that focused on a perfection of democratic nation States through reinforcement of the four so-called ‘fundamental freedoms’ of a citizen instead of new forms of law, which could reach beyond thought patterns that embrace any possible form of State.11 And Il’in’s works were not widely known until recently, thanks to the translations and interpretations of Philip T. Grier.12 However, Alexey and Stanislovas underlined not long ago (without taking any semiotic relevance into account) that:

Russian scholarship at the end of the 20th and the beginnings of the 21st century was based on a well-developed sense of legal consciousness, the key ideas of which were the dependence of the content of popular legal consciousness on the dominant socialist ideology, the domination of public interest over the personal interest of citizens, and the citizen’s predominantly secular (atheist) perception of the world.13

Their words underline (1) the importance of today’s concept of legal consciousness and (2) a recent focus on the ongoing tensions between individual and society. For Il’in, the modern rule of law was more or less identical with a healthy legal consciousness in social life and society. For him, a true patriotism had everything to do with the performance of a State – a performance mirrored in a legal consciousness that aimed at a common desire and strong will to realize the Good. It is clear that a socio-cultural life is in this context understood as the life of human individuals that is based on psychic independence and a consciousness of one’s proper dignity, respect, trust, reliability and justice.

Has Il’in foreseen and prepared the life of modern man in the twentieth and twenty-first centuries with these ideas? Hesitations to answer that question in a positive sense relate to the critical view of legal and social

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12 See the bibliography in Il’in, supra note 10, as well as Ivan A. Il’in, The Philosophy of Hegel as a Doctrine of the Concreteness of God and Humanity, edited and translated by Philip T. Grier, Northwestern University Press, 2010–11 (2 volumes).
Legal conversation as signifier

explorations on the classical idea of a natural law. Il’in’s ideas were embedded in that type of legal thinking. The latter remains a problem in modern jurisprudence and legal theory, which overshadows legal semiotics as well. It is present in all considerations pertaining to the foundation of law and society. The heritage of Von Savigny and Il’in does not seem to be dissolved in a post-modern culture. Emphasis in legal positivism on the importance of written laws did not diminish the attractive character of natural law ideas. But it also did not delete an interest in the values and traditions of the concept of legal consciousness either. Alexey and Stanislovas highlighted the concept of legal consciousness in European and US thinking, especially in their comparison with the US Critical Legal Studies Movement as a form of critical awareness of law in society. However, a semiotics of law preserves traces of insight in the foundations of law as formulated in proximity to the concept of natural law, and honors Il’in with that view. The latter focuses on a legal consciousness based on citizen participation, which contributes to a legal system that provides a just and balanced society, as will be critically explained in the final paragraph of this chapter.

1.7.5 Expressivity: Visual and Verbal

The title of this chapter ‘Thoughts Backing Speech’ implies serious philosophical considerations. The ‘law-language’ relationship is their basis. If legal consciousness backs speech, then legal articulations (conversation belongs to articulation) will have to be regarded as the outcome of legal consciousness efforts, which are mediated by language. That is basic for all perspectives on law’s widely explored expressivity. Hence an omnipresent interest in the speech acts of lawyers in general, and judges or legislators in particular. But one should not forget that this is only one of the many possible perspectives: there is not only the view that consciousness constitutes the basis for linguistic utterances, but also the inverse, which emphasizes that acts of consciousness are formatted and kept alive by words and other forms of linguistic activity. There seems to be no other choice than honoring both viewpoints at the same time – and even that appears to be insecure! We meet here one of the central questions of legal consciousness: is a signifying force in law (which this book accredits to legal conversation, i.e. to ‘talking about law in non-legal settings’') solely verbal, or is a legal semiotic approach possible beyond the boundaries of linguistic expressiveness?

14 Alexey and Stanislovas, supra note 13.
An example directs us – again – to the street: modern roads, in city life as well as in rural surroundings, are filled with signs that characterize the landscape as if it were totally mastered by signifying forces. There is hardly any countryside in the Western world that escapes from this semiotic grip. Yet, there is one condition, which should be revisited and reconsidered: are traffic signs legally effective because of their visual quality? It is beyond doubt that the almost universal traffic signs aim at the regulation of individual patterns of behavior and a collective following of legal rules. But are those rules followed because of their functioning in the world of visual expressivity? Or are they effective because of an implicit link of visual signs to an inherent verbal expressivity? In other words: are legal signs always connected with linguistic expressivity or is their visual property accepted in law on an equal basis?

In her 2006 study of ‘The Rules of the Road’, A. Wagner suggests verbal- and non-verbal expressivity to be equally valid in law and legal discourse:

The interaction between signs and institutional context is at the core of this analysis. The production and diffusion of images tells us a great deal about the meaning attributed to these signs ... By their simplicity in meaning, the Rules of the Road show how simple and unconscious these rules have now become. They are good substitutes for textuality (i.e. written formulas) and reveal the fact that legal knowledge about traffic road regulations are known and visually codified.

She further explains, how ‘the perception of meaning of road signs, road markings and traffic lights’ is, in the words of Umberto Eco, ‘under the domain of meaning-making operations of the human imagination literally the ability to make and remake images and the feelings they evoke in the mind’ so that ‘absence of textuality is shown’ and demonstrates ‘what the consensus of the symbolic among the society is and how pervasive its message can be’. The example in this study aims at a disputable conclusion. They want to illustrate an equivalence of the visual and the verbal in law. At the end, it would lead to a ‘seeing is speaking; a view equals a speech act’ in law. Do I really pay my fine when the police officer shows me a ticket like there was a traffic sign shown to me at the roadside? Is there not a distance between a quality and a faculty of

expressivity? Is the emphasis on non-verbal dimensions in human behavior not a challenge to perhaps widen but certainly not abolish the power of language in law? Does the law-language relation always prevail?

Richard Mohr suggested in the same issue of the quoted journal the opinion that ‘everyday life is continually reconstituting the meanings of law and state’.16 If that is the case, then this reconstituting force is linguistic or language-bound by nature, one should underline. This appears to be extremely self-evident, so that it is often forgotten to consider it. Mohr gives an example near to several others in this book: ‘Even if a person’, he remarks, ‘has been duly sworn as a judge, the opinions she expresses over dinner do not have the force of law: the judge must also be in an authorized place. The power of the law is projected from the bench where the judge sits.’ But no attention is given to the difference between the quality of expressiveness in legal language and the faculty of the bench. Even when this place is indicated by appropriate symbols, which confirm ‘the judge’s authority to give diction to the law (juris)’, there should be attention given to language as the semiotic means to ‘give diction to the law’. Also in this example the link between law and language prevails, which puts the distance between visual and linguistic expression into perspective.

