



Legal Performance: Translating into Law and Subjectivity in Law

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Abstract

Legal language seems to maintain a level of incomprehensibility that creates a barrier, beyond which *something* is happening: a dispute is resolved, a matter of guilt is ascertained, or a life is taken. This paper tackles a trial (in the sense of any type of legal proceeding before a judge) as a performance of justice; one that, not unlike a magical ritual or ritual theater, happens beyond a certain kind of barrier and is fully accessible only to those duly consecrated. It will be argued that legal language may be understood as such a barrier and the role and status of those who do not master it (i.e. understand law and its concepts) are comparable to those of an audience in a performance. Consequently, this paper will show how understanding the role of this barrier in a performance may help us explore the accessibility of law to the layperson and her subjectivity (in the psychoanalytical sense) within law.

Keywords

legal language – (in)comprehensibility of legal language – legal performance – legal ceremony – ritual – legal subject – discursive space

1 Introduction

Legal language, its role and quirks, its structure and specialized vocabulary have been subjected to numerous analyses and critiques.¹ This paper's

¹ See e.g. David Mellinkoff, *The Language of the Law* (Resource Publications 1963); Deborah Cao, *Translating Law* (Multilingual Matters 2007); Peter M Tiersma, *Legal Language*

considerations stem from one particular peculiarity and paradox of legal language: it seems to maintain a level of incomprehensibility that creates a barrier, beyond which *something* is happening: a dispute is resolved, a matter of guilt is ascertained or a life is taken. This specific performative element allows one to draw analogies between law and magic, and there are authors who show that origins of legal language may be found in the language of magic and incantation.² It is this particular analogy between legal language and the language of magic, and that of an adjudication process and a (magical) ritual, or ritual theater,³ that consequently allows demonstrating and explaining some of the performative mechanisms of the adjudication process. This paper will henceforth use the term 'trial' to encompass all the cases of adjudication – the process of settling a dispute by a court.

This paper will treat the trial as a performance of justice, one that, not unlike a magical ritual or ritual theater, happens beyond a barrier and is fully accessible only to those duly consecrated. I will argue that legal language may be understood as such a barrier and the role and status of those who do not speak it (i.e. do not understand law and its concepts) are comparable to those of an audience attending a (ritual) performance. Consequently, this paper will show how understanding the role of this barrier may help us explore the accessibility of law to the layperson and her subjectivity within law.

My considerations stem from understanding law as a discursive space (i.e. a space constantly created and delimited by legal discourse)⁴ and approaching a trial as a discursive sub-space of the law itself. I will follow by analysing the

(The University of Chicago Press 1999) or Vijay K Bhatia, 'Simplification v. Easification – The Case of Legal Texts' (1983) 4 *Applied Linguistics* 42; Matěj Myška and others, 'Creative Commons and Grand Challenge to Make Legal Language Simple' in Monica Palmirani and others (eds), *AI Approaches to the Complexity of Legal Systems. Models and Ethical Challenges for Legal Systems, Legal Language and Legal Ontologies, Argumentation and Software Agents* (Springer 2012) 271; in Czech legal context see e.g. Terezie Smejkalova, 'Srozumitelnost práva' (2013) 152 *Právník* 447.

2 See e.g. Axel Hägerström who focused on formulaic language of Roman law; or in more general terms Robert M Cover, 'The Supreme Court, 1982 Term – Foreword: Nomos and Narrative' (1983) 97 *Harvard Law Review* 4 and his connections of modern law to the sacred.

3 A ritual theater seeks to fulfil a different purpose than a western-type modern theater: its main purpose is not entertainment of its audience.

4 This particular approach to law may be traced in theories and approaches of e.g. Niklas Luhmann, *A Sociological Theory of Law* (Elizabeth King-Utz a Martin Albrow tr, Routledge 1985), James Boyd White, 'Law as Language: Reading Law and Reading Literature' (1981–1982) 60 *Texas Law Review* 415, or Pierre Bourdieu, *Language and Symbolic Power* (Polity Press 1992). An intriguing exploration of legal discursive space was also provided by Mark van Hoecke, *Law as Communication* (Hart Publishing 2002). In this sense, it should be noted that to some

performative nature of a trial in terms of ritual performance. In that layout, and with the help of Lacanian understanding of subjectivity,⁵ I shall tackle the role of the layperson within that performance.

