TRANSPARENCY, POWER AND CONTROL

PERSPECTIVES ON LEGAL COMMUNICATION

Edited by
Vijay K. Bhatia, Christoph A. Hafner, Lindsay Miller and Anne Wagner

LAW, LANGUAGE AND COMMUNICATION

Transparency, Power and Control

Perspectives on Legal Communication

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Preface

The overall aim of this special volume is to bring together three important aspects of socio-legal practice – law, language and communication – and identify a variety of issues and contexts to reflect on the growing importance of concepts such as *transparency*, *power* and *control* with a view to offer a range of *perspectives in legal communication*.

The issues of transparency, power and control were the central focus of the 8th International Roundtable for the Semiotics of Law organized by the Department of English, City University of Hong Kong during 1-4 December 2009, which brought together academics, scholars and practitioners from a range of disciplines such as law, public and social administration, linguistics and discourse analysis, and semiotics from more than 20 countries to reflect on the growing importance of these concepts and to identify the contexts in which these concepts assume crucial importance in the international community, and how these concerns and ideas have been examined, used and interpreted in a range of national and international contexts. Participants explored these issues from a range of overlapping concerns and perspectives, such as semiotic, rhetorical, pragmatic, sociolinguistic, psychological, philosophical and visual in diverse socio-political, administrative, institutional, as well as legal contexts.

The current volume presents a selection of the papers from the Roundtable that were chosen by keeping in mind a variety of different contexts in which these concepts give rise to some of the issues considered important in the present socio-political order and to provide an opportunity for a general discussion of issues in the semiotics of law as well as open discussions to increase our understanding of the broader context of law, language and communication.

The editors would like to express their gratitude to a number of people who contributed to the organization of the Roundtable as well as to the preparation of the manuscript in various ways. First and foremost, we would like to acknowledge the contribution from the Department of English, City University of Hong Kong for its generous financial support to make the Roundtable possible. Special thanks are due to Professor Kingsley Bolton for all his encouragement and support in various ways, including the willing deployment of secretarial staff to take care of some of the most difficult day-to-day tasks before, during and after the Roundtable.

For their invaluable support in organizing and making possible the Roundtable, special thanks also go to Chris Leung Pak Hang for designing the innovative publicity poster and programme schedule and for his management of the audio-visual facilities, as well as to Winnie Cheng Wing Yan for her support throughout the process, especially her management of a team of volunteers who made difficult

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Vijay K. Bhatia, Christoph A. Hafner, Lindsay Miller and Anne Wagner

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Chapter 1
Transparency, Power and Control in Legal Communication

Vijay K. Bhatia, Christoph A. Hafner, Lindsay Miller and Anne Wagner

> Could language injure us if we were not, in some sense, linguistic beings, beings who require language in order to be? Is our vulnerability to language a consequence of our being constituted within its terms? If we are formed in language, then that formative power precedes and conditions any decision we might make about it, insulting us from the start, as it were, by its prior power. (Butler 1997: 1–2)

Communication, in general, and legal communication, in particular, is an act with consequences, and comprises performative utterances with effects. There exist various ways in which actors in our society have provoked public discourse in order to unveil the unsaid or hidden mechanisms of power and control, and then to call for transparency to all citizens – that is, readability, visibility and accessibility. Legal communication encompasses complex relations across a diversity of languages, cultures and different orientations arising from their confrontations within space and time. The treatment of data and its reliability presupposes intercultural analyses with factorial typologies: linguistic, pragmatic and situational accounts. Cultural 'embeddedness' is a key notion in effective, transparent and clear legal communication, which involves analysing the power of social institutions included in the language itself but not limited to it. Bourdieu (1991: 109) posits:

> He thinks that he has found in discourse itself – in the specifically linguistic substance of speech, as it were – the key to the efficacy of speech. By trying to understand the power of linguistic manifestations linguistically, by looking at language for the principle underlying the logic and effectiveness of the language of institutions, one forgets that authority comes to language from outside, a fact concretely exemplified by the *skeptron* that, in Homer, is passed to the orator who is about to speak. Language at most represents this authority, manifests and symbolizes it. There is a rhetoric, which characterizes all discourses of institution, that is to say, the official speech of the authorized spokesperson expressing himself in a solemn situation, with an authority whose limits are identical with the extent of delegation by the institution.

The overall aim of a state is to protect the social order in which the individual liberty of the citizen is a major concern. As a consequence the state should guarantee simultaneously but also paradoxically a high level of individual freedom and an order in which such freedom is made possible and guaranteed with respect to others and within the framework of legal communication.