That link represents a cultural challenge on its own. The challenge focuses on our understanding of consciousness in general and legal consciousness in particular. It brings us to deeper anchored notions of language than those of just a communicative power, and it illustrates in how far law – despite its immense social relevance – is one of the many discourses in modern life. The phenomenon of language reaches other levels of life than those of a pure exchange of expressiveness: it represents a continuous reach of an individual or a group of human individuals for transparency in relation with reality. A speaker is most often characterized by the desire to articulate a world around. It is often said that the more gifted and inspired the speaker is, the clearer reality will be expressed. Unfolding that talent is indeed not a strictly individual gift; it engages generations and a cultural era that stimulates such capacity. The latter is most probably an essential component of human consciousness, which leaves purely individual features behind. This was one of the motives of the Historical School of Law, as well as the work of the Russian jurist and philosopher Ivan Il’in. Legal consciousness

illustrates that a human consciousness is not a more or less passive force-field in which human activity can hardly be profiled other than with an unclear concept of ‘people’. It is, on the contrary, a primary force of expressivity in its relation with reality.

Indeed, law and language are closely tied for legal philosophers in the twenty-first century, and these ties are beyond doubt an important part of the cultural heritage of the Occident. Law’s expressivity is dominated by the scope of linguistic possibilities of articulation. That became a weighty issue of the era. Never before were plurality and the multicultural so evident as in these days. The fact that TV programs and smart phones bring varieties of mother tongues into one and the same daily life at one and the same moment is only a sign of that new complexity. Can law still limit its expressivity to one tongue? Do single-language legal problems still exist? Law’s variety of valid meanings suggests the opposite. Any single meaning of a written law will be surpassed by its multilingual context despite all positivisms hidden in the mind of the modern lawyer. This simple observation touches the concept of legal consciousness. The latter must be understood in its deep dependence on the tongue of individual and society. Legal consciousness is no longer seen as a private attitude, the will or inner force of a ‘Volk’ or nation, nor of a political body of any type. The question came to the fore whether a legal consciousness fits to the new complexities of articulation that characterize a twenty-first century. The emphasis changed from mastering a socio-legal system and its political consequences into the mastering of an unheard complexity of expressivity related to law, which is honored as a human potential.

### 1.7.6 Significs and Human Rights

An understanding of legal consciousness as the foundation for human expressivity and in particular for articulating the language of law was already targeted in the first decades of the twentieth century. Law was, next to sciences, mathematics, literature and logic, a field of discussion and research of the Amsterdam Signific Circle in the years from 1892 to 1926.\(^{17}\) During the time the Circle was active, the First World War had

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not ended and a desire to broaden the notion of legal consciousness in daily life and law was a shared, legitimate and fully understandable desire. That attitude can be read in often important philosophical texts from the famous Dutch author Frederik van Eeden or the mathematicians and logicians L. E. J. Brouwer and G. Mannoury – all more or less inspired by the English Victoria Lady Welby, who, close to the US philosopher Charles S. Peirce, had introduced the idea of \textit{significs}. A generally debated problem in the Circle pertained to the disturbing distance between reality in the words of the citizen and reality expressed in the words of a lawyer. And the concept of a \textit{natural law} played a central political role at that time: patriotism, counter-revolution, Bolshevik revolution, criticisms pertaining to State and Church were alive. We still wrestle, a century later, with that problem of the gap between what we now characterize as two types of language!

The foundations and developments of a \textit{legal significs} (later documented as ‘legal semiotics’) unfolded through the work of the Dutch author, poet, politician and lawyer Jacob Israël de Haan (1881–1924). The signific approach of De Haan is important for us who live after the ‘linguistic turn’ in philosophy. However, De Haan already accentuated that law is definitively connected to the power and uses of language, and thus embraced the ‘law-language’ thesis.

Our everyday talking about law appears to embrace a secret: \textit{the secret of the non-naïve in the midst of an everyday language discourse}. In how far may the artificial change the significance of words spoken on the street, change the intentions of participating groups or even change the purposes of politicians? The question is never solved, but pertains to a particular understanding of a general concept called ‘\textit{legal consciousness}’, which is used on streets as well as in courts. De Haan already formulated the issue in his 1916 inaugural lecture at the University of Amsterdam.\textsuperscript{18} He underlined the gap between our everyday language and the language of the law and its functionaries, which is caused by a gap in the multiple uses of signs and in the many meanings embraced in those two worlds. As a consequence, he was hesitating whether lawyers can express in words what happens in reality. For him, it was a matter of

communication between two languages, a natural and an artificial language – the latter embedded in the first, and the major question was formulated in his lecture: are lawyers able to bridge the gap between their language and their speech acts and the language spoken on the street? That issue fascinates until our days: is our legal consciousness a natural feeling or the expression of a sophisticated artificial language? We always operate one or another form of artificial language in daily life, for instance when using our computer or our smart phone – so why not the language and consciousness of law?

A basic signific slogan was: ‘better law through better language’,

De Haan claims in his PhD thesis that a ‘better language is a better thought formation. And better thinking is better law.’ A first focus is on the language of law as a means to develop a legal system that is just and socially relevant. Whoever wants to complete that task, depends on language. Particularly laws, as texts that should initiate specific patterns of behavior, must be formulated in clear terms. ‘The insight that the language of law should be reinforced is important in the eyes of those who apply laws and the law in general as a truly social science’, De Haan writes.

That challenge to lawyers and the law is also heard in our days. The interest in the linguistic dimensions of law has been enforced by legal semiotics, also by those who were first fascinated by the idea of a signific approach of the task. De Haan, Victoria Lady Welby, Frederik van Eeden and even Martin Buber were (among others) united in embracing that idea and receiving that message. Their ideal was in the construction of a language in which all lack of clarity vanished. A better harmony among citizens and their law – in fact a harmony of two cultures – should result.

There is a remarkable link between the signific/semiotic ideals and early developments leading towards the human rights concept. They expanded via multiple interpretations of the concept of natural law. Several anchors are in the publications of Victoria Lady Welby, in particular her 1903 book What is Meaning?: Studies in the Development of Significance, and her Significs and Language, 1911. Both publications

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20 Jacob Israel de Haan, Rechtskundige Significa en hare toepassing op de begrippen ‘aansprakelijk, verantwoordelijk, toerekeningsvatbaar’ (Legal Significs and its Application to the Concepts ‘Liable’, ‘Responsible’ and ‘Accountable’), Versluys, Amsterdam, 1916, p. 69. See also Broekman and Backer, supra note 18, pp. 73–89.
share an equal disposition, an interest in the concept ‘legal consciousness’ and the gap between multiple types of language that is inherent in both. Their ties with the German Historical School and Russian Legal Philosophy on the one hand and the Amsterdam Significs Circle are stronger than we ever knew. It impresses to learn about common insights in the texts of Ivan A. Il’in and De Haan. The latter must have known the Russian legal philosopher, who was also close to Von Savigny, and the philosophical/political discussions about natural law. However, the works of Il’in were not published when De Haan visited Russia a few times in and around 1912. He visited, analyzed and highly criticized Russian prisons, while using the methods that are still used in our days: visits, document analyses, reporting conversations, interviewing prisoners. Humanitarian questions and criminal law practiced in prison camps were the topics of his investigation. Peter Kropotkin had sustained this activity when De Haan and Frederik van Eeden visited him in London in 1912. The visits to Russia were in later years never researched, neither in relation to significs nor to forensic semiotics. De Haan’s 1913 Dutch publication *In Russische Gevangenissen* did not play a role in his later semiotic publications. Political interest in the life and thoughts of De Haan dominated and was enforced by his often changing Zionistic attitudes as well as the fact that he became the victim of the first political murder in Jerusalem, in 1924.