2 Trial as Discursive Space

Traditionally, the language that legal scholars focus on is one realized both within and through legal interpretation and argumentation. Here, we step further from these traditional considerations and focus on a different role legal language plays in the trial: the fact that a real-life problem may become a legal case only if it is possible to describe it in legal categories.⁶ This ‘description in legal categories’ is essentially a matter of expressing the meaning of a source-language text or an utterance by means of a target-language text or utterance and as such fulfils the dictionary definition of translation. Therefore, it may be treated and analyzed as such.

I agree with MacCormick, in whose opinion law is an argumentative discipline that translates social issues into legal issues: ‘whatever question or problem is in our mind, if we pose it as a legal question or problem, we seek a solution or answer in terms of a proposition that seems sound as a matter of law, or at least arguably sound(...)’.⁷

The considerations tackled in this paper, therefore, stem from closely linking law with its language and discourse. Among all the possible definitions of and attempts to delimit the concept of law, I side with those that connect law with its language, its discourse and the events and institutions created within – and as a result of – this discourse, sometimes going as far as claiming that law is so closely linked with language that it actually *is* a language.⁸ For the purpose of this paper, let us treat law as a discursive space; one that provides for a whole new level of reality that is based on – and in a matter of perception delimited by – specialized discourse capable of influencing physical reality through specialized code/language.

authors, law is not a discursive (communicative) space but a means of discourse that delimits this space. Robert M Cover, ‘Violence and the World’ (1985–1986) 95 *Yale Law Review* 1601.

5 Jacques Lacan, *Écrits: A Selection* (Alan Sheridan tr, Norton 1977).

6 Bert van Roermund, *Law, Narrative and Reality. An Essay in Intercepting Politics* (Kluwer Academic Publishers 1997) 37–38.

7 Neil MacCormick, *Rhetoric and the Rule of Law. A Theory of Legal Reasoning* (Oxford University Press 2005) 14.

8 See in general White (n 4).

Within this vast discursive space of law, the trial may be perceived as a discursive space of its own: a space not limited to the physical space of the courtroom but also delimited by the particular discourse of the concrete dispute, its legal relevance and meaning.

This paper's considerations should further be understood in context of the following: within the realm of civil (private) law, the law usually gives a person (the claimant) a possibility and not a duty to resolve her dispute by means of legal trial, whereas within the realm of penal law (and other parts of public law; and within civil law in case of the defendant) the person might not be given a choice in this matter. In both cases, however, a simple narrative of a dispute between two people or a person and the state can only be recognized by a court, and thus acquire its legal relevance, if the parties to a trial follow a 'script' laid down by law⁹ and are bound by various legally imposed forms of behavior and speaking. During the trial, the real-life problem must be first translated, or transposed, into the language the law recognizes; only then – recognized by law – it may be solved, with these solutions resulting in real-life consequences.

This translation takes many forms depending on the particular legal system in question; it can be rather loose and resemble an act of re-telling a story, or it can be more literal and resemble the act of interpreting. In the Czech legal system, for example, it leans closer to the latter extreme and may be observed as a palpable case of actual translation between plain language narrative of laypersons into the conceptual language of law and legal records. The plain language (non-specialized, often colloquial) testimonies given by the lay parties or lay witnesses are translated into the legal language during the process of recording them. After hearing the layperson's testimony, the judge – who has the authority over what is being recorded into the trial proceedings and what could later be used in the judgment itself – recounts the testimony as she thinks she heard it, using different – legal – terms, simplified and syntactically changed. Subsequently, she asks the lay speaker to confirm that what has been translated is consistent with what she actually meant to say. Upon approval

9 A trial is a scripted activity. Law usually provides a set of rules of procedure that need to be followed by the parties as well as the judge and that, with various degrees of detail, lay down individual steps to be taken in the course of the trial, including formulae that have to be uttered. For example, the Czech Civil Procedural Code (statute no 99/1963 Sb.) lays down specific requirements regarding the oral and written delivery of a judgement. It has to start with specific phrase (*Jménem republiky*, 'On behalf of the Republic'), which has to be followed by certain information in certain order.

