University of Tartu

Faculty of Social Sciences

Department of Semiotics

Vadim Verenich

On some parallels between Tartu-Moscow cultural semiotics

and the current scholarly developments in legal semiotics

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Supervisor: Mihhail Lotman

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CONTENTS

Introduction : some perspectives on Tartu-Moscow semiotics of law

The first 'introductionary' part of this thesis is dedicated to the diachronic (constructivist) and synchronic (historical) description of contemporary semiotic studies of law and basic paradigms of legal semiotics. The significance of this chapter lies in the fact that based on the example of the comparative analysis of history, the evolution and theses of each of the contemporary traditions of semiotics of law help to reveal the general nucleus, which could be considered as the mechanism of 'juxtaposition' of semiotic and legal aspects of legal semiotics. Further in the work, the revealed mechanism will serve as analytical model, which will be the applied to second, the major section of work. In the latter a number of legally relevant concepts and methods are compared and described in the semiotic works of Tartu- Moscow school, their historical development, and consequential reflection in the chosen works of lawyers. This approach lays firm grounds for a comparasion between the tradition of Tartu- Moscow semiotics of culture and two major paradigms of legal semiotics, which ones are mostly drawning on Peirce's semiotics and Saussure's semiologie.

The introduction briefly sets out a historical dimension of the ideological integration of Tartu-Moscow semiotics (taken in a broader context Tartu semiotics) into the general framework of legal semiotics. It argues that there was a 'real' historical mediation between the members of Tartu-Moscow semiotic circle (especially, Juri Lotman) and legal scholars (Igor Gräzin, Ants Frosch, Sulev Kannike, Sergei Issajev, Jaan Kross, Peter Järvelaid among others). The acceptance of such a mediating link between legal academic community and semioticians could give further impetus to construction of a special model of 'Tartu legal

semiotics'. It is focusing on Tartu-Moscow semiotic perspectives in regards of law, which has been articulated as the part of a fundamentally semiotic phenomenon – culture, therefore the proposed argumentation aims at setting out a working definition of law in terms of Tartu-Moscow semiotic school glossary ('law as communication', 'law as text', 'law as a secondary modeling system') and comparing this model of legal semiotics with current approaches to legal semiotics, which ones are influenced by Greimassean text semiotics (Greimas&Landowski 1976, Jackson 1985) and by Peircean semiotics (Klein 1984, Kevelson 1988)

Having said this, it is clear that the current thesis sets out a comparative project, which could be labeled as the interdisciplinary leap from the wider perspectives of cultural semiotics into a little bit more sophisticated field of law, for setting up the principles, which are valid for description of law as a semiotic event within the semiosphere – "a semiotic space necessary for existence and functioning of languages" (Lotman 1990:123).

Before returning to description of Lotmanian cultural semiotics, I would like to put an important observation: I would recall an essay 'About Philosophy of Justice', written by and originally published in German as 'Zur Philosophie der Gerechtigkeit' by Ilmar Tammelo (Tammelo [1982] 2005) possibly the most famous Estonian legal researcher, who sought to construct both modern logic of law as well as new 'legal philosophy of justice' .Living in Australia and Germany after the Soviet occupation of Estonia in 1944, and working in the traditional veins of Julius Stone, Chaim Perelman, Theodor Viehweg, Ron Klinger, Pamela Cureton, Michael Inglis, Anthony Blackshield, and around 1960 he came to developing of his own consistent theory of law, that – at least implicitly – coincides a harmony with Tartu –Moscow model and thus makes an important contribution to a robust models of legal semiotics.

A note of warning should be put here. Although the discussion in Tammelo's article concerns exclusively the humanitarian dimension of the concept of the justice in its relation to the general philosophy of law, Tammelo was always sympathetic with semiotic theory of law. In his outlines of modern logic, he placed semiotics (as a subdivision of logic) within the integral structural framework of conceptualizing law in accordance with outlines of modern logic (Tammelo 1969: 5-12). Despite the fact that there were not personal mediation or any collaborative link between I.Tammelo and J.Lotman, they both were preoccupied with basically the same model of communication. The importance of Tammelo for Tartu-Moscow semiotic school has been implicitly revealed in Tammelo's famous account of justice as intersubjective communication (*justitia communicativa* in the widest sense). Such an approach to the notion of justice significantly differs from traditional approaches, based upon the reception of ancient Roman and medieval philosophy of la and as Imanuel Kant wrote in his books 'The Science of Law':

[Public justice] may thus be divided into protective justice (justitia testatrix), commutative justice (justitia commutativa), and distributive justice (justitia distributiva), in the first mode of justice, the law declares merely what relation is internally right in respect of form (lex justi); in the second, it declares what is likewise externally in accord with a law in respect of the object, and what possession is rightful (lex juridica); and in the third, it declares what is right, and what is just, and to what extent, by the judgement of a court in any particular case coming under the given law.(Kant 1887:155)

It was Ilmar Tammelo who was first to consider the aforementioned of justice to be insufficient, therefore he concluded that justice in a most decisive way depends on humane communication (Tammelo 2005:84): this approach to justice was definitely revolutionary, since this approach had been already developed a long time before Habermas shifted the focus of the critique of law as justice from forms of transcendental normativity to forms of communicative competence (Habermas 1989). This definition is echoed in Lotman's

communication model: information is communicated through language from the perspectives of the speaker and the hearer (Andrews 2003:18).

Still there is a difference between their models of communication: for Tammelo, obstacles of communication will ruin intersubjectivity (and justice as well as it is an entity based upon inter-subjectivity) (Tammelo 2005:85), while according to Lotman, if communication proceeds imperfectly, it only means that the most valuable new inter – subjective information (i.e. justice) lie outside the intersecting space between the speaker and the hearer (Andrews 2003:18).

In my article published early in 'International Journal for the Legal Semiotics' (see Verenich 2003, Verenich 2005) i briefly sketched a historical background for legal semiotics studies in the Soviet Union (mainly in Tartu and Moscow) and mentioned the existence of a personal link between Juri Lotman, as well as some of his disciples, and Soviet legal researchers, who were interested in the study of law in its cultural context. At the moment when an aforementioned link was established (prior to 1984), Juri Lotman had already developed a complex theory of culture. This theory, lately labeled as cultural semiotics, had a profound impact not only on humanities (i.e disciplines traditionally sympathetic to the concept of the culture), but also on social sciences and even more distant fields of human knowledge, such as biology or, say, artificial intelligence studies. The ultimate methodological power of Lotmanian cultural theory is explicitly revealed by Lotman's scientific preoccupation: he focuses on establishing the system-level interactive and modeling principles (Lotman 1992) and applying them to specific forms of cultural information (especially in the context of verbal and visual art forms), rather than on individual signs. Having a great potential of applicability, the universality of Lotmanian epistemology was brought in attention of some Soviet legal scholars (mainly, Igor

Gräzin and Sulev Kannike), whose aim was to seek the way out of the legal doctrine, which had been compromised by Marxist ideology, which was politically conventional and epistemologically limited due to political restrictions laid by dominant viewpoint of communist jurisprudence. The Marxist-Leninist theory considers a law as a unity of form and content. The legal superstructure comprises not only the totality of norms and actions of agencies, but the unity of this formal side and its content, i.e. of the social relationships which law reflects and at the same time sanctions, formalizes and modifies. The character of formalization does not depend on the 'free will of the legislator'; it is defined by economics, but on the other hand the legal superstructure, "once having arisen, exerts a reflexive effect upon the economy" (Pashukanis 1932:287). Nevertheless, certain authors, who consider themselves Marxists, adopt the viewpoint that law exists in preclass society, that in primitive communism we meet with legal forms and legal relationships. Such a point of view is adopted for instance by Reisner. Reisner gives the term 'law' to a whole series of institutions and customs of tribal society: marriage taboos and blood feud, customs regulating relationships between tribes, and customs relating to the use of the means of production belonging to a tribe. Law in this manner is transformed into an eternal institution, inherent to all forms of human society. From here it is just one step to the understanding of law as an eternal idea; and Reisner in essence leans towards such an understanding (Reisner 1925).

1.The development of Tartu-Moscow legal semiotics

The initial impetus for bridging theoretical reflections on law and Lotmanian cultural theory was Lotman's article *''Contract' and 'Devotion' as Archetypical Models of Culture'*(Lotman 1981): but nevertheless law and other law-like forms of societal life were left insignificant place in curriculum of Tartu-Moscow semiotics. Also, it is well known fact that during his last decade of life Juri Lotman and his collegues used sometimes to explain the core notion of their doctrine - 'the sign system' - referring to typically positivist legal concept - the legal system, even though 'the legal system and other normative systems' were used as an example of non-communicative sign systems, rather than of communicative sign systems(Lekomtsev 1973:180). Though Lotman excused himself for lacking extensive knowledge of the law, nevertheless he had concluded that the example of legal system fits to illustrate particular properties of sign system.

Considering adumbrated historical and ideological reasons, one could likely comprehend, why such a convenient pattern for either structural or semiotic analysis as 'legal system' could be, had been overshadowed in favor of other 'secondary modeling sign systems'. For those reasons, law was left outside the scope of semiotic analysis, which extended from language and literature to other phenomena of culture, such as nonverbal and visual communication, myth, folklore and religion (Nöth 1990:309). In spite of the existence of common scientific canons concerned with methodology of semiotic research, Tartu-Moscow semiotic circle assumed the methodological diversity(Sebeok 1998), that is

why it is really possible to integrate legal philosophy into semiotic framework ('semiotic web'). Another problem consists in acknowledgment of the conceptual unity of Tartu - Moscow semiotic school - rejection of such unity leads to evident conclusion: Tartu-Moscow semiotic school as an independent academic 'unit' is a mere myth, it is just an 'invisible college', a kind of network composed of those scholars, who published their works in 'Sign System Studies' series. From critical point of view , it is possible to affirm the co-existence of two divided group of scientists (Leningrad tradition of literary criticism and Moscow linguistics), who shared same academic attitudes, but semiotic research itself took on different spots.

Surprisingly, at least in part due to afore-mentioned Lotman's article some of young legal scholars, explicitly or implicitly aligned themselves with Lotmanian cultural theory and taking it as a starting point, presented their own reconceptualization of legal theory in terms of cultural semiotics. Some of the studies resulted in short essays written for a periodical, which was conventionally titled as 'infratheoretical reflections on law' (published in special series of *Acta Universiens Tartuensis*). This periodical, which was originally meant to be published on a regular basis, to my best knowledge, was issued only a couple of times, mainly because of its masked critical responses to the legal doctrine of the day. The most of articles which appeared in this periodical, in their core of the analysis, remained either legal ones or focused on cultural studies, meanwhile end points of those isolated legal and cultural analysis resulted in a synthetic, synoptic convergence of semiotic perspective. Authors of this periodical published in 1989 included legal researchers linked to the Tartu University (Professor Igor Gräzin, Professor Peeter Järvelaid, a legal historian; Sulev Kannike, Ants Frosch, Mart Susi) and prominent publicists (like Jaan Kross, a lawyer by education and a famous writer). These authors being influenced by attending the lively lectures of Professor

Juri Lotman and having a personal communication with him, based their work on re-articulating/re-casting of law's issues in terms of Lotmanian cultural theory and developing a link between legal theory and semiotics.

A suitable illustration of how this methodological link was meant to be established could be found in Sulev Kannike's article '*On some connections between legal communication and violence*'(Kannike 1989, Kannike 2005). In his attempt to explain the complex nature of 'justified violence', author departs from the thesis of Lotman: 'contract' and 'devotion' are archetypical devices of any culture (Kannike 2005:53). He proceeds from this starting premise to the bridging the gap between Lotman's cultural semiotics and the understanding of the nature of law as 'language of interaction' expressed and developed by the American lawyer and scholar Lon L.Fuller and the theoretical framework of Eugene Pashukanis (Kannike 2005:62).

Although some of authors published in aforementioned periodical (like Mart Susi) did some 'sociolegal' research, none of essays published in '*Infra-theoretical reflections on Law*' could be considered as based on empirical work (in comparison with *Critical Legal Studies* movement, those methodology is easily traced back to sociology of law), probably because an independent empirical research of law issue, as such, was almost a non-existent event in the world controlled by communist visionaries. Nevertheless, it does not mean, that the emergence of Tartu-Moscow cultural semiotics and shifts in intellectual culture of Soviet jurists of Estonia caused by it, were isolated phenomena.

The development of Tartu-Moscow 'legal semiotics' could be illustrated by the implementation of a special explanatory framework, which provides insights into the way Tartu-Moscow semiotics wedded to a legal positivist philosophy. A particular importance of such a framework (which serves as a model of legal semiotics) rests on fact that the

academic ideology of Tartu-Moscow school reflects and conforms to all the historical peculiarities of the Soviet epoch (and most certainly, these peculiarities should be always kept in mind). During the period between 1983-1990 the development of this explanatory framework was marked by some significant movement towards the construction of legal semiotics, although it has not resulted in one clear conception of Tartu-Moscow legal semiotics and the promise fell short.

The underlying principle for construction of afore-mentioned explanatory framework was that from the external viewpoint, the legal system could be described as a particular system for rhetorical and cultural persuasion. Therefore, interdisciplinary approach to this system could provide interesting insights into the way semiotic notions ('text', 'culture') are wedded to legal positivist conceptions of 'normativity', 'property', 'freedom', 'employment', 'liability', and 'crime'. On other hand, it is important to provide an answer to question of whether core semiotic concept of a 'secondary modeling system' (amongst other concepts like 'boundary', 'semiosphere', 'culture'and 'text') is capable of enriching and clarifying legal philosophy in a wider perspective   and the semiotic account of law in particular. A positive answer to the question would favor the further tight integration of Tartu-Moscow semiotic concepts into the domain of legal semiotics.