However, a signific/semiotic approach and methodology is surprisingly effective in that book. That approach is backed by a general impression of the author’s attitude in the entire text. His book does not seem consciously critical of a State, a government or even a political system but is dominated by a deep concern. The latter has a broad sociological intuition as its background and foundation. One of the components of De Haan’s view is that a State always has a substance, which is primordially its population. It fascinated that De Haan describes in how many ways the government has nominated its population in smaller and smaller groups, which are given even more detailed names. That name-giving and specific determination appeared to have become a totalitarian means of governing – an act and attitude creeping even into the prison floors and cells, which were divided in correspondence with those names.

More important was De Haan’s explanation of one of its semiotic effects: the dominating legal system in the country did not know or recognize any legal subject anymore, but only groups of subjects. In

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other words: the procedure of highly differentiated naming caused individuals to disappear in law and the legal system! Where individuals are absent as the result of a system of naming, other names come up: ‘the people’ will oppose ‘the government’, and ‘politicians’ as well as ‘intellectuals’ unite in that action. The vocabulary of political activism, which one encounters in modern public places, has its roots in the Russian system during the second decade of the twentieth century.

Where the people contest governance measures, private persons and private organizations take over. That was especially the case in the field of youth welfare work while no special juvenile courts existed.

That is the reason why in Russia an initiative of private persons is more effective than elsewhere. One does not try to become supported by the government. A juvenile criminal is to a large extent a matter of private care and perhaps of a few liberal councils of large cities. One strives in general, to keep the government at distance. What is in the hands of the government seems hopelessly lost. The power and dedication of non-revolutionary Russian citizens working at a neutral level causes Russia to surpass other countries in many regards ... That is in particular the case when the care for juvenile criminals is concerned.22

The latter was progressive in socio-legal as well as in political regards through the exceptionally important and effective participation of care-taking psychiatrists. That work primarily took place in pavilions, which were systematically in a rather loose contact with the rigid police-guarded prison system.23 But notice that these pavilions socially organized juvenile criminality long before any juvenile laws were conceived and in power! Those social forms of living together were understood as a sign of a new and eagerly desired type of law. De Haan acknowledged that sign during his analyses and his subsequent visits. We venture to formulate the opinion that De Haan's interest in legal consciousness in parallel with his humanitarian attitude was fruitful in the framework of his views in legal theory and legal-semiotic practice as it was decidedly in his socio-political observations.

His ideas and interviews were given importance in Russia as well as in Amsterdam and in signfic (semiotic) circles. Once he returned to Amsterdam during the beginnings of the First World War, he founded an influential Social Democratic Labor Union (SDAP) Committee in which Frederik van Eeden and the Dutch poetess Henriette Roland Holst also participated. It is essential that De Haan understood the positions of the

22 J. I. de Haan, supra note 21, p. 31ff.
Russian prisoners as a sign of a more complex signification process – as Lady Welby would have done. Legal consciousness became in that manner defined at the borderlines of legal discourse and thus approximated an enormous political relevance. It implied the development of a new and different concept, which received only decades later, in the work of Eleanor Roosevelt in 1948, the name ‘Human Rights’. Importantly, De Haan’s legal significs broadened the meaning and significance of a legal and rights consciousness. The concept reached from natural law to human rights.

His visits to Russian prisons, his discussions and reflections on that issue, were inspired by the need of this extension of legal conceptuality towards deep layers of political consciousness. No wonder that his attempts were honored in naming him a precursor of ‘Amnesty International’ and a predecessor of the ‘Human Rights Watch’. It fascinates that the recognition of the multilayered character of language, a specific theme of semiotics, leads to such globally relevant conclusions. De Haan’s thoughts illustrate that the move from a simple sign recognition to complex systems of signification, and vice versa, have implications that also reach beyond the boundaries of law.

1.7.7 Multilingual Consciousness

The system of signification in which we are all enveloped is a system of multiple languages; the multiplicity of those languages does not only function as an expression or communication but is also a sign of our speech performance and thus our abilities and qualities as a speaker in plural cultural contexts. Words and cultural differentiations correlate, and those are often a problem for a lawyer or a judge. Streams of migrants in Europe and elsewhere make visible that a legal decision pertaining to a subject that is anchored in one religious and cultural set of norms and values is difficult to realize in another. Today, geographical locations change more quickly and easily than cultural roots. Basic values, norms and human rights interpretations are at issue once a multilingual consciousness becomes objected to a monolingual consciousness. Languages and cultural patterns function as a sign of differences that are often troublesome to bridge within one generation. Sociologists concluded this since the 1950s while analyzing the world of Polish peasants in the US. A standard example in the European Union of today is the gap between traditional Christian and Muslim notions of life and norms. What is ‘normal’ or ‘desired’ in the one is ‘absurd’ or ‘unjust’ in the other. There
is no way to decide between one or another system of values being ‘wrong’ or being ‘just’ – a view that many politicians try to achieve in vain.

This discussion, itself an example of the implicit difficulties of a multilingual approach and life style, is an important political signifier. The law-language relation is a central issue in politically critical situations. Tensions among them do not dissolve by legal or political means. A possible clue, semiotic by nature, is the insight that language does not describe, but evokes reality. Only an impossible form of positivism formulates the question which person will be able or entitled to solve the conflict. The actor of an evocation in this context is not personalized or dependent upon an acting subject – the actor is an impersonal power active in the field of footing, of human relations, and in particular in being receptive to the appeal of an o/Other. Are law and legal discourse able to take this dimension into account?

The question is the more urgent since the Occidental culture became roughly confronted with the capacity to master more than one language instead of exclusively one particular mother tongue. The clash between this post-modern requirement and the deeply engraved monolingual features of law and legal thought patterns (law is the law as expressed in one particular language; law expressed in another language opens the gates of ‘international’ law) is understandable. Legal jargon has focused on that clash by referring to the eventual plural features of a legal consciousness. This does not, however, solve the issue legally or politically.