from the layperson, this translation becomes an official record of what she said in the courtroom.¹⁰

As discussed later in this paper, a divide between the layperson and the lawyer or a judge is created within this act of translation. Not even the final request for layperson's confirmation of accuracy of such a translation mitigates it, given she may not fully understand the translated utterance. Let us then very briefly stop at this particular property that very often makes legal language subject to critique: its (in)comprehensibility to a layperson.¹¹

Without going into details, it is important to acknowledge that understanding legal language has essentially two fundamental dimensions: linguistic and legal (conceptual). While legal English has been subject to a critique regarding its linguistic structures, legal Czech has been traditionally presented as sufficiently comprehensible.¹² Yet when it comes to understanding legal consequences of legal text or utterance, its comprehensibility may be easily disputed. The core issue of legal communication rests in understanding the fact that its normative consequences (i.e. its performativity) cannot be simply 'read-off the surface of the text'.¹³ As Assy points out, law is typical for its conceptual thinking, i.e. thinking that goes beyond the physical objects and basic meaning of the words, where the words (the legal terms, phrases etc.) contain more meaning than suggested by their dictionary definitions. These meanings cannot be understood without knowing their proper legal contexts.¹⁴ Therefore, the incomprehensibility of legal language and its discourse might not be purely a matter of grammar and vocabulary, but rather a matter of not comprehending

10 It should be noted that this extreme type of translation takes place only where no recording device is set up and where the trial proceedings are being noted down by a specially designated person. The judge's position within this process of translation (and within the performance of the trial) is a specific one and could be also analysed with the same tools as the one of a layperson. Within a performance of a trial, the judge is the one who has been let in on the secret, who speaks the language necessary to resolve the dispute (i.e. understands the applicable laws and the language in which they are written) and who has the authority to speak the words that result in a change of the parties' circumstances (i.e. delivers judgment). However, to assess the role of the judge in a performance of a trial is not the purpose of this paper.

11 For references to detailed analyses of this topic see note 1.

12 Viktor Knapp, 'Právní pojmy a právní terminologie' (1978) 4 *Bulletin Ústavu státní správy* 17, 17–20.

13 Myška and others (n 1) who further elaborate on Christopher Hutton, *Language, Meaning and the Law* (Edinburgh University Press 2009) 65.

14 Rabeea Assy, 'Can the Law Speak Directly to its Subjects? The Limitation of Plain Language.' (2011) 38 *Journal of Law and Society* 376, 402.

the complex conceptual background of the words.¹⁵ Understanding law is a matter of understanding the wider context of given legal system; this ‘conceptual background’ represents an entire system of legal rules and principles that govern the concept in question, as Hyland points out.¹⁶

For a layperson, a text or an utterance that is understandable regarding its linguistic structures is not necessarily understandable as to its contextual background. Yet, the complex background of legal concepts is what makes legal language special and what forms the basis of the distance between law, or the space of a trial, and the layperson’s understanding.¹⁷

I deliberately skim only the surface of the issue of (in)comprehensibility of legal language here to present a point from which I will move further: that the layperson does not have unmediated access to the law because of the specialized language and the conceptual nature of this language, which requires more than simply knowing its terms. Without a sufficient grasp of legal language or an understanding of the mechanisms of legal regulation, a layperson has only limited means of accessing the legal tools available to her. This somewhat Kafkaian language may be seen as representing both an access to law and an obstacle to accessing it.¹⁸

As mentioned above, the nature of the trial is very much based on language; it is, to a certain extent, *created* by language and as such it may be defined as a discursive space. Therefore, the language is important but is not sufficient on its own. The ‘normative consequences’ mentioned earlier are the language’s real-life performative results only when special conditions prescribed and expected by law are met.¹⁹

15 Assy (n 14) 394–395; similarly Richard Hyland, ‘A Defense of Legal Writing’ (1985–1986) 134 *University of Pennsylvania Law Review* 599.

16 Hyland (n 15) 614. This is a matter more writers agree upon, cf Cao (n 1) 17. For more details see also Myška and others (n 1).

17 cf Cao (n 1) 17.