The easiest way for mapping of Tartu-Moscow semiotics into legal semiotics is to re-read semiotic theory of Tartu-Moscow school and recast in terms of legal semiotics. This 'easy' approach may be justified by the inference drawn from already established traditions of legal semiotics: narrative semiotics of law (which is influenced by Greimasean semiotics of text, in particular and Saussurean semiology, in general) and legal semiotics, which is influenced by Peircean semiotics (Nöth 1990:329). For adherents of legal semiotics, Charles sanders Peirce' personal communication with Chief Justice of the U.S. Supreme Court and

founder of American 'realism' Oliver Wendell Holmes (both were members of Boston Metaphysical Club between 1870-1874) is concrete, historical mediation of ideas (Kevelson (1986), Kevelson (1990), Fish (1986), Posner (1992), Menand (2001)), therefore Holmes' idea of law-as-experience is considered to be an extension of Perice's 'pragmaticism'. The followers of narrative semiotics of law were also concerned with establishing of such a mediating link within own tradition: for instance, Jack M.Balkin has sought to draw some parallels between Ferdinand Saussure and famous legal positivist Wesley Newcomb Hohfeld:

Nevertheless, there is a remarkable similarity between what Saussure was doing in linguistics and what Hohfeld was doing in analytical jurisprudence. Saussure's semiology is based upon two important concepts. The first is the arbitrary relationship between the signifier and the thing signified, and the second is that signs take their meaning from their mutual relationships in a system of signification …. Thus, the relation between signifier and signified is mediated by the relationship of signifiers to each other in a general system of signification. Meaning in language, then, comes from the play of differences. … Remarkably enough, Hohfeld was coming to similar conclusions about legal rights at about this same time, and his ideas would eventually be amplified by the legal realists that he influenced. If Saussure offers a theory of the arbitrary nature of the sign, Hohfeld offers us a theory of the arbitrary nature of a right, or more generally, of any legally protected interest. Just as a signifier does not take its meaning from the connection between itself and its signified, a right does not owe its existence to its connection to an individual, or a piece of property. Rather, a right is simply a legal guarantee that one has the privilege to engage in certain actions and invoke the power of the state to prevent other persons from engaging in certain other actions (Balkin 1989:34-35).

The dissemination of semiotic studies in late Soviet epoch enabled them to be linked to various theoretical enquiries into the domain of legal methodology, ontology and epistemology: that is why this paper puts a special emphasis on the notions of 'text'- which is the central notion of legal positivism and one of the most important concepts of Tartu-Moscow cultural semiotics - as a pattern for 'a container' of 'double-coded' information

(encoded by the 'code' of legal normativity) within the legal system, which is represented as a modeling system. As the text (of law) appears as a result of tension between intersecting spaces of established information shared by the speaker and hearer (Lotman 1992:14) then in order to understand the semiotic value of 'legal system' it is necessary to have recourse to other systems.

It is hardly accidental that the analogous reassessment of the character of some of the most important legal concepts was introduced by Roberta Kevelson (legal concepts of 'contract' and 'property' in relation to the epistemology of Peirce (Kevelson 1987) and Bernard S. Jackson, who draws attention to the relationships between legal 'contract' and Greimasian definition of *contract* as "the first component of narrative syntagm" (Jackson 1991:156). Thus it is possible for the legal theory describes in veins of Tartu-Moscow cultural semiotics, to consider the concept of law (which in this particular context is almost equivalent to the notion of 'legal system') as 'a secondary modeling system' and 'text' - as the dominant pattern of legal semiotics. For instance, Igor Gräzin and Igor Issajev in their article entitled as '*Mificheskij mir prava Franza Kafki*', pointed out how a practicing lawyer depicts the legal system from outsider's perspective, in other words from law's 'external' viewpoint (Gräzin&Issajev 1990). The characters of Kafka belong to two, real and mythological worlds - they exist at the symbolic edge of law guarded by 'a doorkeeper'. The authors tried to mediate internal and external perspectives on law that are held by insiders (judges, prosecutors, lawyers) and outsiders (laymen) and to reveal hidden rhetorical and semiotic devices are used in the constant process of paranoid mythologization of law *at the border* as alienating oppressive, yet sometimes *invisible* system.

The model of 'mythologization' was further elaborated by Igor Gräzin in his paper

'Mythologization of Law by Franz Kafka. Post-Communist Alternatives *to Milton Friedmann*' (Gräzin 1999), where he applied theoretical notions of Lotman's cultural semiotics to the study of transdiscursive relations in post-communist transitional societies. In another paper '*The Rule of Law: But of Which Law? Natural Law and Positive Law in Post-Communist Transformations*' (Gräzin 1993), Grazin deals with another pivotal notion of Tartu-Moscow semiotics - the notion of the border, the edge as defined by itself. Later this paper was brought to Roberta Kevelson's attention, who used (perhaps) implicitly Lotman's notion of border to depict open area of transforming world of global intersystemic conflict (or 'tension' in terms of Tartu-Moscow semiotics) where law plays a kind of thematically doubling (in Lotman's expression 'double-articulated') role: of natural law (*jus naturalis*) versus positive law.

Ants Frosch, an author of another seminal paper on Tartu-Moscow semiotics of law '*Ponjatie Pravosfery'* (Frosch 1990) put an emphasis on the role of the notion of marginality within the framework of Tartu- Moscow cultural semiotics. In his definition *pravosfera* is a special type of semioshere: it consists of specific legal texts (Frosch 1990:6). The semiosphere of law poses constraints or boundary conditions to the heterogeneity of its elements ('legal texts'). In a few instances Ants Frosch refers to the semiosphere as to jurisprudence: however, he does not apologize for the ambivalent meaning of 'jurisprudence' understood as 'the semioshere of law' (Frosch 1990:5-7)

In cultural semiotics of Lotman, this assumes the closure of semiosphere, and, by virtue of that fact, the communication occurs only   on behalf of marginal people of special gift (i.e. witches) or those ones of special, sacral craft (i.e. smiths), who mediate between mythical, internal and real, external perspectives on actual culture. At the same time, they

transform chaos, disorder and barbarism (mythological non-textuality of outsiders) outside the culture (textuality of insiders) into 'texts' of culture, and   vice versa. These people are marginal since they are forced to occupy peripheral, borderline, marginal niches of semiotic landscape of culture, at the border between semiosphere, at the edge of semiotic communication between cultural and mythical worlds. A comparison with legal semiotics can illuminate this idea. In the context of legal semiotics, a lawyer is much alike to a mediator. He deals with everything that is brought to a decision by the conflicting parties: normative expectations, rights, duties and the process of the legal mediation, which means the negotiation of claims amongst parties. Legal matters cross the line, border or boundary of the legal semiosphere with its mechanism of textual inclusion: legal   cases penetrate real social and economic practices (which are 'articulated' like a language and have their own meaning and frames of reference), hence transforming them into 'normative texts' of the legal system, and *vice versa*. The ideology of law (legalism, which could be understood as 'grammar' of law) split by means of 'normativity' (which is equal to 'actual grammar' in Tartu-Moscow semiotics) the social universe between the legal semiosphere or the internal domain (what is law, what it means) and non-meaningful area, external to the legal system (what is not law, what is non-law). Here transformation is understood as a semiosis (as the action of legal sign), or as semiotization of social phenomena. For instance, Jana Sharankova sees support for semiotic account of legal transformations:

..both in   what I regard as fundamental characteristic features of law, e.g. in the creation of the legal semantics of the Roman lawyers or in H.L.A. Hart's insightful observation that the normative system gives rise to normative statements in the same way as does the system of natural language, and in the new challenges before legal theory especially in Europe: pluralism of cultures, of ways of dispensing justice, of phenomena which on the one hand claim links to law and on the other, seek to attain a certain degree of correlation and commensurateness between them and between the semantic load of each. (Sharankova, 1996: 402).

In Kafka's mythological framework of law, the access to the *closed* legal system is gained only through the authoritative reasoning given it by the learned counsel, the presiding officer, or the prosecutor - any metaphorical doorkeeper of law. Like in Kafka's The *Trial*, Joseph K., who stands before the law, recognizes that it is on his side, be he ironically remains outside of the object of the law. As the doorkeeper warns the countryman, the door of the Law was intended only for him, but now it must be shut. For Joseph K., the law is myth. The function of myth in law is to legitimize legalism. The myth present a 'social reality' which serves the interests of *the bourgeoisie* in such a way that the values incorporated in that 'social reality' appear to be quite natural, taken for granted, common sense, common logic- if 'normal' myth is a folklore of people then the law is a myth retold by lawyers (Gräzin 2004:159):

Franz Kafka in his ''Trial'' revealed something more than is evident on the surface – the essential resemblance between the law and the myth. Having made the approach that is just the initial one from the perspective of postmodern society Kafka – it is important to remember: a lawyer by education and by occupation – told us a story about myth of law. In other words: for Kafka the law was, in the first place, a subject matter of the myth he was telling us. It was not myth of law but the myth about the law. (Gräzin 2005:30)

An intriguing replica of theme could be found in Doug Litowitz's article '*Franz Kafka's Outsider Jurisprudenc*e'. In the introductory part one find following remarks:

He [Kafka] depicted law from the perspective of outsiders subject to an unknowable and alienating legal system composed of endless layers of petty officials. This posture is most visible in Kafka's best-known parable, *Before the Law*, where a man from the country dies of old age while awaiting permission from a doorkeeper to enter the law. Kafka's ability to depict legal outsiders was the result of two factors. First, he was a multiple outsider in his personal life, since he was a German-educated and secular Jew in a Czech province of the Austro-Hungarian Empire. Kafka never qualified as truly German, Czech, or Jewish, and he remained forever an outsider to all three cultures. Second, he was an attorney for the state agency responsible for

administering the workers' compensation scheme in Prague, a position where he represented injured Czech workers seeking protection under a complicated legal system conducted in German legalese. (Litowitz 2002:103)

Kafka's focus on outsiders makes his books especially relevant for contemporary legal theory, which has become increasingly preoccupied by 'outsider jurisprudence' and the perspectives on law held by minority group members including women, African- Americans, gays, Asians, Hispanics, and Native Americans. Yet Kafka adds an unusual twist in his depiction of outsiders: none of them are members of a minority group. Instead, their outsider status is a function of their positionality (their subordination) in relation to the dominant legal apparatus. Such people can be described as 'situational outsiders.' And in a macabre twist on the literary *cliche* of the crusading outsider who struggles until his or her rights are vindicated, Kafka depicts outsiders who never win their battle for justice, instead remaining forever confused, paranoid, ignorant, submissive, alienated, and self-defeating. By suggesting that outsider status may arise by virtue of one's structural and relational posture *vis-a-vis* the dominant legal system (independently of minority status) Kafka adds a new realist dimension to jurisprudence.

The 1980s, a period that lapsed into the early 1990s and marked the downfall of the Soviet ideology, as well as transition to the 'rule of law', here in Estonia started with a revolution in a legal theory, which in its turn, at least indirectly, gave rise to the law reforms in both private and public spheres. The shift from Soviet theory of law to post-soviet jurisprudence have been reflected in Raul Narits' article about structural theory of law (Narits 2000). This article is in fact an inquiry into practical semantics or pragmatics of legal text, as well as topics of the intelligibility of legal language. The author notes that the structuring theory of law demonstrates how communication functions. Professor Raul Narits is arguing that the normativity of a legal text is resulted from the mere work with

legal text: legal norm is barely legal text, therefore normativity can not be derived from semantic or syntactical features of a legal text, but rather from a norm-programme viewed as an organizing, underlying normative principle of norm-application in legal practice(Narits 2000:17). The norm-programme comes to existence at the point of the intertwinement of two complex systems – a natural language as a sign system and a legal system. Returning to Lotmanian cultural semiotics the concept of the norm-programme could be best described as an adequate analogue to the notion of 'underlying principle' or 'dominant' – a modeling principle that converts non-information into information within cultural space (in juridical context, non-normativity into normativity).

The possible synthesis of logical, sociological and semiotic approaches to the system of law opens a wider multidisciplinary perspective; moreover the need for multidisciplinary synthesis is pertinent to contemporary philosophical concerns. As we will see later Lotman's semiotic conception of the legal system as a secondary modeling system that is both the sum of many partial signifying systems and a means of generating them, could be and has been added other theories - especially those ones of autopoetic and reflexive systems. The theory of dissipative structures and general notion of system have been invoked in relation to a secondary modeling system. This conceptual shift helps to realign various semiotic concepts of Tartu-Moscow semiotic circle in concordance with different dimensions of systematicity in law, as well as with legal semiotics.

Unfortunately, the notion of 'secondary modeling system' as applied to the legal system, belongs to the area in which, so far, little research has been done. Thus, legal semiotics is at big disadvantage here, because only research done was done under the umbrella of other, more traditional disciplines. Tartu- Moscow semioticians used the notion of secondary modeling system to describe the functioning mechanisms of systems using

natural language ('primary modeling system') as material (Lotman&Uspenskij 1978:212).