A legal consciousness will always and in all its cultural and legal forms be appreciated and regarded as an asset of all of us: citizens on the street, in parks and other public places as well as participants in a law office or a court. That view is basic for understanding a consciousness as a footing or a relation, and not as a possession. De Haan already remarked in a 1917 publication that semiotic views on law must differentiate between layers of meaning and first of all focus on the dynamics of materialization, which endangers law as well as language: ‘Think of legal expressions such as “having”, “acquiring”, “losing”, “transferring” a right. Those treat a right as an object and not as a relation. A legal language, which treats a right as a relation, would liberate the law from its materialist character.’24 In other words: laws are

24 J. I. de Haan: ‘Taal en Rechtswetenschap’ (Language and Legal Science), Weekblad van het Recht, No. 10103, 1917; also published in G. C. J. J. van den Bergh, De taal zegt meer dan zij verantwoorden kan. Een keuze uit de verspreide
not things, but human relations. The malady of modern culture is in De Haan’s eyes the Occidental fascination by possession and the vision of reality as if it were a cosmos of commodities.

But that malady is a sign of a deeper problem in Occidental culture. The sign pertains to our understanding of law and legal discourse as a major force that serves society. If the essence of law is in relations among human individuals rather than in the ownership of properties, then those relations are understood like linguistics understands relations: as relations among separate individuals. Theories of language and legal theory focus on ‘speaker–hearer’ relations; those are law’s model for sociality. Dimensions of a legal consciousness are by consequence also determined by such one-to-one relations. ‘So speech, so justice’: good terms are terms among individual parties. The need to speak the same language is rooted in this view of man and society, and reminds us that this view of relations was already the basis for the social contract theories of Hobbes, Grotius, Descartes and others. The way language is understood (as an instrument to relate individuals) has since those days been fundamental. Inter-subjectivity and interactivity were names for individuals and independent parties, which were created by a relation-producing apparatus. The latter is the ultimate corpus to understand and analyze by means of legal semiotics – an approach with great critical potential. There is in this light more than one critical consideration implied in the concept of ‘legal consciousness’, although it has disappeared from legal theory and philosophy since the midst of the twentieth century.

First, the dominance of the ‘speaker–hearer model’ has suppressed in which dimensions a legal consciousness is a power of articulation. The latter is incomplete in any ‘speaker–hearer’ relationship. The appeal of the o/Other is silenced when law remains to be the language of two. Even the discussions with Martin Buber and his dialogue philosophy in ‘Ich und Du’ in the Amsterdam Signific Circle did not entirely overcome this implicit restriction in our understanding of law’s potential to fully understand human relations. Second, the semiotic approach illustrates that law and legal consciousness as a cultural and historical phenomenon should lead to a broad understanding of law’s inherent power of articulation. Law and legal discourse are active in the history of a collective human consciousness: the two participate in modes far beyond individual initiatives or party interests. Third, our considerations also result from semiotic analyses of the ‘legal consciousness’ concept. It
suggests that if the first person, the speaker, dominates the way law enforces that exclusive position, then there is no understanding possible of any access of the o/Other to a common pattern of speech and language. In other words: the road to signification by means of an active legal consciousness appears to be blocked by our (materialist) understanding of law.

A conclusion must be formulated.

What originated a century ago but vanished in our modern understanding of law should be restored: a renewed appreciation of the concept ‘legal consciousness’, in which the language of law’s inner logic and the language of law’s logic of relations unite in appreciating the otherness of the other.

The two languages can perform this task through strengthening the experience that law can speak the language of appeal instead of claim, including an ‘appealing to the other’ without losing one’s self – a challenge that can loudly be heard on the street and is definitively the expression of a multilingual consciousness.

1.8 NATURALNESS

‘Nature’: the word, the concept, the notion presents itself as innocent, without many complex consequences and useful for everyone in every type of language. Above all: everyone knows what should be articulated by the word, without further ado. And the latter is the problem! Many of the above pages tried to make clear that even a mention of the word ‘nature’ (in particular when used as a legal concept) has its problems. Do we not utter the word ‘nature’ to underline that in this case we do not think about any reflexivity? Of course: we pronounce ‘nature’ most naturally. The problem is that even this type of expressivity indicates a particular complication, since it embraces a naïve-non-reflexivity together with varying degrees of reflection. What is ‘nature’? And: what is ‘natural’? Is it ‘Mother Nature’, is it ‘Evidence’ – or is it ‘a matter of course’? How does one know? We often disregard any answer and include the word along the lines of the many traditional ways of performing speech. In other words: the expression ‘nature’ entices us to maintain a certain naïveté in language.
1.8.1 The Natural, and Reflexivity

Modern forms of life illustrate the need to unfold and understand more encompassing forms of reflexivity. Differences between Occidental culture in the sixteenth and the twenty-first centuries illustrate this need very clearly, but the means to achieve more insight remain a philosophical problem. In law, jurisprudence and legal sciences ‘the natural’ is a genuine problem that has hitherto not been solved by philosophers.

That leads to one of the central issues of legal philosophy: in how far is ‘legal conversation’ or ‘talking about law’ a matter of a specific level of language, and can that specificity be determined as the ‘natural’ or ‘everyday’ language?

Basic to this approach is the recognition that language is a multileveled phenomenon with many and often very different features. A natural language is layered at a pre-semiotic level, a level at which signs are taken as natural and significations as evident. That characterizes the expression ‘talking about law’ and the predominant motive for underlining the non-naïve-natural character of legal language and its discourse(s). Do not forget: the leveled character of law’s language is a sign of the multiple implications of knowledge formation. That sign situation embraces the ‘natural’ as one of its basic notions.

Our talking about law on the street meets our ability to reflect upon law. That reflection allows more subtle insights in law as a linguistic phenomenon. A major condition is in the shift from naïve-natural towards non-naïve-natural positions or attitudes, and vice versa.25 The shift must be understood as a shift in the innermost regions of the natural itself. Any unfolding of human knowledge – be that knowledge religious, philosophical or scientific, be it in relation to nature and natural facts or to society and social facts – begins with the introduction of fragments of non-naïveté. This process is neither a simple negation within nature nor a shrewd dialectical move in science and thought. It is in itself a fragment of cosmic dimensions and its most powerful component is the human capacity to articulate linguistically. Language plays a major role and a simple speech act illustrates the ties with body movements, looks and movements. All are present in stories we tell or narratives we reproduce – and all are distanced from the naïve-natural position.

There is, however, more to register than a simple shift from naïveté to non-naïveté. The natural’s naïveté can never disappear completely; it is

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already articulated in the fact that no artificial language and also no discourse of whatever discipline can exist without an encompassing natural or everyday language. Although it cannot disappear, it can change. The major and all-determining change is from naïve to non-naïve, as has already been underlined several times. But the naturalness remains natural during the first steps of that change, a non-naïve-naturalness does exist and is often heard in public when an ‘uh …’ is uttered. With that sound, a certain uncertainty arises: a second thought that will be followed by a third, which is an interruption of evidence with deeply rooted consequences. First steps of the non-naïve are filled with naturalness. But they already support a distance from the naïve. Naturalness appears as an unfolding balance between the two. A long way towards signification seems ahead. The balance will always be represented in language. Our speech acts are witness to the degree of balance and thus live from the progress made towards signification. ‘Am I clear’? That question always indicates a phase in the unfolding of meaning: ‘do you understand’?