18 I am referring here to Kafka’s ostensive image of a gatekeeper who stands between a person and the law in the short story *Before the Law*. Franz Kafka, *Proměna a jiné povídky* (Československý spisovatel 2009).

19 The issue of performativity of legal utterances (the ‘normative consequences’ of a judgement) may be understood in terms of speech acts, where a speech act leads to expected consequences only where certain ‘felicity conditions’ are met. These ‘felicity conditions’ are bound with the participants’ expectations of what they mean and an acceptance of the fact that certain speech acts have certain consequences. This acceptance may be within the specific realm of law further analysed in terms of a relationship between the authority and its subjects, and it takes various forms, from an active acceptance to a passive obedience.

Thus, we may consider the trial as the space from which the language used draws its performativity.²⁰ The performativity of the language and the ‘practices that transform the meaning of a set of circumstances through a combination of performative, formal, metaphoric, and temporal techniques’²¹ make the judgment delivered by the judge alter the reality.

If the layperson wishes to make use of the law and its tools fully in her dispute resolution, she has to enter this space and is requested to comply with its rules and to participate in its actions. Unless the reality of a dispute receives recognition by (and by means of) legal language, it cannot be resolved on the plane of law.

This performative nature of the discursive space of the trial allows one to examine the performance of the trial as such and to understand the layperson’s role in the performative reality of the trial in terms of the role of the audience/spectators in a ritual performance.

3 Trial as Performance

Considering either the European-style theater or the ritual theater,²² there is a divide between the center of performance on stage and the audience or spectators. Turner points out that all performances require framed spaces set apart from the everyday, routine world.²³ Thus, a gap is being created between those who perform and those who observe, between what the performance means to

See further John L Austin, *How to do Things with Words* (Clarendon Press 1962) on speech acts and Mitchel de S.O.-l’E. Lasser, ‘Judicial (Self-) Portraits: Judicial Discourse in the French Legal System’ (1994–1995) 104 *Yale Law Journal* 1325–1410 on the concept of acceptance in judicial legitimacy.

Dahl calls this legitimation of authority by acceptance of its effects ‘underlying consensus’. See Robert A Dahl, *Modern Political Analysis* (Prentice Hall 1976) 60.

20 This conception is similar to those of social situation of power – Pierre Bourdieu, *Language and Symbolic Power* (Polity Press 1992); felicity conditions – Austin (n 19); or social establishment – Erving Goffman, *The Presentation of Self in Everyday Life* (first published 1959, Penguin books 1975) 231–233.

21 Jessie Allen, ‘A Theory of Adjudication: Law as Magic’ (2007–2008) 41 *Suffolk University Law Review* 73, 76.

22 Or whether we agree with these differentiations at all – see e.g. J Ndukaku Amankulor, ‘The Condition of Ritual Theater: An Intercultural Perspective’ (1989) 11/12 *Performing Arts Journal* 45.

23 Victor Turner, ‘Frame, Flow and Reflection: Ritual and Drama as Public Liminality’ (1977) 6 *Japanese Journal of Religious Studies* 465, 467.

the people inside and what it means to those who remain outside.²⁴ Whether we are talking about performance as regards the theater, or ritual, or 'primitive' magical ritual, the enclosure and separation of the space where the actions are taking place is always present.

Anthropologists and religionists often point out that one of the very purposes of a ritual is to divide: to clearly differentiate between those who have been let in on the ritual and the core of the secret that is happening from those who have not. Regardless of the fact whether the intended purpose of legal language is to divide in such a way, in its current form, it is often its effect.

In the context of various analyses of European-style theater, it has been claimed that the theater is a special kind of space designed for communication.²⁵ '[T]he theater comes into being in the direct contact between the stage and the audience.'²⁶ It is the audience who provides a new context for the performers every time the performance is repeated.²⁷ However, this 'directness of contact' is not a matter of equal exchange as in a conversation, but a matter of shared space of the theater house, understanding of the theatrical representation (complementarity and metacomplementarity, as Osolsobě calls it²⁸). It is the architecture of the space of the theater itself, the division between the stage and the audience, which makes the usual form of exchange practically impossible.²⁹ Even though the communication runs in both directions (from the stage to the audience and vice versa), it is not a symmetrical communication, as the audience has only a limited means of voice.