According to this thesis, the natural language is the only semiotic system that can be at once both an interpreting and interpreted system, therefore language is the primary modeling system in relation to reality, and the secondary modeling system, as a meta-language of description, is applied to all other languages of art and *languages of culture* - another pivotal notion of Tartu-Moscow semiotics, which covers mythology, religion, moral and legal norms, etc.(Torop1999).

However, the questions of great importance are emerging here: does legal system studies deploying semiotic resources imply the generalization of the concept 'legal system' from its vernacular 'legal' sense and legal connotations? Or, vice versa, does adaptation of semiotic notions to legal matters suggest the recasting of semiotic theory in terms of wider legal theory? Does notion of 'secondary modeling system' complements the notion of the legal system? Or, perhaps, 'secondary modeling system' is just another metaphor for 'legal system'? The legal-theoretical problems behind these questions are so inextricably intertwined, so that in answering one question it is almost inevitable that other questions must be answered at the same time - but in order to answer these questions one should draw a clear distinction between different system notions currently being deployed by legal theory.

2. Theoretical dimensions of the legal system: pluralism and unity

2.1. The general notion of system

The delimitation of different system notions applied to law, is a very diffi- cult task, mainly because it refers to the problem of co-measurability of law complexity and that one of theoretical reduction of complexity. As famous German legal sociologist Nicklas Luhmann put out:

Any attempt to employ the intellectual means and the previous experiences of system- theory for the task of specification will be faced with the fact that it has not been possible to formulate an unambiguous, one-dimensional concept of complexity and to apply it logically or even empirically. (Luhmann 1972:43)

The practical measurability of system notion in law, its 'weight' depends on level of theoretical abstraction, reduction. Among the plenty of systems, there are just four particular kinds of system beyond the general system that are of significance for legal theory. They are the dissipative, the autopoetic, the reflexive i.e. social systems (institutions) and the secondary modeling sign systems. Each of the mentioned systems builds on one another, thus one can not imagine an autopoetic systems that is not dissipative, as well as one can not have a reflexive social system, a psychic system or a living system that is not autopoetic. They define a goal-oriented behavior that only little number of general systems can emulate. Yet they are very important for they represent an order/disorder inducing system, a living cognitive system, and the social psychological reflexive systems:

- The general notion of system (law as system of norms)
- Dissipative systems (law as order-disorder)

- autopoetic systems (law as self-referential cognitive system) reflexive dialogic systems (law as social psychological experience)
- social systems (with legal system as a subclass)

Systems cannot be defined by simply enumerating the layout of their constituent elements, entities. The definitive attribute of a systemic entity is the set of structural relationships, which outline its form (*Gestalt*) at any given moment and serve as the core 'identity', unity that is maintained in spite of dynamic spatial and temporal transformations. The system encompasses its own relevant structure: the structure of a system is defined as the sum total of the relations holding between the elements and complexes of the system. (Nauta 1972:66-67) Therefore, all systems share - with certain reservations - in common three underlying general properties: totality (*totalite*), in other words submission of elements to the whole, and autonomy of a whole system guarded by system isomorphism, it means that the system maintains its status, its invariant configuration, even in case of severe transformation. The system configuration of properties can be physical, logical or statistical; its structure can be called concrete, conceptual or formal. The features of system cannot be reduced to a property of the individual parts. A consequence of the combined existence of general system properties is the appearance of structural similarities or isomorphism in different fields (von Bertalanffy 1968:30-53).

2.2.Law as a formal logical system of norms

The elementary combination of above mentioned general properties results   in the logical construction (*Systembildung*) of the simplest system model. For positivist legal theory, this model aims at identifying the essential logical structure of law (*aussere System*), which presents the playground for the further theoretical speculative 'mapping' of law and society into 'legal terms' (Bydlinski 1996).

This essential logical structure of law has its underpinning in the formal institutional structure of law, which is superimposed upon the 'real' world, and which is supported by the grand norm. From the positivist point of   view, the essential formal logical structure of legal thought constitutes an inner unity (*innere System*) in diversity of law's sources (legal norms, statuses, roles) and the inner unity of internally bound norms gives rise to a sort of "organic order (*Rechtsordnung,   ordo,   taxis,   kosmos*)" (Синайский 1986:16-17), when legal-logical validity can be traced back to its final source in a single norm (basic norm), which determines legal validity (in other words, logical consistency) of the whole system. Such a system understanding of law is built upon a formal logical principle that organizes that inner unity of system (which is composed of law's sources) into the continium of multilevelled and variegated semiotic formations - 'semiotic space', as Lotman calls it (Lotman 1990:123)

2.2.1.The sources of law

A legal positivist claim according to which all sources of law can be defined, as well as semioticfilling of this claim, in many respects depend on the position held by positivist researcher of law in regards to the origin of law - in the most general terms the positivist social thesis is that what is law (i.e what is meaningful for law) and what is not is a matter of social fact (Raz 1979:37). The ultimate reason (for legal positivists) consists in simple fact that a sole material basis for the formal source of law is the volitional decision done by a bearer of constitutional power (whoever it be, a single person or a collective body), which possesses an authority 'to give a law'. Here is outlined a line of the divergence between two traditions of positivism: between those scientists, who considered the will of sovereign as the material basis of formal sources of law and those ones, who following Kelsen, do not recognize the difference between creation and application of the right, equalizing thus judge with the legislator. It means that a representative body possesses not only law-making authorities, but also the representatives of judicial authority. However, it seems that similar views could be coordinated with the theory of dialogical legitimacy, which will be discussed later. Furthermore, so called movement of American and Scandinavian realists (represented among others by judge Oliver Wendell Holmes Jr., who was loosely affiliated with Charles Sanders Peirce's 'pragmaticism' and John Dewey's 'pragmatism') generally denies the value of the figure of legislator, advancing to the role of true lawmaker - a judge .

As far as the enumeration of sources of law is concerned, it can be very impressive, since besides positive sources of law it could also include which are typical for natural law

(e.g. compare catalogue of legal sources, used for the creation of Napoleon's French Civil code (in particular by the draft, initiated by Jean Étienne Marie Portalis - so called 'project of the eighth year'(Arnaud 1973:25-30)). The French semiotics of law rests mainly upon the reception or Claude Levi–Strauss' structuralism(Arnaud 1973:31-33), hence, a prominent French legal 'structuralist' Andre- Jacques Arnaud in his structuralist study of French Civil Code completely modified the original form of Levi-Strausse's catalogue. Using a binary method, developed by Claude Levi-Strauss, Andre- Jacques Arnaud has proposed three main types of legal regimes, implicated in Portalis' classification of legal sources: *'a proper (domestic) law – an alien(international) law', 'a written norm - an oral tradition (a custom)', 'a positive (variative, if necessary)law – a natural (invariant, universal, invariable) law'* .

This primary classification had served for a quite long period of time as the basis of almost all positivist classifications of law's sources, until the positivist enumeration of sources of law was substantially enlarged due to the theoretical outburst of post-positivism. As Roberta Kevelson pointed out, it is a fact well tolerated both within any given legal system and by the public served by such legal system that law consists of rules. The actual situaution that law is as much social values and relations between values, persons, collective habits of community, power structures among the official legal actors, ideas and dialogues between ideas and ideological system, as it is rules (Kevelson 1990:41).

The widening of a notion 'legal source' has occurred mainly as a result of post-positivist developments: after clarifying different connotations of notion ''source of law', legal post-positivists developed a completely new concept of legal sources. In doctrine, proposed by post-positivists, the widest meaning of the concept 'source of law' covers not only the classical juridical sources (such as a written law, an oral juridical folklore, customs,

the arguments of natural law, etc.), but also semantic, syntactic and logical dimensions of juridical argumentation. According to post-positivist doctrine of law, the sources of law can be understood either as human acts, linguistic behaviours, or as linguistic texts, i.e., as results or products of such human acts.

Unfortunately, with a rare exception (Aarnio 1996:171), a concept 'source of law' in its widest sense is rarely mentioned in the juridical literature. It seems like lawyers leased a privilege of speculating about legal sources in the widest meaning, to philosophers, linguists, logicians and to semioticians.

In its narrower meaning a concept 'source of law' designates primary juridical sources plus some auxiliary sources of law, which are often represented in the doctrine of post-positivists by teleologic arguments, principles, moral values, analogy, political arguments and undoubtedly the ideology (at least, in its latent role). Thus, source of law in this sense includes two different types of legal sources,using the terminology of Robert Summers (Summers 2000), purely juridical sources and auxiliary sources, which could be co-respectively described as authoritative sources and essential sources.

Finally, the narrowest meaning of legal source entails only classical juridical sources: among them are a written norm, a legal act, which is a central subject of reflection in juridical discourse. A legal 'normative' act exists materially in form of a concrete text, which fixes rights and responsibilities between legal subjects (persons): being enacted in that way, it most surely resembles model of autocommunication described by Juri Lotman (Loman 1970:27-30), in which messages are encoded against the other (already redefined in the discourse of either as a legal subject or as legal persons) and are in fact directed back to their sender (the lawgiver). In this case, the discourse of law deals with purrely aesthetic functions of both imperative normative acts (for instance, that ones of law) and dispositive

legal acts (such as an agreement, a will, a contract etc.), especially in case, when these acts are thought to be contradictory to unwritten norms(morals) of civil law and/or to historical customs. The *written* legal norm as a whole one, does not refer to a distnict existence but to the total context of social phenomena and by virtue of that fact, as an aesthetic object, "it certainly posses the aesthetic autonomy and the aesthetic function" (Mukařovsky [1934] 1978:88)

Being fixed in the written form, utilitarian and sometimes aesthetic aspects of legal act become a specific object of combined research methods of semiotics of law and visual semiotics. In other words, a specific aesthetic form and the normative properties of common legal act (the aesthetic properties of a normative text or a mode of will-expression), a style and a juridical formulation, official 'sign markings' of confirmation (such as a seal, a signature, a fingerprint or a bar code) in the semiotic plan of legal discourse are significant because of their indexal correspondence to the specific criteria, design and style, which characterize the source of signal (a will of legislator, in our case) as a particular individual one (Lyons 1977:106).

Therefore, it is possible to speculate about the strong visual aspects of legal semiotics; moreover, sometimes in juridical literature a positivist semiotics of law (which privileges a legal 'text' in its usual connotation) is substituted by visual semiotics (compare Spiesel(1999), Sherwin (2001)). Inasmuch, the semiotics of law, while determining and analyzing the visual sign aspects of the correspondence of source of law to the specific models and rules, pays appropriate attention to the juridical problems of falsification, forgeries, and various distortion of original will-expression. Umberto Eco in one of his works notes that in the legal process, there is not only a possibility of the distortion of legal author's initial interpretation, but also a great deal of danger to hear completely not that

which was initially contained in the authentic interpretation of the author: therefore in the proceedings of legislation all methods of protection from the possible forgery must be fixed (Eco1992: 236). The main tool of fight against the falsifiers of material sources of law (a written text or an expression of the will) - this is, first of all, the confirmation of their authenticity using special signs of confirmation (such as a signature or a seal). An etymological origin of both types of the 'confirmatory signs' goes back   to the Roman tradition of the use of a sign *formulae* [*name* + Latin predicate *'subscripsi'* + an impression of a seal]. The Roman practice of the confirmation of agreement's legal force by means of arbitrary symbols had been evolved into the creation of special legal institute – a notary office. The first notary office appeared in France in the middle of XVth century, when the function of information (*notificatio*) about the conclusion of the transactions between private individuals was entrusted to the notary, with the authority to use a special seal and name (Fraenkel 1992:93).

The role of author of a legal document was negligible prior to the French revolution, since the continentional justice considered only those documents to be valid ones, which were signed by a signature of Secretary of State and were fastened by the keeper of the Royal Seal: the principle prevailed, according to which only this fact is valid, which is confirmed by the seal of king (Arlette&Foucault 1982:11). It was only after French revolution, when the idea of personal signature surfaced in the foreground of juridical discourse (Foucault 1971:28). From the point of view of legal semiotics, the signature is significant in two ways: in the concept of the signature the functions of legitimatization and individualization are interwoven. The signature individualizes a text as an autonoumous semiotic object with a certain aesthetic function, separating any particular signed text from a huge number of identical texts, which share the same normative and dispositive patterns, as

well as the sources of subjective rights, indicating the legally bound and obliged subject. In this case an olographic signature or a signature of notary replace the semiotic mechanisms of identefication and protection, which are typical for the author's copyright (compare the reverse principle, according to which, the copyright could not be applied to the sources of law). The legitimizing aspect of a signature is attached to the juridical refinement of any written document - for example, a legal agreement acquires the legal force at the moment of its signing. Prior to this moment, all rights and responsibilities stipulated by an agreement, would simply hang in the air. Metaphorically speaking, a signing of agreement binds one side of an agreement to another, putting restrictions on a possibility to change conditions of contract without the agreement of other side. The biding force of contract possesses an enormous value in the structure of a contemporary discursive order of law.

However, the contemporary system of legally relevant things reserves a space for transactions concluded in the free form, the very existence of which ones facilitates the use of semiotic methods in the analysis of juridical discourse.

For example, in the German system of civil law a contract of buying and selling, a leasing agreement and a labor contract could be arranged in a purely dispositive way leaving normative clauses without a consideration. For example, according to the principles of German labor law in case if employer does not conclude a **written** labor contract, it is still legally bound by an oral recruiting agreement, since the German labor law does not foresee an obligatory requirement of a written conclusion of labor contract (Weiss 2005). This simple example illustrates, how the discourse of law in course of its own development, constantly gets rid of the ritual legal formulas and redundant rudiments of the past (including that one of a signature and an obligatory written form).