1.8.2 Understanding Law

It would be understandable if law in general becomes categorized as a clear form of absolute non-naïveté. From that legal viewpoint, reality would then be completely naïve-natural and law its ruling force. The difference would be a solid ground for law to manage and thus to intervene in the stream of everyday reality. But this view does not honor the differentiations in the heart of the natural, which are also relevant for law and legal discourse. A philosophical remark, which is never discussed in legal theory, will come to the fore: law can only characterize itself as ‘non-naïve’ in social reality if it accepts the ‘naïve-natural’ in itself as an articulation component. The latter is the essence of the expression ‘talking about law’ and of our conclusion that there exists on the street a ‘pre-semiotic’ field of understanding law.

As explained, roots of that viewpoint are in the complexity of the natural as a cultural concept. Indeed, it seems undeniable that ‘nature’ and ‘the natural’ can be terms loaded with a different meaning and signification than the Occident provided. But the center of our reasoning remains the term ‘natural’. The latter will never evaporate under the pressure of a non-naïve positioning; changes in naïveté do not annihilate the nature concept. The opposite seems true: ‘the natural’ changes its character where non-naïveté develops; it opens up to reflection, it creates perspectives on a new path from sign to signification and to new thought formations with a deeper understanding of law. This has far-reaching
consequences of a philosophical and cultural character. Changes in nature take place in the stream from naïve-natural to non-naïve-natural attitudes, positions and viewpoints, their vice versa included. Those changes are cosmic, and thus are ours: they include man although they are not man-made. New attitudes and positions are components of the unfolding of nature and its history in which the human mind is enveloped.

Understanding law is not a matter of a subject–object relationship, but in the first place of a participation in the unfolding of natural processes and the recognition of otherness of the other.

It has always been a problem to understand the role of the subject when the need to understand law becomes an urgent issue. Now we can see that this problem is characterized as a different type of holism: not man creates the whole but the whole creates human creative positions. Law is a sign of that new type of holism, and its signification a facet.

1.8.3 Holism, Naturalness

Emphasis is not on the creative powers of human consciousness as an autonomous source of knowledge, but rather on the inclusion of those powers in nature as a process. Law has a surprising feature in common with a work of art: artwork and law appear both as man-made – a feature that leaves naïve-natural positions behind while striving for articulation as a specific concept takes place. But one remembers the famous considerations of Kant on the question ‘what is law’, including the fact that the question will never be correctly answered. That lack or difficulty to answer is engendered by the ‘man-made’ dimension, which is often connected with the ‘I know’ scheme used in all those cases. In the expression: ‘I know what; I know how’ knowledge is involved, and human knowledge is in our minds determined by a subject–object relationship. Because that is the case, one must expect that law’s essence (which is a concept) could be perceived as a sensible object within the domain of a traditional subject–object relationship. It is to Kant’s merit to have concluded that this cannot be the case.

The seminal question for ‘knowing law’ in parallel to ‘knowing an artwork’ is in the consideration: how can the concepts of art and law be present in the world of signs and sensations, meanings and significances? Their presence is beyond doubt a matter of a more transcendental character: what logic makes this presence knowable? What logic is at stake when the view of a painting, a water color, an etching, a statue, the sound of a harp, an orchestra, a disc, the reading of a text, a poem, a law or an ingenious construction plan has entered human life and the human mind as a sensory event and eventually an object? It is evident that the
answer refers to the logic of life, of which logic as a philosophical consideration in the tradition of human thought formations in a certain period of humanity and within a certain culture is a component. The ‘I know’ expression is solely a phenomenon within the broader context of the latter – a phenomenon that is certainly not able to construct a ‘whole’ or a ‘universality’ nor a ‘naturalness’ tout court.

1.8.4 The Self

The same is true when we regard any ‘talking about law’. One often encounters a complaint in conversation: ‘as an individual, you feel very much alone and completely powerless in law, despite the support of lawyers’. In other words: what do loneliness or powerlessness mean here? It requires traveling a long distance and a walk on various philosophical byways to find fragments leading to an answer on that question. All of them touch the logic that backs the concept of presence, and all refer to that presence in the form of some type of perception.

How do we perceive a concept in life? Not with our eyes, but we perceive in the first place through organizing life in such a way that a perception can and will be realized. This organization requires the presence of o/Others in various forms: others in the form of the natural, other persons, but also others in the form of cultural histories, habits, institutions and phenomena, as well as others as stories, narratives, eventually discourses, and others as conceptions with a logical character. The majority of these forms of o/Otherness are called: language. Every detail of what organizes presence, is in need of, or is: language. Is language the ultimate form of the Holon in human life?

That question has multidimensional consequences. It would mean that loneliness and powerlessness – the abovementioned complaint in much talking about law – is not an issue that could be solved by social measures, by financial remodeling of the encounter with a lawyer, by being more clear in the reasoning of judges, in more accessibility to sources and thought patterns of jurists, or by filling in the gap between a natural and a professional language. The answer is in the positioning of the Self.

An ‘I’ that does not consider itself to be a component of a larger totality is condemned to be left on its own, because it seems unable to accept the meaning of ‘receiving’ and ‘otherness’ in human life. In other words, a subject–object relationship is never the final instance to decide about inter-individual relations. And what is an obvious consequence: if
an ‘I’ or a ‘Self’ is *not* able to see itself as a component of a larger totality, then it is also not able to engage in a conversation or any speech act.

To take the steps of a discourse in our stride is normally an act without awareness of spatial components of our speech or the limits of our language. A multilingual consciousness does experience this challenge, although it often withstands the influence of the o/Other and otherness, which is in essence a rejection of its belonging to dimensions reaching beyond the ‘I’. The Latin expression ‘*discurrere*’ indicates the roots of the word ‘discourse’, and an enlargement of speech dimensions is incorporated here: one can ‘walk through’ speech dimensions and encounter others speakers! Such language dimensions are *not*, however, determined by the speech quality or capacity of an individual. Solely an attitude towards the plural defines a speaking human individual. This invites one to rethink the speech act in the frame of talk and conversation. Each speech act (also in legal conversation) engenders a presence that is larger and more encompassing than the speaking subject envisions in its singularity.

*Speech is a sign of freedom and presence.* It does not determine what is said, but regards the act of speaking itself. Do not forget that the latter, as Jacques Derrida underlined in many of his texts, occurs solely amidst others and otherness. However, one has to consider that this insight is formulated in a particular context: the predominance of speech. The speaking seems more important than any form of silence, the writing and the emergence of texts and discourses more than holding one’s tongue. That predominance can apparently not be abolished. Presence articulated in speech cannot be dissolved, annihilated or elevated – not even by silence. Speaking is a form of presence that cannot be denied.