Between the stage and the audience, between the enclosed space of a magic circle and its spectators, there is a divide: often a physical divide (as between the stage and the space for the audience in case of a theater house), or a discourse divide (where the stage is designed for the utterance of the specially crafted words and the audience is expected to listen). The same also holds true for the courtroom. We may consider the legal trial to be such an enclosed space. Not only does the courtroom provide the physical enclosure, but also the legal language provides a discursive enclosure. The conventions and rules of legal language of the trial make the language itself a *stage* on which the routine, everyday dispute is being enacted. And without entering the enclosed space,

24 Richard Schechner, 'From Ritual to Theater and Back: The Structure/Process of the Efficacy-Entertainment Dyad' (1976) 26 *Educational Theater Journal* 455, 480.

25 Ivo Osolsobě, *OstENZE, HRA, JAZYK: sémiotické studie* (Host 2002) 15.

26 Osolsobě (n 25) 15.

27 Schechner (n 24) 479.

28 Osolsobě (n 25). For an explanation of metacomplementarity see Chapter 5 below.

29 Osolsobě (n 25) 15.

without becoming a part of the performance and participating in the stylized and unnatural communication that may be observed in the courtroom, the dispute cannot be resolved by law.

4 The Subject of (and in) Law

A layperson's status in the above-described performance seems to be very ambiguous. Should we set aside those cases where a layperson is 'just' a witness, a dispute of a layperson, whether in the position of a claimant or a defendant (respondent), is the reason for the trial to take place; she enters the physically enclosed space and participates in the drama by her physical presence.³⁰ But does she also enter the discursive space of the trial when her grasp of the legal language is limited?

In Lacan's psychoanalytic theory, language plays an important role in the formulation and transformation of the self (one's subjectivity), since basically a subject is the effect of language.³¹ Similarly, as Whorf recognizes the limitations imposed by a subject's perception by the language (words and concepts) that she has at her disposal,³² Lacan, too, recognizes that language contains structures that regulate meaning and subsequently regulate and constrain the formation of the subject.³³ For the purpose of this paper, I shall be building upon various interpretations of Lacan's approaches to the formation of the subject through language.

As shown above, in order for the layperson's problems to result in any solution within the realm of law, first, they must be recognized by the language of law. Legal personality is a concept known to the majority of legal systems: by granting them rights and imposing duties the law recognizes (or even creates) subjects who are capable of acting within the realm of law and whose acts have recognized legal consequences. A person is the subject of and in law because of general law-imposed criteria recognizing her as such. The trial is one of the spaces created and delimited by law where this recognition is also visible.

30 Of course, this does not have to be the case when she is not present and only represented by her legal counsel.

31 Jacques Lacan, *The seminar of Jacques Lacan. Book XI, The four fundamental concepts of psychoanalysis* (W.W. Norton 1981) 20; cf e.g. Karen Coats, 'Lacan with Runt Pigs' (1999) 27 *Children's Literature* 105, 106–107.

32 Benjamin L Whorf, 'Linguistics as an Exact Science' in J B Carroll (ed), *Language, Thought, and Reality: Selected Writings of Benjamin Lee Whorf* (MIT Press 1956) 220–232.

33 This is further Coats's interpretation of the matter. Coats (n 31) 107.

In Lacanian understanding, law belongs to the realm of the Symbolic Order:³⁴ it dissociates the subjects from the Real of the physical world by *nam-ing* their lived experience, by translating their lived experience into the concepts of law. Therefore, the trial may be thought of as a space of the Symbolic, while the lived experience of the dispute of the subjects belongs to the Real. The roles occupied by the subjects of the trial (both lay and professional) are created by the present Symbolic Order of the society. Within the discursive space of the trial, the experience of the layperson becomes accessible to the law only through its specialized discourse and this discourse is a matter of master discourse of legal language.