2.2.2.The validity of legal system

Another axiom of legal positivism maintains that the positive law is always a valid law, on one hand, and an effective law, on another. In its essence, this thesis is one of the trickiest doctrines of positivism. Although, while the positivists as a whole movement identify positive law as formally legal, the 'valid' law, some positivists observed that certain observations that only *effective* norm is a *efficient* norm. However, in a Russian translation, this seeming contradiction is not so striking and the difference between concepts *'valid'* and *'efficient'* , at first glance, is difficult to reveal: they seem to be extentions of the same concept. But in the language of law, these concepts are far from being equivalent; in order to grasp a meaning of this difference, it is necessary to recourse to a study of legal language and communication. In terms of legal semiotics of Greimas, legal validity is the manifestation of a modal 'value': this is the communication of a message that certain claims are being made between communicators. Legal semiotics easily accepts such a communicative model without endorsing in any way the truth or justifiability of truth-claims: legal validity is a part of the ideological message conveyed within legal discourse, while 'truth' depends only on the plausibility of law's narrative structures ('truth' is a part of narrative syntagm) and on coherence of semantic structures (Jackson 1991).This statement is a point of major divide between Greimasean semiotics of law and Tartu-Moscow cultural semiotics, as applied to the study of law. According to Tartu-Moscow cultural semiotics, there is no need to speculate about 'truth' or 'validity' of law: law as a system of cultural texts, is always 'true', since 'a false text' of culture is the same contradiction in terms as 'a

false' text, 'a false' prayer or 'a deceitful' law: "a false text is not a text, but the destruction of text" (Lotman&Pjatigorskij 1968:76). The 'reification' of 'truth' occurs only then, when any particular text is being correlated to the context (Levin 1998).

The Polish philosopher of law, Jerzy Wroblewski distinguished three different contextual meanings of a concept legal validity', and this distinction was further developed by post-positvist Aarnio(Aarnio1996:72). These three different meanings of a term 'legal validity' (Wroblewski 1992) can be designated as a systematic action of law, a factual action of the law (with the latter almost identical to the concept 'effectiveness') and the axiological action of law, based on the morals and values (so called social recognition of norm) (Aarnio1996:72).

An expression 'formal legal force' has explicit connotations with the normative (deontic) aspect of the law (compare common structure of usual norm: 'a norm is y, which acts accordingly to situation x'). First of all, whatever enforced legal norm could be, it lies within the scope of a lawyers' activity; therefore a formula of a juridical solution usually appears to look like a logical sequence: 'whatever is a case, it should be solved, following the requirements of a norm y'. An important question about any particular reason for norm's action, does not arise at this stage of logical reconstruction (which, in this conext, takes form of syllogistic reasoning); the norm is legally valid in any particular situation and in case, when it formally belongs to the hierarchy of norms and this normative hierarchy exists coherently in with the constitution. This formalist hierarchical model of norms is echoed in works of Tartu-Moscow semiotic circle, especially in those ones, which were dedicated to the semiotic studies of normative behaviour and logic of norms (Chernov 1967). As a starting point of his inquiry into the systems of prohibitions, Igor Chernov assumed that the norm of behavior has the multilevel nature (because this norm in itself is hierarchic) and

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the evaluative choice of normative dominant is always a question of personal self-appraisal: it is a particular person, who always must to decide, according to which aspect or his/her personality he/she will regulate his/her behavior in any particular situation. It means that the subjective selection of the behavioural rules implies the subjective essense of norms (Chernov 1967:55-57).

The chief proponent for logical positivism in law, Hans Kelsen, considered that the root of the formal validity of law exists within the fundamental norm, "which lies at the foundation of each legal system" (Murphy&Coleman 1990:15). Hans Kelsen represents a scientific movement called *normativism*: this is a very strict and scientifically understood type of legal positivism, which is based on the metaphysical idea of a *Grundnorm*, a hypothetical norm, upon which all subsequent levels of the legal system, such as constitutional law and other branches law are based.

Nevertheless, it is only possible to speculate about formal validity of the fundamental norm (regarded as a basis of legal system) only in case, when the legal case concerns the external scales of the natural law (such as the need for overcoming of a legal chaos, a general tendency toward the order and the universal reason, movement to socially equal conditions and the fulfillment of moral obligations). Quoting J.Murphy and J.Coleman, who considered moral 'validity' to be "a logically necessary condition for enacting the law"(Murphy&Coleman 1990:15), since moral criteria of natural law is the highest standard of validity. Consequently, if an essence of the fundamental norm refers to the highest level of validity, then the fundamental norm is a formally valid, and by virtue of this fact, then the fundamental norm possesses an juridical relevance.

For our concern, it is pertinent to mention that the concept of 'efficient or effective law' belongs to the repertoire of empirical studies of the law (for example, 'as experience

shows, norm y is proved to be efficient in a situation x'). A legal norm is effective, if features of a social life controlled by this norm, are independent from normative motivation. If any particular norm is unenforceable or even inapplicable to any concrete situation, then this norm is either 'a dead law' (*desuetudo*) or 'a figure of law', which is deprived of any practical significance: in other words, the law becomes, in Roscoe Pound's terminology, '*law in books*' (Pound 1910). In such a case it is possible to speak of the crisis of the social acknowledgement of this norm. Indeed, as Jürgen Habermas (Habermas 1989) noted, in the pure democratic society it is guaranteed to any member of society a discursive opportunity of criticism towards even an effective norm, and this democratic feature of criticism indicates a possibility of social consensus, normative acknowledgement or even non-recognition of norm. In the current discussion of legality in law, there is a constantly repeated criticism of mythological persuasion, according to which, the final referent of the legality (or, in Peirce' terminology, *a legisign* or a general type of legality (CP 2.246) in law is determined by dominating juridical opinions.

Another prominent legal positivist H.L.A.Hart claims, that in reality the dominanting principle of law's 'legality' consists in a social recognition of a norm as the majority of jurists should consider the fact that others members of society also recognize this norm and obey to legal rules provided by this norm (Hart 1961:94). As another standard type of the law's legality should be recognized the public readiness to accept a norm as a valid one: in this case, the aknowledgement of norm implies the readiness to accept responsibilities (obligations) and to make use of rights, which are stipulated by any given norm.

Passing to the semiotic clarification of questions concerning the validity and law's legality, it is worth to start with the definition of the formal 'validity'. In an article written by one of the most prominent Italian legal scholar, Luigi Ferrajoli, a theory of legality as

'formal validity' is just another embodiment of 'legal semantics'(Ferrajoli 1997:242).

Already at the very beginning of article, after the interpretation of a content of particular

norms (provided as an example), Ferrajoli introduces a clear division between the concepts

of the formal validity (*significance*) of norm's grammatical elements (legal propositions and

words that claim formal validity) and material validity ('legality' in a proper sense of this

word) of norms themselves (Ferrajoli 1997:233-290). By the latter the attribution of a

special quality of 'legality' to a rule, is meant: "by virtue of the attribution, one may say that

the rule has a normative force within the law" (Jackson 1991:181).

On the basis of this distinction, the validity of norm is nothing but a total sum of

formal and material validity; in other words, the content of concept 'validity of a norm'

entails both a normative (deontic) significance, legal connotations and grammatical

properties of any given legal proposition: it is attribution of an objective meaning to acts

and events within the framework of legal signification.

Therefore, the concept 'validity of a norm' is much wider than its normative

significance; taken this claim as granted, it is possible to conclude that validity of a legal

norm is identical to its normative value only in a few cases. Most frequently the validity of a

norm assumes only the presence of a certain normative significance in   formally significant

legal propositions.

In order to resolve discrepancy between different notions of validity, another famous

legal scholar and logician Amedeo Conte in his influential article 'Minima deontica' (Conte

1988) has sketched out the 'deontic triangle' of validity, whose three apexes represented

syntactic deontic validity, semantic deontic validity and pragmatic deontic validity (Conte

1988:436). The deontic triangle of validity found its application in the doctrine of legal

positivism developed by Umberto Scarpelli, yet another representative of the Italian

analytical school of law. In his monography 'Semantica, morale, diritto' (Scarpelli 1969) he discussed problems of the differentiation between the legal practice and the science of law, as a result Scarpelli touched on a question of the law's legality. Italian semiotics of law shaped out thin division between three types of the action of law - the legal validity of any particular norm, the validity of constitutional norm and legality of legal order as whole.

The validity of legal norm is affected by the concept of system validity ('legality'), while in case of validity of constitutional form, the concept of norm and the fundamental principle (which is Kelsen's base norm) enter the consideration. Taking into account the fundamental principle, proclaimed by Umberto Scarpelli, it is necessary to deduce that a criterion of effectiveness is a mere estimation of constitution's legality (Scarpelli 1969).

The semiotic argumentation of this approach rests upon the three-dimensional model of semiotics of law (*semantics-syntactics-pragmatics*), that representatives of Italian analytical school perceived as a starting point of the analysis of legal language (as based upon deontic logic). From semiotic points of view, this thesis of Italian legal semiotics is very close to the tradition of Saussure and French semiologie, because it starts from the analysis of law's linguistic aspects through the optic of Saussurean dyad *langage(linguaggio)-parole(parola)*(di Lucia 1994, Jori 1997). A relative opposition between the abstract system of a legal language (*linguaggio guiridico*) and the concrete speech act (*parola del discorso guiridico*), being mediated by the three-dimensional model of legal semiotics, makes it possible to provide an answer to a question about the contextual nuances of the concept   'validity'. For instance, while using the concept 'legality', Italian legal semioticians are fully aware of fact that this concept can belong to the different plans (levels) of juridical language. Just as it occurs in reality, the divergence between the semantic and pragmatic plans of legal language, is somehow analogous to the differentiation

of authorities between a legislative branch and an executive branch in the real legal system. This analogy serves as a key to understanding of the role of semiotics of law within the framework of contemporary legal theory.

Actually, on the semantic plan of legal discourse, the function of both validity and legality preclude an estimation of the juridical significance of constitutional norms, which are basis of the legality for other legal norms. The pragmatic plan, in its turn, reflects the distinctive special features of the semantic and syntactic structure of language, indicating the constitutive element of legal discourse, which appears at the level of the semantic organization of legal language. This constitutive element determines the type of a discourse, its participants, methods and channels of communication.

Incase of legality, the constitutive principle of this concept will be the goal-directed legalactivity of competent authorities.The purpose of this activity consists in an efficient application of the law: the successful solution of the existing conflicts of law and averting those conflicts that may arise in the future. Therefore a pragmatic measurement of the concept of legality has other nuances, namely that ones of effectiveness.

2.2.3.Legal logic

According to another thesis of legal positivism, law is a subject to the rules of logic. Although the vast majority of positivists recognized the existence of logic element within the realm of law, their attitudes towards the role and place of logic in the law can vary. It is well-known fact that the need for the application of logic to the science of law was already

articulated by G.W.Hegel – and later logics appeared to be a constant element of the positivist study of law, as it was for other sciences (mathematics, etc).

The legal logic makes use, essentially, of at least two components: logic and jurisprudence. This legal logic would be a 'material' or 'informal' logic as opposed to formal logic. The claim to existence of a special legal logic has run into serious objections. Soeteman has argued forcefully that formal logic can play a significant role in the legal domain, but that there is no need for a special legal logic, in particular when Soeteman's primary target, when he made this argument, was Perelman, who argued that in the law formal logic is not sufficient and that formal logic needs to be supplemented with an informal, or material logic that takes the peculiarities of the legal domain into account(Soeteman 1989, Perelman 1963).

Depending on predominance of either legal or logical component, it is possible to make a distinction between two specific fields of legal logic: so called *'juridical logic'* in a proper sense and the *logic of law*, by which is frequently implied classical deductive logic, or to be more precise, a logical operation of *subsumption* derived from a special type of syllogism. Other types of logical reasoning (such as inductive and abductive) usually remain out of the scope of the attention of lawyers, since these ways of logical reasoning do not cope with the demands of positivists. For them, indeed, logic is merely a tool for ascribing to the law a solid scientific weight. As Dinda L. Gorlée pointed out:

European law has a strong rigidity and stability, and offers through its written form some resistance to manipulation. The repeatable regularity in continental law is the conclusion of its deductive habit: its real logical syllogism goes from legal ideas to real ideas. Probable reasoning is the inductive syllogism, which moves from ideas to things, the latter are material (extralegal) things existing in human experience (Gorlée 2006:253-254).

Thus, the nature of logical reasoning in law is determined by purposes legal logic is oriented to (for example, to the demonstration of logical connections between the legal norms). However, concerning juridical logic, everything speaks in favor of fact that *non-formal legal logic* is much more important than the existing *formal deductive logic of law*. Taking into account a maximally formalized form of logical studies of law, it is reasonable to recall the enormous amount of publications dealing with topics of juridical logic and logic of law: some of those publications have certain semiotic overtones. Moreover, a valid conclusion could be done here, according to which, at least one part of these publications belongs to the corpus of the 'classic' publications related to legal semiotics (Jackson1990:415). The range of topics in papers dedicated to juridical logic varies from the pure digest of juridical logic (Kalinowski 1965, Klug 1966, Tammelo 1969) and application of modal calculus (Becker 1952) - to the logical estimation of legal reasoning's methods (Perelman 1966) and deontic logic (von Wright 1951). Von Wright's deontic approach to the logic of law (and especially on the logic of *should* and *ought*) could be understood in the tradition of Austin's speech acts as a response to Austin's argument about *if* and *can* (Kevelson 1986:441).