The power of speech and the power of presence will ultimately become identical in all human linguistic activity. A *Self* does not recognize or know *it-Self* in silence! The natural character of language and speech in Occidental culture is the key to understanding reality. Even if a jurist were able to hold their tongue, that silence would be powerfully embedded in law’s speech. The question whether silence is an interruption of speaking, melts down in the predominance of speech. This dominance of performance illustrates the limitations of a legal consciousness. The latter has normally been understood as a capacity to perform speech acts – an uninterrupted activity that does not appreciate silence. The professional speech activity of the lawyer does not allow any interval. A lawyer’s mother tongue, which will be experienced as a specific discourse, is in essence a continuum. Any threat to break this continuum down (even by moments of silence) will be qualified as an
1.9 INTERACTION

Interaction is one of the pillars of the shift towards the non-naïve that characterizes the path from sign to signification. We already highlighted the multiple meanings of interactivity and their in-built difference between collegiality and cooperation. But if the emphasis is on interaction, a specific meaning comes to the fore when law is at stake. Close ties between nature and interaction are basic for legal articulations from streets to courts. But one has to understand that the non-naïve is a matter of nature (in the sense of reality naturally given) and of the social (in the sense of preparedness to accept the o/Other) – an insight particularly precious for lawyer and judge alike. All positions in law and social life are by definition ‘shared positions’. So there are two foundational contexts of the interaction concept: first is the specificity of legal discourse and second the institutional character of law. Both, discourse and institution are understood as thought patterns that support legal speech activity in a specific manner.

1.9.1 Dynamics of Discourse

Law has principally to do with a shift from naïve-natural towards non-naïve-natural languages – their thought patterns and influences on patterns of behavior included. The dynamics of law seem to have their foundation in continuous changes from naïve to non-naïve views, positions and attitudes. These are culturally anchored phenomena at a distance from any psychological or psychoanalytical restriction. To be a skilled lawyer or an experienced jurist implies insight and mastering of those shifts from naïveté to non-naïveté, and vice versa. To be knowledgeable in legal practice thus implies mastering a shift from one to the other as well as from the other to the one continuously. It thus means that with regard to thought patterns, traditions of explanation and understanding, legal practice is first of all a matter of mastering social dynamics.

The word ‘mastering’ is used in its most powerful meaning; the balances to be mastered in legal practices are subtle, complicated and require the mind of a pioneer. Legal security and legal certainty should not do away with renewals, changes of view or adaptation of the mind with regard to new techniques, to new data, or to political or economic interests. Naïve and not-naïve are continuously on the move. Nothing
seems so challenging in law as the evident, the normal, the given, the traditional and the safe! Those dynamics are in law represented by the challenge of the shift, which is in itself a beginning and a finality of dynamics. Interaction is in this view an omnipotent requirement within legal discourse. The latter dominates all phases at all moments of law’s proper unfolding. Law is by definition an interactive occurrence because of its dynamic character that focuses on a plurality of participants. The position of various speakers in the discourse of law reflects this necessity of interaction as well as the need for a dynamic unfolding of speech, thought and action.

1.9.2 Managing Meaning

Interactivity may belong to the potential to define law; interactivity is always encapsulated in a broader context; the latter is in the first place the mastering and management of meaning. Lawyers are professionals in meaning-making, and it is interesting that their task is often understood as a most powerful mastering of non-naïve-natural positions. However, there are limits to this activity, even if one agrees with this characterization. Interaction and interactivity among participants of a legal discourse can never be completely non-naïve, because its opposite (the naïveté) remains an important force. This does ultimately mean that jurists, who indeed do manage meaning, can unfold that management only within boundaries. The many cases of repetition in a lawyer’s discourse illustrate this observation. A repeated term, a frequently used expression, a word in various contexts repeated in law’s discourse, focuses on stages within the evolution and inner dynamics of law and its language.

We speak, for instance, of a ‘victim’ in the language of the street. Someone is a victim of aggression in traffic, of a car accident or plane crash, the victim of a company’s incorrect behavior or the victim of an illness. A lawyer repeats the word but handles the context of that word in connection with the situation in which he wants it understood. The meaning of the word victim in his or her discourse will without further clarification be specified and managed through its proximity to concepts such as ‘suspect’, ‘accountability’, ‘injury’ or ‘reimbursement’. A field of meanings is created, often qualified as belonging to a professional language, and mostly at a distance from the everyday articulations we regard as our life-world. There is no need to explain: the lawyer’s speech, in particular when it demonstrates his mastery of meanings, creates a degree of alienation. This is the most important issue in the context of interaction and interactivity in law’s discourse. Meanings brought to the
fore should meet that fore; they must have a communicative base and serve understanding and commonness. That view implies restriction in so far as the management of meaning is concerned. All interactivity needs a frame of expressivity, of meaning management, of applicability – and only within those frameworks can a lawyer’s word be (inter)active and a value to society. This restrictive component is called ‘institution’. It was said before: law is institutionally anchored in Occidental culture.

1.9.3 Institution

It is not simple to answer the question what this expression ‘institutionally anchored in Occidental culture’ means as a component of legal discourse. Its formulation refers to important parts of legal philosophy, at least in the last two centuries, and there is equally important research from the second half of the twentieth century. All have in common that ‘institution’ and ‘institutional’ refer to strong ties to a State or comparable organizations, to (often international) corporations as well as to deeply engraved habits, uses, prescriptions and other cultural values, which have an obligatory character for their participant citizens. The major obligation in the concept ‘institutional’ is to develop a strong identification with the dominant features of the institution, so that the recognition of an identity, a view, or a form of participation and thought formation, can easily take place. The State’s virtue and interest is to offer powerful frames for thought patterns and social behavior, which unite its citizens, make them identifiable and create conformity, so that questions about the quality of interactivity do not even come up. States and corporations are in many regards identical, and interactive commonness is one of their major conditions for surviving.

Do not forget that the concept ‘institutional’ is a thought pattern and a social organization at the same time. No wonder that Law relates to States: the two are sublime and complex thought patterns and effective social organizations, and both reinforce each other in every decision or judgment. Occidental law has, for at least four centuries, determined that the legal concept of contract is one of the most outstanding manifestations of freedom. The latter is institutionally anchored, so that Western concepts of freedom, legally determined, do in essence lack freedom. The philosophical discussion about differences between ‘freedom to …’ and, for instance, ‘freedom from …’ mask the foundational ambiguity in the concept, caused by its roots in institutional thinking.