It has been claimed that the law and within its discourse the sub-discourse of a trial are to a certain degree incomprehensible to a layperson. Her words that do not belong into the correct conceptual discourse of law are translated into the legal language. The layperson speaks, but she does not speak the language proper to the discourse situation in which she finds herself. As Milovanovic interpreting Lacan notes: she is the subject of speech, but not the speaking subject.³⁵ Stacy further elaborates upon this element by pointing out that '[t]he subject's discourse [...] exists *outside* the available juridical discourse...'³⁶ and therefore must be translated, or transposed into the legal language.³⁷

Given the Lacanian idea that production of speech is the production of subjectivity, it could be also claimed that the language in which the layperson's narrative appears after being translated by the judge represents a kind of incomplete inauguration into the Symbolic Order of the trial; this access is not direct but mediated. The dissociation from the Real and entering the Symbolic – the lack-in-being described by Lacan and other psychoanalysts – is thus not a completed process.

34 The Symbolic Order, as a part of the Lacanian psyché (the other two are the Real and the Imaginary Order) is the one of social communication, knowledge of ideological and social conventions, and the acceptance of law. The main tool of accessing the Symbolic order is language – the code through which the relations, conventions and laws are accessible. See Lacan (n 5).

35 Dragan Milovanovic, 'The Postmodernist Turn: Lacan, Psychoanalytic Semiotics, and the Construction of Subjectivity in Law' (1994) 8 *Emory Int'l Law Review* 67, 73.

36 Helen Stacy, 'Lacan's Split Subjects: Raced and Gendered Transformations' (1996) 20 *Legal Stud. F.* 277, 287 (emphasis added).

37 Of course, as in any translation, it may actually happen that there are no equivalents in which one can translate the non-legal discourse. In law, these situations are usually identified as 'gaps' in legal regulation and mean that the judge must resolve the issue e.g. by means of analogy, that is by finding the nearest equivalent in the language to which she is translating.

Is the layperson a full subject in Lacan's view, if she cannot speak the language of the Symbolic Order and constantly needs another (an Other) to speak for her? The layperson seems to be stuck halfway; she and her personality within the law, the qualities that fill in the structures of her subjectivity, owe their very existence to the Other's³⁸ – in this particular case legal – language.³⁹ The development of subjectivity itself is the effect of language, through the individual's assumption of the position ascribed to the subject in language.⁴⁰

This incompleteness is the source of the split role of the layperson: she is at the same time a participant in a trial, where a specialized, subjectively incomprehensible language is used, while being an outsider, a spectator of this drama, not fully capable of accessing what is actually happening. She is physically on the stage but not fully participating in the discourse; she has not fully entered the enclosed space, which is capable of producing the result to her dispute.

The split in the ambiguous role of the layperson may also be approached differently. According to Goffman, when human/social activities are perceived as a performance, an individual acts in a double role as both a performer and a character, where a character is a dramatic effect arising diffusely from a scene that is presented.⁴¹

The layperson is by all means a character: she has a role ascribed to her by the rules and customs of procedure. In this respect, she is the 'subject of speech'. Her position of a performer, though, is limited by her access to the legal discourse in which the proceedings take place. What she lacks here is to become the 'speaking subject'.⁴²

This differentiation is not dissimilar from that between knowledge and the live reality of those whose (split) subjectivity lies outside the master discourse⁴³ and which is strengthened and re-inscribed by the legal discourse.

We may understand 'the societal structures, formal and informal, that provide the racial, cultural, and gender markers through which we define ourselves'⁴⁴ as the Other, who plays a crucial part in recognition and formation of the subject. The subject's words, or in case of a legal trial, arguments, 'do not

38 cf Lacan (n 5) 67.

39 cf Coats (n 31) 121–122.

40 Coats (n 31) 124.

41 Goffman (n 20) 244.

42 Even though this situation may be somewhat comparable to that of participating in legal proceedings in a foreign language and requiring interpreting, I solely focus on the situation when a trial takes place in the layperson's mother tongue, as this allows me to tackle law (legal discourse) as a code normal speech needs to be translated into.

43 Stacy (n 36) 289.

44 Coats (n 31) 107.

count as compelling unless an authority figure, one whose power is legitimated by the societal Other, is willing to allow them to count.⁴⁵ Moreover, given the complexity of law and its conceptual language the subject is not expected to cross over, to transit fully into the discursive sphere of the Symbolic Order of legal trial.