Noting the role of legal logic, Hungarian researcher Csaba Varga writes that any attempt to create the model that would make it possible to bring together the application of law and the realization of law, would also lead to the logical concept that narrows the conceptual framework of legal decision making, equating juridical logic with over-simplified *subsumption* model. However, such an approach by no means is innovative, since it continues the tradition lego-logical studies in veins of '*more geometrico*' ('geometric method') and Cartesian ideal method of the universal *mathesis* (Varga 1982:53). In a lightly arevised form this theoretical viewpoint still exists in some juridical circles. As the saying

goes, the historical parallels between the contemporary tendency toward the axiomatization, i.e., towards formalization of jurisprudence, from one side, and the idea of Leibniz of the universal calculation of ideas, with another, lie on the surface. In fact, in 17th-18th centuries' for a long period of time the idea of legal calculus was widespread among the jurists, who described the law from the specific mathematical positions of 'legal calculation' (Varga 1986). Therefore, it becomes clear, that one of the earliest examples for the use of principles of logical calculus in the law could be already found in G.W.Leibniz's dissertations, mainly in his '*Dissertatio de conditionibus*' as well as in a treatise about the universal science or the philosophical calculation. The principle of logical calculus as the tool of the formalization of law in many aspects is consonant to the semiotic principles of formalization: it became a powerful system for manipulating symbols whose meaning is constrained only by number. Roberta Kevelson in her encyclopedic article '*Law*', written specially for Th.Sebeok's '*Encyclopedia of Semiotics*' (Kevelson 1986), illustrated some mechanisms, as well as models of interaction between logic and semiotics within the universe of law. Laying aside a certain analytical conventionality of the proportional relationship between elements of semiotics and elements of logic in the positive law, it is possible to contrapose the non-relative logic of the judicial decision-making to the 'relative logic' introduced by Charles Sanders Pierce (the relative logic operates with *set of objects* comprising all that stand to one another in a group of *connected relations*, while the ordinary logic works with *classes*.). Under the conditions of classical juridical logic, a key variable of the juridical decision-making function (which is a sentence) will prove to be either analogy (as it is in the countries of the Anglo-American *Common Law*) or syllogical subsumption (a logical operation that lies at the basis of juridical decision-making in the continental Europe's legal systems). Consequently, a legal judgement, ruled out using either analogical method of

reasoning or subsumption is considered part of a symbolic legal code In relation to its contectual society, the legal code will need a refinement, having been detailed in order to acquire a legal force (which is a predominantly iconic sign function, because legaly inforced legal code is refered to as the 'mirror' (*Spiegel*) or 'map' of society (Kevelson 1990:359)) - in the semiotic context of relative legal logic, the existing judgement assumes the functions of Peircean concept   'type' in its relation to 'token'. In such a case, legal logic performs the role of logical syntax within the structure of the formal language, which aims at the description of law. By virtue of its position, legal logic 'couples' the meaning-generative (semantic) units of legal discourse into the single whole.

As far as the function of logical calculus is concerned, Roberta Kevelson notes (Kevelson 1986:441), referring to the work of American logician Joseph Horovitz (Horovitz 1972:49), that the application of contemporary logic methods to the science of law (jurisprudence) should be aligned to the notion of 'calculus', i.e, the calculation (*Kalkülisierung*) of the existing systems of positive law and underlying deontic structure of law's descriptive field should not be disjoined from a logical descriptive of legal signs and sign relations in law. Within the small community of semioticians of law, there has been a long dispute *apropos* of the nature of the internal interrelations between prepositional logic, logical calculation and the concept of reference. This debate focused on a semiotic critique by Touchie of Jackson's analysis of propositional logic and the requirements of decisions and how distinctive semiospheres, such as legal systems, may or may not constrain decision-making. The initiator of this discussion, Bernard S.Jackson criticized MacCormick's account of the justification of 'easy' legal decisions through the normative syllogism, categorically stated that main distinction between reference and pure propositional logic consists in the fact that the reference, in contrast to the propositional logic, allows the possibility of the

individual choice between the acts of reference (for example, act of ascription, ascribing linguistic concepts to real world's entities). The starting point of critique by Jackson is the distinction between semantics and pragmatics, and the nature of 'reference' within pragmatics. While logic as a system operates without the intervention of 'decisions'or 'judgements', logic in use is part of the pragmatic dimension of language, which requires consideration of the identity and purposes of its users(Jackson 1998:79-93). Jackson's main opponent, John Touchie advanced a counter-argument: he noted that Bernard Jackson's model of propositional logic is flawed. Touchie examined the nature of the 'decisions' that Jackson claims are a necessary concomitant of factual determinations of the predicate, and argues that if Jackson's analysis is correct, then contrary to Jackson's assertions, these 'decisions' must also be made within the sphere of 'pure' propositional logic. It further argues that Jackson's seemingly unobjectionable claims concerning the 'decisions' that have to be made when applying rules have substantial, but frequently overlooked, implications for rule-based conduct governance and the notion of following and applying a rule, one of these being that the question of whether or not there is a 'decision' to be made in applying a rule can only be determined by turning to an examination of its content and the environment to which it refers. Finally, a more general argument is made against Jackson's position by relating his claims to discussions of "the philosophical notion of intentionality" (Touchie 1997:317-335).

Touchie's central argument is that Jackson cannot argue both that reference always requires individual choices, and at the same time that 'pure' propositional logic, being a rigorous calculus, does not require such choices or decisions (Touchie 1997:330-335). According to Touchie, Jackson can either be 'sceptic' or 'non-sceptic' about both logic and reference. On the contrary, Jackson says that interpretive decisions are required only by

reference, the applying or interpreting or ascribing words and sentences to actual facts. Pure formal logic is indeed a rigorous calculus involving no choices apart from accepting the rules of the logic game. The amount of choice required by concrete acts of reference (ascribing language to things) can be variably reduced by making the language more precise. Such interpretive choices can be reduced to a practical nil for the normal purposes of particular kinds of descriptions (the easy cases in jurisprudence and the normal cases in ordinary life and language) (Jori 1998:59-65).

The apology for the purely logical nature of propositional calculation, is contained in articles written by Bernard S.Jackson (Jackson 1998), Bruce Arrigo (Arrigo 1998) and Mario Jori (Jori 1998). Defending their views, afore-mentioned authors restated their position either using the Chomskian distinction between *competence* and *performance* (B.S.Jackson), the theory of ascription (M.Jori) or Lacanian-inspired psychoanalytic-semiotics of law (B.Arrigo).

A special niche in logical studies of law is occupied by normative (or *deontic*) logic of and the logic of norms. In the middle of XX century George Kalinowski (Kalinowski 1965) and Georg Henrik von Wright (von Wright 1951) constructed (irrespectively of each other) the logical *calculi*, which can formalize some normative reasoning (for instance, legal reasoning). Essentially, the specific character of the logic of norms could be reduced to the differentiation between two structural levels of norm – between descriptive and formal levels. In Kevelson's opinion the descriptive level of a norm, or more precisely – the deontic structure that constitutes norm's basis - consists of six elements: an essence of norm, a content of norm, a condition of application, a carrier of authority, subject and guidelines for the application of any given norm (Kevelson 1986:442). The formal level of norm is its logical form. Underlying deontic structure mentioned above cannot be examined separately

from the logical description of legal signs and semiotic relations between the elements of this structure (von Wright 1957, von Wright 1963, von Wright 1964).

Differently from classical logics, Pierce's logic – 'pragmatcism' - is characterized by its 'relative' nature. Extrapolating Peircean logic into legal material, it should be noted that the process of legal reasoning is facilitated not only by the concrete definition of the letter of law, but rather by the emergence of new legal sign (the decision-as-interpretant sign) in regard to initial problem (Kevelson 1986:441). It is completely possible that in this situation Peircean model of dialogic semiosis (that one the type '*type→token*') comes into full force (the dialogic semiosis follows the direction from a class to a sign, from the general to the particular). As it was said aforehead, the logic of Perceain pragmaticism is relative - it ignores absolute values, preferring to deal with concrete things. In the juridical context, the pragmatic relativity of logic is manifested both in the negation of written law's absoluteness and in the underlining of social context of legal decision-making. Taking into account aforesaid, it is possible to make a conclusion that legal pragmatic is based on neither the inductive or nor deductive method of argumentation. At the same time, relative logic has little in common with the analogical method of reasoning.

For comparison, the analogy operates on the development of similarity between any particular case found in legal practice and legally relevant referent-*habit* (which is either law or normative act or precedent) (Larentz 1983:362). In contrast to this model, the logic of pragmaticism, as Peirce explains himself, is the logic of reasoning based upon hypothesis of abduction (CP:5.144, CP:5.145, CP:5.148, CP:5.154, CP:5.296) The logical procedure of legal substantiation is thus a chronological sequence, which follow the sequence of *abduction, deduction* and *induction.* It is the model of abduction that appears to be a 'driving force' of Peircean reasoning. From semiotic point of view, the rational core of logic

consists in revealing the obvious fact that the complex matrix of law-reality is many-folded, as logic covers the analytical, epistemological and dialectical dimensions of juridical method of reasoning.

In this way Peircean logic reminds of popular theories of coherence in law , that find their source of inspiration not only in jurisprudence, but also, and perhaps mainly, in the general epistemology. In his work *'On Law and Reason'*, Peczenik writes that legal reasoning is supported by reasonable premises, and that a premise is reasonable if and only if it is not falsified the hypothesis "which is not to a sufficiently high degree corroborated and this premise does not logically follow from a highly coherent set of premises" (Peczenik 1989:160, see also Alexy&Peczenik 1990:130-147). According to this thesis, the inner logical form of legal system (in other words, the descriptive level of law), as well as system of legal justification should be coherent. Concerning the relevance of coherence for the law, Peczenik first refers to MacCormick (McCormick 1984) according to whom justice would require that legal justification is embedded in a fairly coherent system. This is a evaluative argument why the premises of legal justification should belong to a coherent theory. The theory of law coherence is a focal point of so called *post-positivism* (represented by McCormick, Aarnio, Alexy and Peczenik) which appears to be a dialogical approach to legal argumentation from the perspective of general theory of coherence. In a pragma-dialectical approach to legal argumentation, the argumentation is considered to be part of a critical discussion aimed at the rational resolution of the dispute.

2.2.4 Logic: Norms, rules and values

According to Kelsen, a norm is *the meaning of an act of will* (*Sinn eines Willensaktes*), that is expressed in language by means of an 'imperative' (*Imperativ*), or an ought-sentence (*Soll-Satz*) (Kelsen 1979:2). Von Wright distinguishes three main types of norms (von Wright 1963:15). First there are norms in the sense of *rules*. These include the rules of games, that determine which moves are correct, permitted, prohibited, or obligatory. The rules of languages also belong to this main type. The second main type distinguished by Von Wright are *prescriptions*, or regulations. The laws of the state provide an example of this main norm type. In general, prescriptions are commands or permissions, given by someone in a position of authority to someone in a position of subject. The third main type are norms in the sense of *directives* or technical norms. They specify "the means to be used for the sake of attaining a certain end" (von Wright 1963:6). In comparasion to von Wright's approach to deontic logic, the normative logic derived from works of Tartu-Moscow semiotic circle, tends to emphasize the system of prohibitions: any particular norm of behavior is supported by underlying system of prohibitions, which is assigned by traditions, the considerations of the 'common sense', special agreements, codes and rules either to whole society or its separate members. The vast majority of norm is disposed according to the negative principle, i.e. using the enumeration of prohibitions, because it is irrational to describe norms positively, since the positive definition would require the extremely bulky list of the rules (Chernov 1967:54-55)

Rather than attempting to offer a formalized division of norms, Alchourrón and

Bulygin sought to derive two independent conceptions of norms, which they labeled as *hyletic* conception of norm and *expressive* conception of norm. They claimed that according to *hyletic* conception, norms are either proposition-like entities or meanings of normative sentences. In contrast to descriptive sentences, which have descriptive meaning, normative sentences always have prescriptive meaning: *expressive norms* are the result of prescriptive use of language. They are expressions in a certain pragmatic mood (commands), and should not be identified with what is commanded. The expression cannot be identified with its content: expressive norms have no meanings, while hyletic norms do have (Alchourrón& Bulygin 1981:95-100). There are not only different theories about the nature of norms, there is a plenty of theories, which are concerned with entities related to, but allegedly not identical to norms. For instance, aforementioned Von Wright distinguished between norm-formulations (linguistic entities), norms, normative statements, and norm-propositions (von Wright 1963). At the same time, Conte developed a simple tetrachotomy of the term 'norm' parallel to the distinction, peculiar to the theory of speech acts – Conte stressed four meanings of the concept 'proposition':

as 'sentence' ('*enunciato linguistico*', '*Satz*'), as 'utterance' ('*enunciazione d'un enunciato*', '*Äusserung*'), as 'proposition' in its strict sense ('*ciò che un enunciato esprime, ... proposizione `strictu sensu"*), and as the state of things with which the sentence deals. (Conte 1988:430)

The nearest example of an account, alternative to that provided by deontic logics, can be found in Hart's positivist philosophy, acording to whom, the minimal units of the legal system consist not of norms, but rather of 'social rules', while Hart's main opponent Dworkin adopts a different identification of these 'minimal' units (which may be identified within the structure of legal discourse as 'semes', the elementary components of meaning in terminology of Tartu-Moscow cultural semiotics(Levin 1969:290)) within the same theoretical framework - by viewing them as 'rights' to which judicial discourse

refs (Jackson 1991). In the analytical theory of law (represented by Hume, Bentham, Hart, Guastini) as a theoretical cornerstone should be recognized the inquiry into the practical resolution of ethical problems: the latter assumes the clarification of the linguistic ambiguity of the legal definitions. As the illustration one could have recourse to simple legal concept such as 'an accomplishment of crime'. Generally, problems of definition are inseparable from problems of classification in law, but in analytic theory of law legal definitions, in essence, signs of inquiry; say, the analytic theory will ignore legal definition of 'accomplishment of crime'; therefore it considers the same question under another angle – the analytical inquiry in law would be then devoted to the clarification of what is meant by words 'accomplishment' and 'crime', establishing thus their proper linguistic meaning (their 'proper' semantics).