Words in law are signs of freedom, but institutions limit their meanings and socially modeled expressions repeat vested State structures and
suggest that judges judge in courts, that courts are privileged supporters of the democratic State and the latter supports the rule of law. Institutional requirements determine the meaning, the value, the evolution and evaluation of the constitutional State in a mixture of terms and codes, which illustrate the necessity to intermingle law and politics. Even a democracy is a *cratos* (power) founded upon a *legally codified* interactivity of its citizens. Notice that even voting rights are limited in the US as well as in the European Union, and that these are determined and managed by States and State interests – not to mention corporate interests.

A conclusion fascinates: a repulsion of the naïveté and a legally refined activity to further the non-naïve in speech, thoughts and practices within a democratic society creates abundant space for the realization of institutional dimensions to regulate major dimensions of life. This insight makes the *anarchist* position clear – a position that wants to create freedom from institutional dominance. But what happens after that freedom is acquired? A lack of possibilities to answer that question again leads us to embrace the fixations of institutional thought patterns.

### 1.9.4 Legalism

Legalism is an example of such a path. It is often regarded to be one of the most conservative spearheads of legal discourse. To ‘take the law literally’ is a leading slogan in this context. If applied, legalism seems to make the change from a naïve to a non-naïve attitude superfluous. To follow the letter of the law implies following the spirit of the law!

Why is *legalism* still an issue in times of mass (im)migration, political instability and terrorism – and even in times of the rapidly progressing power of electronic communication? The question seems ridiculous: it is evident that following the letter of the law offers social as well as emotional, communicative, State and political security. Legalism does not need any interpretation: act in accordance with what is laid down on paper or with viral means! It thus delivers a maximal limitation of meaning, reduces signification to a handbook-security and inspires citizen behavior to (inter)activities as if a dictatorship reigns. In that case, law in the books suffices to direct law in action, as Roscoe Pound accentuates.26 Is it feasible that law books are dictators? Pound, initiator of applying the term ‘sociological jurisprudence’, wanted to integrate the

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Common Law pragmatist approach and the European social traditions to create an interdisciplinary research and theory program that leads to large scale possibilities of a social engineering through law. But legalism and its strong positivist attitude do represent an extremely strong desire for security, which initially should be delivered by lawyers and particularly by judges.

One should not forget: legalism’s cultural context is not limited to Western history and democracy. It is generally known that one of the schools in the ancient period of Chinese philosophy lasting until 221 BC was the Legalist School. The name was never in function before 90 BC, but the basic idea(s) lasted nearly five centuries. That is most remarkable to remember. The concentration of power was the mark of the School, and law was, with statecraft’s power, the main instrument through those ages. The system blossomed because of a rigid manipulation of power, a strict and perfect balance of reward and punishment influencing politics, and because a stable ordering of social levels could express the total involvement of citizens. The latter did not possess freedom, but they were hardly aware of it. It is interesting that an implicit image of a human being was based on the assumption of the evil nature of human character and thought patterns. Only a rigid system of rule-following could prevent social life from being a disaster. State-laws and law in general should balance the ineffectiveness of moral values that guide social conduct. It is evident that this School brought feudalism to an end and initiated a new dynasty.

However, early Chinese legalism did not completely embrace authoritarian views and practices without further reconciliation. Taoists around 220 BC affirmed already that rulers should act in accordance with nature but foremost with the talents of the people. Legalists interpreted that insight with their own preoccupations and furthered legal control of the State. Law should perform as a good neighbor: good relations as well as enforced and respected rule-following and a sense of peace. That is in harmony with the insight that education should be the basis of law and State. Moral and legal consciousness, the legalist confirms, must be acquired through education. Modern psychology and education theories confirm this viewpoint.

1.9.5 From Anarchism to Legalism

Legalism is not overtly present in legal theory or jurisprudential considerations. But it is omnipresent as a thought pattern in the Western world, and its closeness to legal education (and education in general) is a brute fact. It is fascinating how legalism displays the genius of differentiation.
Legal conversation as signifier

It takes the distinction between public and private law as a natural fact and draws lines between law and non-law rigidly. While differentiating between law and non-law, between itself and others, law distances itself from all other domains of social reality. As a consequence, law’s inherent legalism causes legal theory to differ fundamentally from other sciences and from other social theories. Law’s heart is legalistic, because it engenders a ‘minimum of positivism’. Legal facts will for that very same reason bear rights before any semiotics can elucidate their significance. Rights are a dogmatic form of representation. They contain a binding opinion about how reality is, without considering time, place, character or culture.

The problem remains nevertheless the absolutism in accepting those forms of non-naïveté. When considered in the above-outlined specter of meanings that reaches from anarchism to legalism, ‘talking about law’ in one of them is consequently a different discourse about legal thought formation and practices. The first revolts against almost all aspects of the second, and the latter cannot imagine any form of society on the basis of the first. Disorder and order are opposites in this legal span; lack of values and absolute validity a complete contrast.

‘Talking about law’ occurs at both levels, and both can be found everywhere, but legalism and its institutional meanings put the relevance of those ways of talking in perspective. It will be clear that law itself, especially in the form of legalism, suggests that presuppositions of jurists and judges are natural. Citizens share them (for instance, enforced in a dictatorial State) or oppose them (in anarchist opinions and small communities), but all are continuously confronted with this feature. A sharing darkens the legalistic differentiation, which accepts certain biases of jurists to function as a mark of the profession. Law is inevitable: if jurists’ biases weigh heavily, then these will be presented as democratically generated – a reasoning that reinforces democracy as a contract, that is: as a legal issue. Can it be done differently? The institutional features of law make one hesitate to suggest a positive answer to that question. Yet one remembers the expression ‘Law without State’ which is almost neighboring those considerations. They forcefully select, differentiate and fixate meanings that belong to natural languages into a professional language: meanings that bind, suppress others and leave no choice, direct meanings autocratically and argue as if law’s grammar is a natural phenomenon.

1.10 NATURAL LAW

References to nature and/or naturalness are significant in anarchism as well as in legalism; so why not interpret law as natural? The distinction between a ‘naïve-natural’ and a ‘non-naïve-natural’ position is not specific for law and legal discourse, but the expression ‘natural law’ has existed since ages past and is an influential way of thinking in law. Reaching beyond the boundaries of Western culture, natural law is a concept related to various religious traditions.

However, this form of understanding law does not specifically represent a particular religion. We rather think in this context of Aquinas or the seventeenth century Renaissance with Grotius, Pufendorf, Locke and others. The key of that thought pattern can be found in an argument that is astonishingly near to anarchism. It suggests that the power, the intentions or practices of a State can never be the origin and the justification of law. Another power has to be acknowledged, as, for instance, the protagonist Antigone suggested in Sophocles’ tragedy that ‘unwritten laws of God that know no change … live forever’. One cannot, however, suggest that these laws are of no importance for humans and for human society. The question whether normativity is the key and the beginning of any engenderment of law, posed by Hans Kelsen, illustrates the opposite.