The layperson needs constant support when it comes to the specialized discourse of law within (and by means of) which she is sometimes required to settle her disputes. Even though the layperson at least partially knows her role and place within the discursive space of the trial, her position, though by general principle protected by law, is very vulnerable: as long as she is not a full subject she is in need of protection from someone who is a full subject.⁴⁶ Consequently, the subject who is not a full subject because of her incomplete entrance to the Symbolic Order needs representation and requires someone who speaks *for* her and on her behalf.

One of the questions that naturally follow at this point is: how can the law and its sub-discourses claim any legitimacy within the current society when such a gap between the full and incomplete subjects exists?

As has already been mentioned, in a legal trial (as in any social situation that produces performative utterances) it is not only the language itself, but also the circumstances or the procedure that count (or the mere existence of language, not necessarily its meaning).⁴⁷ Are we able to point to other elements within these circumstances that bridge the discursive gap within the trial and help to build the legitimacy of the law?

5 The Magic of Legal Trial: A Symbol

Law represents a special worldview that involves special categorizations and conceptualizations with transformative effects.⁴⁸ The power of the language that judges use in settling disputes rests not in the words themselves but in the judges' power to decide.⁴⁹

45 Coats (n 31) 108.

46 Coats (n 31) 114.

47 See Austin (n 19) and Bourdieu's reply to Austin, both in a different set of terms grounding the performativity of language into the social context of its utterance. This topic could be elaborated upon further. Together with Bourdieu, we could further claim that the language of law is a representation of the exercise of the authority's power to name. See Bourdieu (n 20) 239.

48 See e.g. Allen (n 21) 789.

49 Allen (n 21) 797.

If legal ceremonies ‘symbolically reconcile conflicting social norms’,⁵⁰ it is the symbolic nature of adjudication what makes this reconciliation possible. This symbolic nature requires for its existence ‘a shared belief that [they] symbolically resolve normative conflicts.’⁵¹

Adjudication may be considered such a legal ceremony, or even a ritual. As such, it is directed at changing the social worldview of its participants – and as magic rituals do, it works not by changing the reality directly but by influencing the minds of the participants⁵² and *thus* changing the reality.

The words uttered on the stage – in the context of the stage and when enacted properly – stand as a symbol, whereby the physical and discursive space of the trial occupies a symbolic space of justice. That said, it follows that the trial is not irreplaceable. The symbolic space, this special instance of Name-of-the-Father standing for justice may be occupied by a different ceremony in different cultures, in different Symbolic Orders.

What is actually represented (in the theatrical sense of the term) is the language; it represents the discursive space, the ‘protected circle’ in which reality is changed by changing the mindsets of people. This representation has an effect because the audience accepts – or believes in – it.⁵³ The dialogue between the audience and the stage (if there is any) is the dialogue of the acceptance of this representation. As briefly touched upon above, Osolsobě claims that the communication between the audience and the stage is essentially metacomplementary; that is, the basic asymmetry in communication rests not in the audience having less voice nor less means to communicate, but in their allowing the performance to happen in the first place. By coming to the theater and paying for the ticket the spectators *allow* for the performance to happen.⁵⁴

The incomplete state in which the layperson finds herself may therefore be bridged by the nature of the trial as a whole. As Bourdieu points out, the power, the performative nature of words, rests in the background social situation (of power). I believe that this situation may then be perceived by the layperson, by the subject – who has not fully entered the Symbolic Order of the trial but who is still expected to comply with it – as a whole: the trial itself, with all its incomprehensibilities, has the capability to be perceived as a symbol.

50 Thurman Arnold, *The Symbols of Government* (YUP 1935) as cited by Allen (n 21) 803.

51 Allen (n 21) 804.

52 Allen (n 21) 806–807.

53 cf Bourdieu (n 20).

54 Let us for the sake of this argument disregard that when acting in the role of a defendant the ‘audience’ may be actually coerced to participate.