According to Hart, in a system with a basic rule of recognition, before any given rule is actually made – a particular norm will be valid, only if it conforms to the logical requirements of the basic rule of recognition: otherwise, it is just a set of rules. In Hart's theory, law and morals are thought to be two distinct logical systems: even if law and morals contradict, they demand logical consistency of their own systems.

The logical comprehensiveness of the legal system includes the idea that there are no gaps, such that all legal meaning or signification is to be found within the legal system: law has some special forms of syntactic, semantic and pragmatic distinctiveness as compared to ordinary language in its strain towards mono-semioticity (Nelken 1991:191) But whatever adoption of the classical positivist doctrine of law, constructed as logical system is, the positive doctrine of law-as-logical system does not eliminate essential gaps which exist at the purely logical level of independent minimal units of legal system - in that system only specific closure rules (rules of transformation) could foreclose the existence of gaps. Roberta

Kevelson provided an interesting semiotic account of 'gap' problem in law, resorting to Kantorowicz's 'free law':

> His [Kantorowicz's] 'free law doctrine recognizes the importance of the so-called gap, usually ignored by other schools, which seem to assume that the law is complete and that every legal question can therefore be answered automatically'. Goodhart, in his introduction to Kantorowicz, points out that it is this creation by Kantorowicz of a free law doctrine which provided a major theoretical basis for Realists and that this doctrine rests on the assumption that formal law, statutes, and precedents are interconnected by 'gaps' or intervals, or in Peirce's sense, by stages in a process which the sign- functions of 'icon', 'index' and 'symbol' represent. These gaps are like Peircean *modes* of relationship. This 'gap-filling material' is rule ordered and rule ordering in law. Such laws are 'free' in the sense that they are not part of a formal system. They are in transition. (Kevelson 1990:43)

Perhaps, the most striking distinction between purely formal logical meta-system of law and any other system consists in logical stiffness of former - this is explicitly seen in comparison between the actual legal reasoning of a real legal system (which is reflexive system) and the purely logical reasoning of a formal system (the latter represents at its best Kelsen's pyramid-like hierarchy of norms). At the bottom of formal logical system of law an abstract or formal norm that 'closes' the legal system (in pure theory of law closure happens through transcendental *Grundnorm* or *constitution* in a legal-logical sense of this word). In such a formal system of logic, one contradiction, anywhere in the system, and especially in its foundation (*Grundnorm*), is enough to collapse the entire system, for in such a system any theorem is provable and there is no place for paradoxes. As the social world evolves it sheds innovative light on the signification of social and economic rules that intend to regulate social life. Of course, possible interaction between society and law is barred by a legalistic conception of law as a formal logical system. However, this is valid only in theoretical dimension of legal system. In actual legal system, the contradiction does not ruin the whole system, but, on contrary, it is essential, because the contradiction is a

necessary spur to the ever continuing development of moral and law. Rather surprisingly, the key figures in British jurisprudence (such as Lord Halsbury) seem to agree with the paradoxical and even illogical nature of Common Law:

A case is only authority for what it actually decides. I entirely deny that it can be quotes for a proposition that may seem to follow logically from it . . . [T]he law is not always logical at all (Case *Quinn v. Leatham* [1901] *A.C.*459, at p. 506., quoted from Atiyah(1987:10))

This judicial statement echoes in the current postmodernist doctrine of legal philosophy, which has its starting point in *paralogism*: privileging paradox, irony, instabilities and contradictions, tension, disorder without center over permanent, stable, logical order. Postmodernist system construction privileges 'dissipative structures', or 'dissipative systems' which are treated as relatively stable societal structures that remain sensitive and responsive to their environment. Tartu-Moscow semiotic circle provided a pattern strikingly similar to that of paralogism. This model asserts, that one of four fundamental concepts associated with the semiosphere is heterogeneity: this concept implies that "the languages of the semiosphere run along a continuum that includes the extremes of total mutual translatability and complete mutual untranslatability" (Lotman 1990:125). The existence of cultural space implies co-existence of multiple and continous levels within cultural space. For Lotman, cultural space (in particular case, the semiosphere of lawas a sub-set of cultural space) is a result of a tension between continuous and discontinuous (discrete) elements:

Culture as a complex whole consists of layers of different rates of development, such that any of its synchronic slices will unveil a simultaneous presence of different levels of development. Explosions in some layers may combine with gradual development in others (Lotman 1990:25).

3.Law: dissipative structures and autopoetic system

Dissipative systems are meta-stable systems that use energy flow (influx) to maintain. The term was coined by Ilya Prigogine (Prigogine 1969) and can also be used more generally for systems that consume energy to keep going on. These systems are generally open to their environment. Accordingly, this model begins with far-from- equilibrium, disequilibria conditions as being the more 'natural state of being', and places an emphasis on flux, nonlinear change, chance, spontaneity, intensity, indeterminacy, irony, paradox, puzzles, riddles and orderly disorder. The impossibility of formal closure (either through Kelsen's *Grundnorm* or Hart's rules of recognition), dictates that the search for a global pure theory (of law, for example) is a useless exercise, because – as postmodernists claim - there is no global unity or center exist, and global is always oppressive, politically totalitarian. This concept implies both relative stability as well as continuous change, ever changing flux (constant drifting between implied order and implied disorder). Implied disorder is the coexistence of multiple sites of determinants whose unique outcomes are never precisely predictable. Because of inherent uncertainties in initial conditions, iterative practices produce the unpredictable, spontaneous result (Milovanovic 1995, Milovanovic 1997). Such a position necessitates a reconsideration of the traditional notion of a legal system, and it assumes a transdisciplinary leap into the field of transformation theory.

In this regard, transformation can be understood as a process out of or through which implied order gives way to implied disorder (chaos) and implied disorder (chaos) again leads back to implied order. However, in order to adopt the transformation theory to legal studies,

the original understanding of logical rigid systematicity must be revised. This modernist notion of systematicity originated form a time when the human and social sciences were influenced by structural-functionalism. Legal sociologist David Trubek puts it out:

> This school's view of the social system contained two key ideas that have been questioned: social integration and functional necessity. For the structural-functionalists, society is a tightly integrated system of inter-related elements or structures. These structures exist because they perform functions. One can explain various structures, including those of ideas, by discovering their function. To this extent, functional analysis is a useful and unavoidable form of social thought. (Trubek 1990:23)

Contrary to structural functionalism and its privileging of social homeostasis, postmodernists stand for the ongoing flux and everlasting change, best described by the notion of nonlinear conditions (conflict, tension, struggle, contradiction, paradox). The functionalist notions of tight societal integration and social function loose its grounds in those changing conditions: postmodernism asserts that law and society are tied together not by the virtue of social integration or social functional necessity, but rather in a looser and more tenuous way - for instance, through the autopoetic closure of an autopoetic system.

Autopoietic systems are systems that are defined as unities, as networks of productions of components, that recursively through their interactions, generate and realize the network that produces them and constitute, in the space in which they exist, the boundaries of the network as components that participate in the realization of the network (Maturana 1975). 'Autopoetic systems' imply almost all general properties of abstract general system: but it can use only own elements, i.e. an autopoetic system is operationally closed – the autopoetic closure consists in fact that all operations of system always reproduce the system. Autopoietic closure is the condition for autonomy in autopoietic systems in general. Such systems can be coupled to one another to bring about a harmonious, synchronic whole, which can become self-organizing, thus regarded as a single unit insofar

as its function is concerned.

Law as an autopoetic system is also closed in another meaning: the legal system needs no (moral) legitimation by the social (reflexive) system. In this respect the theory of an autopoetic system has a rough resemblance with Weinberger's institutional positivism (law is an independent self-legitimizing institution), even if Weinberger's theory shares more in common with Kelsen's theory (Weinberger 1991). The autopietic closure (which is sometimes equal to 'normative' closure in legal sense) means that morality as such has no legal meaning - neither as binary bifurcating code, nor in its specific connotations, because the legal system's binary code constitutes the continuous necessity of deciding between legally right and wrong. Thus, the binary code allows to organize the autopoiesis of the system, and this is only internal feature of the system, which has nothing in common with morals. The autopoiesis of the legal system is normatively closed: i.e. only legal system can impute the pure normative quality to its elements. The operational closure of an autopoetic system differs from a formal closure of a logical system: the latter is logically closed due to the perpetual existence of the basic norm or the basic rule of recognition. But the autopoetic theory claims, that the legal system knows of neither *Grundnorm* nor social rule of recognition representing its unity within the system (Luhmann 1992:1426-1427). Conceptually speaking, the normative closure is a purely operational (but *not* a logical) closure of system.

At the same time being a special type of dissipative structures, the autopoetic system of law is cognitively open - it should be open enough to respond to continuous flux of changes, it means that autopoetic system is open for structural coupling. Accordingly, Nicklas Luhmann and Gunther Teubner have offered the notion of *structural coupling* and *constitutive theory* to explain the peculiarities of communication occurring between legal

structure and extra-legal environment. Structural coupling could be understood as communicative exchange, channeling the infra-legal material into the legal and vice versa. Structural coupling enables a continuous influx of disorder (contradiction, conflict or 'tension' in terms of Tartu-Moscow semiotic circle) against which legal system seeks to maintain its inherent 'mono-semiotic'structure. The influx occurs due to the process of communication, which is the basis and the subject matter of the system at the time. The communication of legal system to the society does not require classical communicative model (communicative relation between sender and receiver), because "the legal system cannot communicate as a unity and the society has no address" (Luhmann 1992:143-144). However, for postmodernist theoretical jurisprudence, the communication of contradiction, controversy and conflict is of great importance and it seems to act as an evolutionary instrument of the social system. Conflicts outside the law save autopoiesis of communication at higher costs: they assure that communication goes on even if nothing of informative quality remains and even if the communication becomes controversial. Autopoiesis opens new dimension of the communication of conflict beyond normative closure of a legal system. The cognitive openness of law allows to 'learn' from the legal experience and to make more complex rules for behaving under abnormal conditions in conflict situations.

Noteworthy here is Kevelson's work on conflicts of law and conflict in law (Kevelson 1990). In her offerings, the creative role of paradox should be privileged:

It is suggested here that there are all variations on the basic problem of paradox - that the problems of conflicts of law deal with the need to resolve distinctly different frames of legal reference between different legal systems. The problem of conflict in law involves different kinds of choice-of-law procedures and justification of such choice. At the forward border   of all fields of inquiry today we find the problem of the paradox. But, following Peirce, we realize that this is at such critical juncture or crossroads between semiotic systems or frames of reference that new value emerges. At such points the creation of new referential norms

and rules becomes possible.(Kevelson 1990:37)

A relatively closed system - in our case, a closed system of law - attempts to resolve apparent indeterminacy and to subordinate one member of the indeterminate or conflictual situation to the other. A relatively open system wants to sustain the paradoxical structure; at the same time, it may act in only one direction only at a time, since that is all that is possible in any practical sense.

Roberta Kevelson and Lawrence M. Friedman argued against a formal abstract model of ideal legal system with the essential logical structure of law (*aussere System*), which organizes an inner unity (*innere System*), so called 'body of law', in diversity of different legal 'codes' of authoritative norms, rules of social recognition, moral and legal values, ideas, principles, commands. Such an ideal legal system as whole does not fit to the description of a continuing process of legal communication, legal interaction between different 'codes' representing different semiotic groups, different rhetoric modes of reasoning (logic), different legal subsystems. These modes of reasoning and appropriate type of logic underlie each particular type of legal subsystem. For instance, the closed ('formal') subsystems accept either inductive or deductive mode reasoning, based on relatively small, a fixed set of given premises (known as legal propositions), which does not allow alternative conclusions to evolve. In closed formal systems there is only one correct answer and it must refer to the source of derivative authority (i.e., the divine will, sovereign, parliament, sacred scriptures etc).

Open legal subsystems ascribe to the legal reasoning new value of innovative and hypothetical reasoning (*abduction*), based on dialogism, which admits a choice between two or more possible and sometimes unpredictable solutions of problem in focus. It must be said here, that innovative dialogic reasoning in non-formal open systems tolerate both formal

legal arguments of jurists, as well those outside the formal system of legal reasoning ('reasons behind law'), dictated by other public socio-economic groups or popular customs (Kevelson 1987:76). The change of power-balance within the society, the ideological shift within any given legal culture or any particular legal community, the emergence of new socio-economic forms and cultural identities result in evolutionary changes within the legal system.