1.10.1 Nature and Validity

In the field of legal thinking named ‘legal positivism’ one encounters the burning question whether an ‘unjust law can be a law’. The formulation of that question leads to a hidden semiotic component. If unjust law can be, or cannot be, or possibly ought to be law, the expression ‘law’ does not articulate what legalists consider as the most important dimension: law is regarded as valid only when this consideration is brought to the fore in a legally correct form. Change the words and one has another position: may valid law be immoral or unjust? If such law is valid and immoral, then the validity sustains its character articulated as ‘law’ – although legal practice will hesitate to appeal to such laws. But substantive moral criteria are not criteria to decide legal validity: law is law because it is acknowledged as: being law.

Law is law because of legal criteria.

So natural law is a form of law in which legal criteria decide about its being law. Since the Ancient Greek period, but in particular since the Renaissance in Western Europe, we focus for that decision on human nature as rational and as the basis for reasonableness in justification.
The necessary context is, however, outlined by a set of natural goods, which are substantive values that are not marked as ends but as means for law and legal practice.

1.10.2 Human Nature

Natural law may defend the thesis that any reference to the nature concept brings a maximum clarity about the position of the naïve-natural in the entire field of meaning. Also non-naïve-natural positions will come to the fore while doing so. The important tradition of natural law is based on its pretension to articulate and to position law (mostly represented by the State) in a cosmic order. That pretension does not, however, clarify the crucial bound between ‘nature’ and ‘the human mind’, which seems always presupposed.

An important aspect is not considered: each concept referring to ‘human nature’ is a cultural phenomenon. The contrast between nature and culture appears decisive in its clear implications to defend a natural law as such: nature is independent from the human mind and its abilities to articulate, whereas culture is its product! Ultimately this leads us to the question: can nature be thought of while separated from culture? Is not each thought needed to articulate each component? The same question pertains to the factual character of those components. Are facts decidedly: facts? Or are they ultimately the result of human articulation? It fascinates when we take into account that Italian natural philosophers first used the term for ‘fact’ in its contemporary meaning in the 1570s and that only after 1660 did it acquire more widely spread attention in English and French.28 Is nature a fact? Is the human mind a fact? Do legal facts exist, and if they do, what is their nature?

Tensions between the naïve-natural and the non-naïve-natural rose in the politics of the first decades of the twentieth century, as we mentioned in preceding pages. The Bolshevist revolution, the dominance of the Communist Party and the establishment of the Soviet Union, developments rising to National Socialism which later led to the Second World War in the middle of that century, are altogether linked to the nature–culture debate and to the political dominance of selected fragments of ideas about the State and the basic features of mankind being anchored in natural law. The relation between, and coherence of, ‘nature’ and the ‘human mind’ was an essential point – even in discussions, theories and

research in physics, with Einstein’s theory of relativity or Heisenberg’s uncertainty principle as eye-catchers in modern history. Phenomenology underlined in the same years that the ‘I-think’ mode contrasts importantly with thought patterns that regard the ‘I’ as a philosophico-solo-instrument. Indeed, an ‘I-think’ mode transforms the divergences among the naïve and the non-naïve-natural into components of the dynamics of the human mind. The latter dominate our theory of knowledge, and put the concept of natural law into perspective. Does that concept represent, or even articulate, the naïve-natural in law and legal discourse? Is it a valid legal concept although it is not a valid law?

1.10.3 Natural Law Re-Positioned

While considering the many meanings and roles of the natural law concept in legal discourse, one is surprised how skilfully it positions the ‘naïve-naturalness’ in its proper theory of knowledge. But to what level of language does the naïveté of the naïve-natural in these positions belong? The question at the background of this entire chapter becomes visible again. At issue is again the gap between a natural and an artificial language.

Are meaning and significance of the natural here a legal language issue or an everyday-natural language issue? Has the concept ‘natural law’ been successful in counterbalancing all naïveté and is it therefore understood as a pure non-naïve, legal concept? The difficulty of that position is, and has been in that case, that a reduction of naïveté – the demand of every artificial language – is required for such a natural law concept. But does it meet those demands?

We change the formulation of that question and remember (as has been concluded in the above pages) that every professional or artificial language needs a context of natural language in order to safeguard its special power of articulation. This insight guides us in the case of understanding and (re-)positioning the concept of natural law properly.

Once legal discourse operates as an artificial technical discourse (as a practice) and has diminished the naïve-natural and its manifestations, it needs to determine precisely the naïve-natural remains in itself as well as in its proper context. These remains are baptized ‘natural law’ and in that regard legal discourse is a truly unique discourse. The naïve-natural is determined in legal terms. That is the reason that Occidental jurists spoke about ‘natural law’ for centuries and the streets continue to talk about law in approximately the same terms. Notice that this region in law’s discourse is not valid positive law: it will never be the language in which
judges are allowed to formulate their decisions, but it remains rather the language in which legal conversations can be articulated.

1.10.4 Legal Knowledge

Law’s discourse has this particular feature: it has (a) diminished/reduced the naïve-natural in its discourse, and (b) kept a place for the remains of natural naiveté. That feature is itself a clear sign with regard to a general insight in the basic structures of human knowledge. All discourses with the task of unfolding scientific insights and transferring scientific knowledge focus on non-naïveté. While performing this task, they reduce meaning and re-scale signification. This reductive dimension can be understood as a general feature of knowledge. It also occurs in law and legal knowledge. But here the concept of natural law, with its longevity and its trans-cultural history, is significant.

The concept is a sign for meaning (the naïve-natural) and a sign of a specific feature of human knowledge in general.

Knowledge is always a matter of a complex articulation of reality, as the implicit tensions between mind and body, matter and mind, reality and perception illustrate. Emphasis on these signs is characteristic for the knowledge process in its totality; it unfolds, as it were, beyond cultural specificities or periods of history.

We must underline again that law and legal discourse have a very special position in this context of knowledge creation. Knowing law (a particular feature in ‘talking about law’) implies a positive position/attitude in view of the tensions between the naïve and the non-naïve-natural dimensions of knowledge. The concept of natural law illustrates that those tensions are not solved by a violent reductive attitude or by silencing phenomena of their existence.

Natural law understood as a sign for the complexity of human knowledge, coming from a particular discourse – the legal discourse – bears the burden of the continuing plurality of discourses through which knowledge engenders. ‘Legal conversation’, even in the form of ‘talking about law’, has occurred already during many centuries and in various cultural settings. Many of them sound identical but demonstrate different meanings in the languages of judges as their tools. Relevant thought patterns, and those having law as their major subject, unfold in many fields. And philosophical reflection appears to move above limits and boundaries like a drone.
REFERENCES

De Haan, Jacob Israël, Rechtskundige Significa en hare toepassing op de begrippen ‘aansprakelijk, verantwoordelijk, toerekeningsvatbaar’, Versluys, Amsterdam 1916.
De Haan, Jacob Israël, Wezen en taak der rechtshandige signifca, Van Kampen, Amsterdam, 1916.
Legal conversation as signifier