A symbol as a device enables us to make abstractions and in so doing serves as an instrument of expression, communication, knowledge and control. In particular, symbols are seen to be significant in power relations.⁵⁵ For some anthropologists, the culture is understood as a symbolic system⁵⁶ and in return, the symbols are culturally conditioned. As Turner very fittingly points out, '[a]s members of society, most of us see only what we expect to see, and what we expect to see is what we are conditioned to see when we have learned the definitions and classifications of our culture.'⁵⁷

The legal process is not only a performance in Goffman's general sense,⁵⁸ but also a matter of enactment of a form of scripted action, which in Allen's sense makes it very similar to magic, or to a ritual. However, this 'legal magic' is not to be viewed negatively or primitively. The ritual-symbolic view of adjudication may in fact reveal how the trial moves the dynamic everyday-life conflict into legal structures⁵⁹ and reveal another dimension to the translation process discussed above.

The legal ceremony of the trial has a ritual aura⁶⁰ and stresses the importance of certain prescribed procedures and conventions that on a principal level contribute to one's understanding and satisfaction with judicial outcomes.⁶¹ Thus, representation of a layperson may be a part of the whole symbolic performance. Her own capabilities within this space of a trial are limited. Yet what counts, in the end, is whether or not the trial as a whole, as a special kind of social situation retains its symbolic value. The weaker role of the layperson, her lack-in-subjectivity, may be perceived as a requirement of the ritual of adjudication. Although she has not been let in on the sacred secrets of the legal ceremony (i.e. does not comprehend law and its code fully), she is given a recognized role that may be understood in terms of understanding the role of an audience in a ritual theater. Without the audience's acceptance the

55 Victor Turner, 'Symbolic Studies' (1975) 4 *Annual Review of Anthropology* 145, Turner refers to Raymond Firth, *Symbols: Public and Private* (Cornell Univ. Press 1973) 84.

56 See e.g. Claude Lévi-Strauss or Clifford Geertz's writings.

57 Victor Turner, 'Betwixt and Between: The Liminal Period in Rites of Passage' in I C Mahdi, S Foster and E M Little (eds), *Betwixt and Between: The Patterns of Masculine and Feminine Initiations*. (Open Court Publishing Company 1987) 235.

58 As Goffman (n 20) 32 very widely puts it, 'a performance is all activity of an individual which occurs during a period marked by his continuous presence before a particular set of observers and which has some influence on the observers.'

59 Allen (n 21) 819.

60 Amankulor (n 22) 51.

61 cf Allen (n 21) 824.

trial would fail to live up to its ritual value.⁶² The layperson's role is two-tier: she is at the same time an outsider to the performance and a legitimizing reason for the performance to happen.

It is then this symbolic value of the trial as a whole, with all its incomprehensibilities to a layperson, that manages to fill in, or at least bridge, the language-based divide. It is within this symbolic value and its bridging capabilities that law is being represented, enacted and active.

6 Conclusion

It may be concluded that the performance of justice as enacted through a legal dispute stands as a symbol. As shown by Allen, the words themselves in magical rituals are not meant to communicate their literal meanings to the spectators; the audience is not required to understand the individual words or the complexities of the concepts used. However, they are required to understand and accept the situation and to acknowledge its results: they themselves – by accepting the adjudication – participate in making the result happen. When the trial is truly a symbol that communicates to those who understand⁶³ only then it is capable of triggering social action.⁶⁴

By constantly influencing the mind of both the participants and the audience of the ritual of adjudication, justice constantly acquires new content.

It has been shown that within the discourse of psychoanalytic approaches to subjectivity, the layperson is essentially a split subject. The law speaks of her own subjectivity, but given the language divide, the full extent of this subjectivity may stay beyond her reach. It consigns her simultaneously beyond and within the center of the space of the law and makes her case, her real-life problems, heard by the master discourse of law only in terms of master signifiers.⁶⁵

It seems that even in our contemporary societies, justice is a matter of enactment, of performance, whose power is essentially symbolic. The trial provides the enclosed space for justice to appear and change the reality. This is not to claim, that justice enacted within the protected spaces of the trial is the only, objective one. Yet, for the time being, the belief, acceptance and subsequent respect by lay subjects (incomplete subjects as it comes to the mastery of the legal discourse) are essential.

62 cf Clifford Geertz, *The Interpretation of Cultures* (Basic Books 1973) 112.

63 cf Amankulor (n 22) 56.

64 Turner, 'Symbolic Studies' (n 55) 155.

65 For a similar reasoning see Stacy (n 36) 291.