Legal communication serves that purpose with legal interpretation and conceptual transfer, translatability in legal texts. These activities are captivating not only for the jurists who can conceive hypotheses, but also for actors in society (amongst others: politicians, photographers, drafters, artists, translators) who have to understand the very core of the message. The participant in legal interactions is seduced by the sophisticated repartee established between the law and its medium of expression. It offers him/her the opportunity to enter the world of legal communication by his/her active participation in the comprehension of the law, but it also shows his/her vulnerability in terms of understanding, misunderstanding or even non-understanding.

The present edited collection of research papers offers an integrated perspective on the issues of transparency, power and control in legal communication. Each chapter focuses on a specific context providing a study within a specific theoretical framework to investigate how these three issues and other related concepts impact our socio-political environment in the present-day world. The volume is divided into two parts: Part I contains chapters that deal with theoretical aspects of legal communication, while Part II is a collection of chapters addressing issues of visualizing and contextualizing transparency, power and control.

Part I: Theorizing Transparency, Power and Control in Legal Communication

It is an illusion to believe in clear legal communication and legal drafting of norms. Transparency is a goal to attain in itself, but this goal is subject to legal interpretation.

> Clear, simple and precise drafting of Community legislative acts is essential if they are to be transparent and readily understandable by the public and economic operators. It is also a prerequisite for the proper implementation and uniform application of Community legislation in the Member States. (European Parliament etc. 1999: preamble (1))

Rules are not free from interpretation, from controversy (Moor 2005: 170), from social conceptions, manipulations, political beliefs and 'diplomatic' law:

> Where jurists seek precision, diplomats practice non-speak and are not averse to ambiguity. It happens more often than one might think that they fail to agree on a word simply because it does not have the same meaning for everyone. ... They

> likewise encourage writing techniques that here and there allow for perpetuating interesting – and promising – contradiction. (France, Conseil d'Etat 1992 cited in Gallas 2001: 117ff)

As such the debate over legal dynamism, plurality is a never-ending story. Language has this capacity of distortion, of modifying its initial meanings which is viewed as a lexical potentiality (Cornu 2005), as 'spaces in meaning' (Fish 1989) or as an evasive criterion 'fuyance' (Gény 1922). There are two possibilities of translatability in legal communication, which are the direct consequences of the descriptive intent of the legislator:

1. What degree of flexibility is given to the user/interpreter of the rule? And/or
2. What degree of rigidity will be imposed on him/her in the application? Will he/she have the capacity to 'speak' or interpret the law?

> An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of the legislative purpose; and (c) its acceptability, that is, the outcome is reasonable and just. (Driedger 1974: 131)

Research into the intention of the legal communication gives the interpreter a free space within the confines of the text to produce a dynamic application of the law. In his/her search for meaning, he/she essentially uses terminological, semantic and syntactic tools and takes the consequences of the application of the law into account. The interpreter integrates in his/her data collections new formulations, which are combined with specific cognitive contents. Consequently, saying that legal communication has specific, bounded meanings is not that simple, since if this were the case, laws would be too rigid and only one single meaning would exist and fit only specific circumstances (Wagner 2005).

> ... whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose integration and application are questions of practice. (*The Sunday Times v. The United Kingdom* (1979) ECHR 1: para. 49)

The criteria for legal certainty and transparency in legal communication remains subject to the power and control of government as expressed through the legal instruments that constitute the state's legal system. However, access to these important texts remains limited, as Cutts notes when he says:

> like a poor man's Martin Luther King, I have a dream. It is that every person of reasonable intelligence and literacy may sit at their kitchen table and open a

> small book or CD-ROM in which the most important laws that govern them are clearly and simply written in their original, unabridged form. I have that dream. But we stand a long, long way from making it reality. Indeed, I sometimes think the prospect is daily receding. (Cutts 2000: 11)

The chapters in Part I of this book offer theoretical insights into the social and linguistic practices that relate to issues of transparency, power and control. Deborah Cao in her chapter 'Linguistic Uncertainty and Legal Transparency: Statutory Interpretation in China and Australia' investigates linguistic uncertainty in statutory interpretation in China and Australia. Cao suggests that transparency of law serves an important function to secure the trust of the governed population. However she points out that linguistic uncertainty, defined as 'the indeterminate properties of language such as linguistic vagueness, generality and ambiguity' may make such transparency harder to achieve as it reduces predictability and stability. Of course, such linguistic uncertainty can also be useful as it provides a certain flexibility in the application of law. The chapter provides a comparative analysis of practices in China and Australia, which aim to resolve linguistic uncertainty in legislative texts. The analysis suggests that there is greater uncertainty in the Chinese system and this is attributed to a 'lack of coherent and consistent legal narrative in China, and the lack of precedent which may settle indeterminate cases in reference to a settled past legal history as it exists in English common law'. Cao argues that established legal rules and principles of statutory interpretation are yet to form in China and this means that authorities can make decisions or exempt themselves from the law, i.e. use the uncertainty to their own advantage.