Similarly to the autopoetic theory, where the evolution of law is explained on grounds of cognitive openness, the methodological tools of Peircean semiotics applied to the study of law - *relative transforming logic*, *hypothetical reasoning* and *dialogic semiosis* - give rise to the comprehensive explanation of an ongoing development and evolution of legal system. For example, semiosis in the context of legal semiotics is a dialogical process between legal systems and their referent social groups:

[Semiosis] is a process of a shift of authoritative power between legal actor/speaker and public actor/speaker, where each in turn assumes the role of legal or public patient/listener. With this shift, a change in legal style takes place; the message exchange is no longer that of legal sentences or sequences of sentences, but is, rather, an interactional, agonistic dialogic transaction. (Kevelson 1981:188)

This semiotic model of legal communication (which, in this context, is equal to legal semiosis) significantly differs from autopoetic version, because it demands dialogical communication between reciprocal opponents - public/legal sender and public/legal receiver. However, both theory of dissipative structures and that one of autopoetic systems are capable to solve problems of contradiction, instability, antinomy and disorder, which are lethal to formal logical system of thought. The autopoetic system contributes to the facilitation of legal communication: in focal concern here are distinction between normative and autopoetic closures, between normative and cognitive expectations, between law and morals. Unfortunately, they fail dealing with the construction of a legal meaning and

the evolution of new information in dialogical socially constructed structures. One of Luhmann's successors, Gunther Teubner, reviewing arguments of Habermas, Luhmann, Berger, Luckman and Foucault, developed the constructivist epistemology of law, within scope of which felt the conceptual idea of law seen as one amongst many self- referential 'epistemic subjects' (Teubner's synonym for a notion of 'autopoetic system'). An epistemic subject implies more sustained engagement with the cognitive options of an autopoetic communication (Teubner 1989) .The solution of this problem may be found in the last cluster of general system theory, which is occupied by the cognitive theory of reflexive system, which opens new field of inquiry, the construction of a special legal meaning, the reflexive cognition of 'law as epistemic object'.

4.Reflexive system, sign system and 'the secondary modeling system'

The notion of a reflexive system denotes a particular system, consisting of reciprocally constructed/perceiving subject and object: in this system the subjective and objective components reflect each other. Eugen Baer defines the reflexive system as:

….a system which is in two different states, call it 'self' and 'other', which, however, constitute each other reciprocally in a functional loop, for instance, the predator/prey loop and which, in this sense, reflect each other. Reflexive systems can be seen as having the minimal structure of the semiotic triad, in which sign-vehicle and significate reflect one another on the grounds of an encompassing network of signification. In other words, a reflexive system consists of a plan of signification, in which at least two systems functionally belong together and in this sense signify each other. (Bauer 1984:2)

Hence, the reflexive system is just a special kind of autopoetic system, the social system is a reflexive system *sui generis*, and the legal system is a specific variation of social system. Law as a reflexive system constructs the social reality of its own (Berger&Lukmann1966).

In the law as reflexive system, legal objects (such as legal acts and things) are produced by the subject of law: using Jakob von Uexkull's expression, one may conclude that all legal reality is subjectively constructed. At the same time, law as a communicative process produces human actors as semantic artifacts (Teubner 1989:730).

Therefore, a legal subject is the *interpretan*t of a constructed object and vice versa. The legal system, from viewpoint of the theory of reflexive system, consists of subjects (persons, *personae*) and objects (things, *rei*), which reflect each other via the channels of a specific legal communication, which, in this respect is a specific communication that

differentiates the legal system from other social systems. Such a viewpoint is a heritage from the development of sociology, in accordance with the theories of social action whereby law was embedded as a subsystem within the pluralistic network of society. The differentiation of a legal system from other social systems occurs in the 'domain' of an autopoetic communication due to a structural coupling. The structural coupling of social communication draws a line between information reproducing society on the one hand, and special legal meanings as normative projections claiming legal validity - the legal code (which is deprived of its primary semantic meaning) and the legal acts (decisions, commands, orders, rules) - on the other. From the communicative point of view, legal acts can be regarded as messages exchanged between legal and coexisting social systems, however, according to autopoetic theory of law, it cannot require a communication of the legal system to the society as a relation between sender and receiver. The communication model of law as a reflexive system is rather different in this respect that communication of a reflexive system assumes a reciprocal construction of both objects and subjects: all objects of law owe their structures to a subject of law, as well as subjects of law (especially, collective entities) owe their own fiction existence to subjects of law (legal acts, i.e. things, commands, requests, orders, rules, norms). Since the legal subject (especially as a collective entity) is socially constructed, the concept of legal understanding has came to the focus of postmodernist jurisprudence. The classical analytical jurisprudence of positivism overshadowed cognitive connotations of the legal system and its direct connections to the reflexive (i.e. sociological, ideological and psychological) grounds of cognition. At the same time, positivist jurisprudence isolating a legal subject from cognitive interpretive scrutiny of law "restricted equally internal perspective of sociology of knowledge on legal system" (Balkin 1993:110).

The restriction of 'internal perspective' is seen as the result of rational 'unification' of a legal system, as the result of reduction of pluralism, which is in its turn is 'the outcome of a power conflict between those who want to control the legal system in order to bring about utopian social   ideals and those who still wish to consider legal actors, such as judges, as 'institutions of a spontaneous order'(Kevelson 1981:187).

The discursive pluralism, being proclaimed by the theorists of postmodernism, undermines the inner sanctum of juridical thinking – a firm belief in the unity of legal system. Indeed, it is well known fact that the analytical thought of jurist, relying on legal values, brings into order and systematizes different, but nevertheless legally relevant facts into single whole. In this systematizing process of the formation of juridical dogmatics the jurist follows the pointing finger of the legislator, who detaches juridical facts from the complex mosaic of social relations. In contrast to this, the theorist of law sympathizing to postmodernism will attempt to put the sovereignty and legitimacy of legislator in doubt, at the worst being turned to the scales of natural right.

Some traces of the legislator's will, which is expressed in a normative act, may remain in legal dogmatics: indeed, it is a normative text, that appears initially and it is followed by historical interpretation and application of normative statements, expressed in this normative text. It is quite common that the moment of adoption of act and its legal enforcement are historically separated by significant amount of time. In this case others tools of normative text's interpretation (such as systematical and grammatical interpretation) do not fit to a historical measurement of the purpose of legislator. A good example would be Article 6 of Austrian Civil Code, where is implicitly   stated that the purpose of interpretation is the development of the historical intention of legislator.

From this point of view , a routine activity (interpretation of normative text and the

application of a law) of practicing lawyers in the countries of Continental legal system resembles the procedure of 'decoding' of the legislator's 'will'. The imprint of such archiving is especially noticeable in a clerical work (such as registration of commercial society, the formulation of will, the delivery of residence permit, etc.), where decision-making is effected by the rigid framework of administrative, notarial or judicial procedures. In the theoretical jurisprudence, the influence of legislator's will is less formal and this lack of formality allows theorists to trace boundaries between the formal side of the juridical normative act and the empirical elements of law.

In juridical literature it is frequently cited Julius von Kirchmann's aphorism: "three words said by legislator could render entire law libraries into corpus of a pulp literature"(von Kirchmann 1848:28). The accuracy of this statement is justified by the current state of rapidly transforming Estonian jurisprudence, in course of which the theoretical heritage of Soviet times - entire volumes, dedicated to the analysis of the once vital problems of Soviet right – are doomed to raise a dust in archives. The interpretation of the normative and objectively existing text of law in reality is reduced to the construction of a model of understanding of law, generated by the will of legislator.

Contemporary law is exposed to irreconcilable conflicts between different institutionalised discourses in society. This excludes that the law subscribes to one of the colliding rationalities. Instead, legal practice and legal theory need to confront directly the phenomenon of polycontexturality.

Actually, one and the same normative text can be understood in a plenty of ways: therefore, alongside with the postmodernist concept of polyphonicity (or 'polycontexturality') of different law discourses it makes sense to emphasize the co-existence of diachronic and synchronistic analysis of one and the same discourse, for

example discourse of the positive (written) law. This plurality of legal discourses (or rather 'plural legalities') has been stressed by French legal scholar A.J.Arnaud, who asserts, that the diachronic analytical construction of law is one of the most important methods of inquiry in law, mainly because it discursively resists the synchronistic empirical observation (Arnaud 1973:42).

However, there are always certain exceptions in this over-simplified diagram of legal inquiry, which illustrates direction of analysis, which is performed by the practicing lawyer. If the actually existing socia relations are not reflected in any particular legally enforced legislative act, it is necessary to use proper analytical tools in order to 'substantiate' social relations diachronically. For instance, in the Estonian civil law the actually existing economic relations between agent and manager , have not been adjusted by the special normative provision until the adoption of Code of Obligations (in year 2002). In legal practice, conflicts on this basis were thought to be solved using analogous provisions, contained in reformed Soviet civil code (GK §§ 410-416) and common directive of the EU (86/653 18.12.1986), aiming at the protection of agent's rights.

Taking into account the aforesaid, it is worthwhile to note that the given 'technical' model of juridical analysis implies the acceptance of 'discursive pluralism', which has been proclaimed by post-modernist jurispruders. The idea of a plurality of legal discourses has already crossed the very border-line of the contemporary epistemology of legal science, according to which, comprehension of law is impossible without a reflection on legal object. The shift in legal epistemology indicates simultaneously the loss of dominant position, previously reserved for legal ontology . As far as the latter is concerned, the current scholarly development of legal critical ontology has manifested a certain tendency to get rid off the positivist doctrine, according to which the ontological description of law has been

placed within coordinates of 'proper' and 'real', derived from universal philosophical categories of normativity, causality and finalism (Kubek 1986).

Moreover, the divergence between legislative discourse of law ('legislation') and practical legal discourse (*praxis*) has resulted in the infamous 'epistemological clash' between legal dogmatics and legal philosophy. It is obvious that 'disagreement' between legal practice and theoretical jurisprudence could be compared to the concept of 'epistemological clash' introduced by Gaston Bachelard, i.e., the epistemological precipice between the science and the common sense (Bachelard 1971). Therefore, the very idea of imaginary priority that legal dogmatics take over the legal reflection, is deprived of any sense, since these phenomena epistemologically belong to the different levels, although, as it was crisply noted by Roland Dubishar, legal dogmatic itself is the theorising of legal praxis in a first place (Dubishar 1978).

The difference between legal dogmatic (perceived from the 'inner' epistemological angle) and praxis becomes especially evident in cases, when legal problems of practical signficance are being considered. In those cases, a lawyer ought to 'imitate' judicial discourse, even though not exceeding the limits of the 'internal' aspects of legal epistemology. Thus, in theoretical discourse of law, a pivotal position belongs to a systematic explanation of the content of legal norm. The judicial discourse includes, besides the establishment of facts and the explanation of norms, a decision making process, i.e. the process of practical law-application and by virtue of that, the judicial discourse is always directed from 'internal' perspective of law towards the certain patterns of social behavior which are detectable 'externally'. To an extent judges may, sociologically speaking, exceed the scope of internal view of law, in their considertaions of law's 'legal fictions' as 'facts'. From epistemologically external view of law, it is possible to perseive the legal system as an

independent object of scientifc inquiry. As a classical example of the external analysis of law, sociological studies of interrelations and correspondence between legal norms and the specific groups of 'consumers' (who consume different types of 'legal discourses'), could be recalled.

The famous French sociologist of law, Georges Gurvitch, assuming the plurality of legal discourses, confined this to the psychological properties of legal understanding: legal system is a subjective psychological construct, which appears as a result of apprehension of the actual legal communication and judgment of it having temporal and spatial properties. Different participants of a legal communication have different visions of it and bring different purposes to their own, subjective understanding of law or, say, 'internal perspective'law. The plurality of 'internal perspectives' leads to 'the plurality of legal systems' or the plurality of legal subsystems within any given society (Gurvitch 1958).

Within the context of Tartu-Moscow cultural semiotics, the very existence of plural 'internal' and 'external' perspectives on culture is immanent to any language and culture, because every language and culture assume the bilingual 'self-description'(Zhivov1979:10) - polysystemic mechanisms of culture always consist of at least two mutually contradictory systems (in our case, say, rational and mythological discources of law).

The same claim of pluralism is valid for legal semiotics. Bernard S. Jackson states that legal semiotics is agnostic to the truth of system unity's claims: "it starts from the level of individual text or discourse. That text or discourse may claim to belong to some larger, unified system. Equally, other texts and discourses may make same claims. But unless that unified legal system itself assumes a unified discursive form, all we have is parallel claim, and existence of certain intertextualities" (Jackson 1990:418). It is obvious that for legal semiotics, such a readiness to accept the discursive plurality of law is a mere result of

epistemological choice: legal semiotics assumes a naturalist epistemology that claims the existence of universal structures of signification, and there are no exceptions from this rule in law (Jackson 1985). This assumption is also reflected by Roberta Kevelson in her review of Lawrence M. Friedman's book 'The Legal System: A Social Science Perspective':

. . . There is no dominant legal system in any given society: there are only networks of legal subsystems. Friedman says that 'law is only one of many social systems. [and that] other social systems in society give it meaning and effect' (p. vii). He maintains that a concept such as 'the legal system' derives from the ideal of law as imposed upon society from an external source, but legal systems evolve through conflicting internal forces within given societies as a result of a dynamic exchange of messages between legal and other social systems. (Kevelson 1981:184)

From the semiotic point of view, an ideal legal system, which consists of real opposing legal subsystems can be regarded, using Peirce's expression, as a *type or a legisign,* a continuous subject, which includes the varieties, subsystems, which are predicates (tokens, rhemes, sinsigns) of this ideal system. According to Peirce, a system is a unified, cohesive sign, a continuum, constructed of sign relationships (Kevelson 1981:1983).