Celina Frade in her chapter 'The Power of Legal Conditionals in International Contracts' discusses the use of conditionality in common law texts, especially focusing on the role it plays in contracts. Considering legal English as the main tool of international contracts to regulate legal relations and actions in multilingual and multi-legal contexts, she discusses what constitutes conditionals in this legal genre. In her view, conditional constructions seem to be the phenomena which most evidently portray the inherent power of the parties to control potential contingencies and anticipate possible (and agreed) solutions in contracts. She investigates how conditionality is manifested in international contracts in English, under a multifunctional approach comprising functional and discoursal and cognitive domains, and claims that a conditional construction *if p, then q* – takes on a restrictive value dependent upon the position of *if p* in contractual clauses thus helping in the understanding of the correlation between situations and actions by transposing discourse from one current context (the contract rendering valid in the present) into another (the contract dealing with future contingencies).

Irena Szczepankowska in her chapter 'The Directive and Persuasive Style of a Legislative Speech Act and the Transformations Thereof' focuses on the historical development of speech acts in legal contexts within Poland. Her claim is that such speech acts have been historically shaped by the communication convention of the time they were given. In Poland such legal speech acts have been influenced

by the Germanic stylistics of an ortyl. The author considers if such speech acts are clear and transparent to citizens nowadays as they are often based on the concept of 'motiva evitentur': that legislators are not expected to give explanations, only declaratives and directives. Szczepankowska considers whether this antipersuasive restriction is justifiable nowadays in democratic states where citizens may want to know the motives for legal decisions, but which are not apparent because of the ways in which the legal speech acts are framed.

Anita Soboleva presents '*Zorkin v. Morschakova*: Legal Dispute in Rhetorical Terms'. The chapter provides a rhetorical analysis of the debate between two prominent Russian judges and legal scholars on the subject of judicial reform in Russia. Soboleva shows how the two judges differ in the *topoi* or commonplaces (common background knowledge, warrants) that they adopt in order to support their arguments. The chapter highlights a philosophical difference in the way the two judges approach legal interpretation, similar to the difference between the legal positivism of H.L.A. Hart and the natural justice of Ronald Dworkin. While one judge (Morschakova) approaches legal interpretation by appealing to 'higher principles of law', the other (Zorkin) prefers to rely on the letter of the law, and avoid reference to what he terms 'higher principles of expedience'. The rhetorical analysis shows differently grounded argumentation styles, with Morschakova making appeals to reason (*logos*) while Zorkin appeals to emotion (*pathos*). Soboleva argues that ultimately, appeals to emotion are unsuccessful in persuading the legal community for whom the texts are intended.

In André Bélanger and Andy van Drom's chapter 'A Dialogical and Polyphonic Approach to Contract Theory' the authors present a complex analysis of the roles of dialogism and polyphony as applied to contract theory. The authors illustrate through examples that '... polyphony concerns the traces of decisions and positions that are elaborated in a fully-fledged interaction with the other, whereas dialogism considers the elaboration of a given utterance in the verbal milieu of social representations ...'. As such, when deciding on the definition of a contract we should focus on the polyphonic process rather than the dialogic mechanisms. In their analysis of the literature on dialogism and polyphony, Bélanger and van Drom develop a conceptual framework illustrated in a tetrahedral model for discursive contractual analysis in order to answer the simple question: who is thinking and speaking in the utterance of a contract? This chapter shows how the '... relationship between discourse and social factors is not direct (transparent), but manifested through a process of mediation'. In order to understand the process we have to consider the ways in which language is used by the addresser and the addressee, and that 'a mosaic of voices' interact in binding the contractual text together.

Colin Robertson presents 'What EU Legislative Texts Reveal about Power, Control and Transparency'. Robertson's chapter is based on the assumption that the European Union has been constructed using legal texts, in the form of primary treaties supplemented with a plethora of other acts and instruments, which express the will of the member states and the institutions they have created to work