The actual system law in itself is a conventionalized system of signs, based on underlying ever-changing socioeconomic values and cultural ethnical identities. In this sense, systems of sign (alias *semiotic systems, sign system*) are products of society: from communicative aspect, any social reflexive system of use composed of social objects may be considered a 'double- articulated' semiotic system of meaning, composed of signs. Thus, legal system as a reflexive system and its components - objects and subjects- is a particular semiotic system, a modeling system of meaning. Here references must be made to Juri Lotman's theory of modeling systems. Juri Lotman defined a modeling system as a structure of elements and   of rules for combining them that is in a state of fixed analogy to the entire sphere of an object of knowledge, insight or regulation. Therefore a modeling system can be

regarded as a language. Systems that have language as their basis and that acquire supplementary superstructures, thus creating languages of a second order, can appropriately be called secondary modeling systems (Lotman 1964). The term secondary modeling system somehow emphasizes the derivational character of the second order system in relation to natural language.

Recalling Peirce's general definition of system and its adaptation to sociosemiotics one could mention significant divergences between the system approach of Charles S.Peirce and the system modeling method of Juri Lotman: this is a question of precedence and origin, which brings to specific issues that have been vehemently argued between enthusiasts of Peircean logical semiotics and proponents of Saussurean tradition of *semiologie*. However this question must be left aside here, except mentioning that Peirce's model of system stemmed from his abductive logic, whilst Lotman's point of departure is linguistics (and Saussure's linguistics), although Tartu-Moscow school is considered a school of semiotics. However, it is not of avail to discuss here well-known discrepancies between Peirce's method and European tradition of semiologie. An ultimate source of reference here may be Thomas Sebeok, who illuminates actual inconsistencies between the linguistic and the logical images of modeling system).

In Sebeok's definition of a secondary modeling system, two twin endeavors of semiotics and semiologie are conjoined. In this context, the notion of modeling system refers to

an ideological model of the world where the environment stands in reciprocal relation with some other system, and where its reflection functions as a control of this system's total mode of communication. (Sebeok 1989)

Refining Sebeok's definition, it is possible to imagine the reflective system of law, which acts as the regulating mechanism in relation to society, while language will be

the operative or executive linguistic system underlying this regulating mechanism. These system comprises "not only all the arts (literature, cinema, theater, painting, music, etc.), the various social activities and behavior patterns prevalent in the given community (including gesture, dress, manners, ritual, etc.), but also the established methods by which   the community preserves its memory and its sense of identity (myths, history, legal system, religious beliefs, etc)" (Schefflyzyk 1986:168).

Sebeok's definition reminds not only of reflexive systems (reflection functions), but also of autopoetic system (especially in respect of reciprocal relations between modeling system and environment): however, in social context, it is always an ideological or a cultural system, based on natural language and composed of minimal units - 'texts'. In framework of Tartu-Moscow semiotics, the notion of text covers quite the extended range of objects - from 'real texts' to the visual art and the behavior system, because the notion of 'text' covers the lingual behavior of an individual' (Uspenskij 1966:6). All these kinds of texts, measured according to   their own systems of interpretation, are substituted by the generic notion of 'cultural text'. The latter is understood as a specifically 'manifested' text, and to that extent, this additional manifestation of 'cultural text' allows us to distinguish between general linguistic meaning of 'text' from any particularly manifested meaning: for instance, in the oral cultures thehere is a tendency to assign the additional linguistic 'supra-organization' (in the form of proverbs,etc.) to juridical, ethical, religious texts (Lotman & Pjatigorskij 1968:75-78)

A cultural text is a bearer of generated social meaning (which is reflected in common social memory) or social value added to some sign sequence by a given community: a cultural text is an element of semiosphere. One of the main functions of cultural text is to preserve social memory (Lotman&Pjatigorskij 1968).Thus, law as a secondary modeling

system can be understood as a system of legal texts, constructed in legal language, which is based upon natural language.

5.Legal text.

Lotman constructed his system model being inspired from cybernetic theory - he placed important notions of 'text' and 'art of work' in the domain of secondary modeling system; text's building blocks are composed of language units, inherited from the primary system.

Modeling systems can be understood as sign systems, in other words as specific sets of rules (codes, instructions) for the production of output- texts. Describing the semiotic properties of modeling systems, Tartu- Moscow school departed from the studies of art and literary criticism - nevertheless Lotman's model is valid for any cultural aesthetic system, system which reveals itself to be a normative set of rules. For example, an 'upcasting' of legal system (as a secondary modeling system) to the primary system could only occur by means of 'legality', which is 'overcoding' by means of separation from pre-legal (moral or cultural) rules, as much as the 'literariness' is overcoding by way of language's deviation from the norm. 'Overcoding' by deviation adds to aesthetic sign new, evolutionary properties: as a result of 'overcoding', the equivalence between sequences of different structures and their separate elements is established (Lotman 1965:23-25). The cultural deviation is hence an essential reservoir for further evolution.

This assumes that all the semiotic systems of a culture serve as means of evolutionary modeling of the world. The primary modeling system is natural language, while all others are secondary. All secondary modeling systems (literature, myth) use natural language as their material, adding to it further structures, and all of them are constructed on the analogy

of natural language (elements, rules of selection and combination, levels), which also serves as the universal metalanguage for their interpretation.

Additionally, for Lotman text is a specific multiply coded aesthetic   sign, which heavily relies on a context of cultural sign systems (Lotman 1982). A **context** forms the extratextual background of a double or multiply overcoded aesthetic sign (a cultural **text**). A cultural text may be any semiotic object: a painting or a verbal utterance, not just a written sequence of words. However, in Soviet semiotics, a particular form of sign is privileged , i.e 'a work of art': a work of art or artistic text in any medium is an analogue of Platonic reality in which reality is translated into the language of the given sign system. Lotman, defining culture as a collection of texts, had to declare the art a secondary modeling system, i.e., a system possessing the means of self-interpretation, in order to make the semiotic approach possible.

For early Lotman, the text is considered as an autonomous and complex, 'highly organized integrity' (Lotman 1964:156), as a quasi-spatial configuration (system) created by formal relations between the structural elements of different orders and its formal level. Text is everything that generates meaning. Thus legal text is everything that is capable of conveying of the specific legal meaning. This meaning is immanent and contained in the context of text: the main task of legal analyst is to restore and reveal meaning conveyed by context and attached to the text. The objectives structures of legal meaning exist independently of the observer: they are constituted by differences and oppositions. These structures are universal and influence the formation and functioning of any cultural phenomena through the text, which is an ideal medium for converting primary modeling system (ordinary language) into other language-like phenomena. The affinity of any cultural phenomena (secondary modeling system) with language allows to reveal the meaning of

cultural phenomena using methods of linguistic or semiotics as meta-linguistic.

For Lotman's latest papers it is also characteristic the explicit connectedness of intratextual structures of texts with extratextual context (Lotman 1974). This connectedness finds its expression first of all in the communication of the text reader with this text and in the communication between the text and the cultural tradition. The text is describable by communicating with it. In order to become the text, a graphically fixed document ('enacted document', for example, a sales contract) must be defined in its relation to the author's intention, the ethical values of any particular epoch and other 'yardsticks', left without a graphical fixation in this text. In fact a text can not exist by itself itself, because it is always entangled into some sort of a historical context bound by social conventions. (Lotman 1964:156-157) Therefore, the textual analysis of law should not overemphasize on the form or the structure of text at the expense of social or historical context.

It is logical that Tartu –Moscow semiotic concept of 'text' is capable of enriching and clarifying legal philosophy in wider perspective and the semiotic account of law in particular. It could be explained by academic environment of this time – indeed, at the very end of Soviet era , the dominant legal tradition, endorsed by Tartu legal scholars, was revived legal positivism, hidden under umbrella of the official Marxism. Moreover, a significant part of senior actors on academic scene of jurisprudence relied heavily upon Kelsenian vision of positivism. This trace of positivist inheritance (preoccupation with the text) remained relevant in early papers of so called 'legal semioticans' from Tartu (Gräzin 1983), but there the pure legal normative categories in a sophisticated way amalgamate with semiotic idea of ' the text of culture', which became a notion of the first priority to Tartu-Moscow semiotics. It must be mentioned here that exactly the   'text' gave Lotman the possibility to pass from literature over to culture as the universal *organic*   object of

semiotics. Considering the primary role of text (especially literary text) others theoretical

notions (such as 'culture' or 'law') are inevitably treated as additional notions.

It also seems to be clear that Lotman's semiotic model focused on the generalized

concept of the text and was applied only lately to other cultural phenomena (i.e. law). When

semiotic analysis is applied to the law, the positivist meta-theory looses its ground - the legal

text is viewed as an   entity translatable into semiotic account or describable by semiotic

funcion much alike to the functions described above. Semiotic metalanguage reveals hidden

underlying meanings, embodied cultural and moral values, the channels and devices used to

convey these values in form of tacit messages. It is not avail here to cite here an extensive

list of publications dedicated to deploying structural and rhetorical layers of 'legal texts' (for

the extended list of publications, see Jackson 1990:1250-1251).

5.1. The relations between legal discourses and legal texts.

The theoretical discourse of law (jurisprudence) could be represented using

Hjemslev's prolegomena to a theory of language (Hjemslev 1943), as a connotative semiotic

(whose expression plan is occupied by the enacted law). In Hjemselv's glossematics, a

meta-language is defined as a language, whose plan of the content contains the plan of the

expression of another language (Hjemslev 1943:120): the theoretical legal discourse is thus a

metasemiotic with a nonscientific semiotic (law) as an object semiotic.

In this sense the language of law theory accepts the primacy of the language of norms,

with the latter being produced by legislative discourse. Following in the same direction, it is

possible in its turn to distinguish several sublevels within the   language of law: in this

language the boundaries of two organically interlaced, but nevertheless different levels of thinking - the level of practical judgments and meta-level of reflections - are clearly visible. An important problem arises here, concerning the question, which of above mentioned levels should be considered as a base for semiotic analysis of law. to erect the multistory building of legal science. For the positivist theorist of law, who is accustomed to deal with the meticulously regulated system of positive law, it would be much simpler to investigate the concepts of legal theory in a partuclar case and practical legal judgements, meanwile the postmodernist legal would seek the appropriate means of speculating about the legal system in general. In parallel to that, the method of systematic law-construction has been developed due to the process of the formation of analytical jurisprudence: it is the systematization of public legal praxis – which is already in place in any given legal system – that gives a fulcrum for the creation of the first meta-level of jurisprudence. From there on, the distinction between practical work of a lawyer and the legal reflection is possible

The evolution of a legal reflection into the independent branch of theoretical jurisprudence began as earlier as in ancient Rome, in a period when, together with the practical knowledge of law (*cognito legum*) the science of law (*scientia legum*) came into being. An instructive example of the separation between the ancient Roman orators and lawyers could be considered as a result of the transformation of rhetorical skills into the juridical concepts a new notion jurisprudentia arose: besides the knowledge of positive right (*insitutio*) jurisprudentia implied the presence of the professional skills of legal interpretation of norms (*instructio*) (Zimmermann 1991).

The practical knowledge of laws included the knowledge of legal techniques and methods (such as an acquaintance with the normative acts, normative techniques of law creation and art of legal reasoning). The practical comprehension of law required the

specific training, even despite the fact that the overall expertise in some legal questions was accessible to 'legal outsiders'. The full access to the legal activity in the narrowly specialized fields was granted only to a relatively small group of lawyers. In the contemporary legislative practices, privileges of lawyers in certain spheres of professional activity have been fixed, first of all, by the laws of justice (law of the legal profession, law of notary office and so forth): however, the legal studies are not exhausted by purely technical side of legal reasoning ('legal philistinism', as it was labeled by legal scholar Richard A.Posner (Posner 1989)), because there is always a vital neccesity to formulate the theoretical framework of legal activity, the theoretical understanding of law.

As legal history shows, the separation between the theorists 'from the side' and the lawyers was brought forth by a thrust to narrativization or a fanciful revetment of legal instructions. The theorist, using a legal argument to solve any theoretical problem, sometimes intentionally obscured the technical side of a 'question of law', paying primarily attention to the argument's ideological form. Lawyers, on the contrary, always strove to eliminate from the technical side of law any reminiscents of 'poetic', 'ritual' or 'irrational' narrative: they attempted to substitute the narration of law by the analytical model of rational discourse, which combines both linguistic ('textual') form of law and extralinguistic factors.

The semiotic inquiry into textuality is considered to be of the great importance to legal semiotics, especially when it deals with the readings of legal texts. According to a sophisticated plan, suggested by legal positivists, any legal scholar must start out with text, because *positivism* privileges legal text. Apparently it was (and still is) valid for so called practical jurisprudence, for many of Estonian legal scholars, straight in veins of continental tradition in the discourse of adjudication relied mostly on normative *written* text (*jus*

scriptum). Taking the position of a legal dogmatics is no doubt about relevance of 'legal text' in the context of a legal consciousness, neighboring the parallel model of legal system. But in the frame of legal semiotics a <u>written text</u> does not play any pivotal role anymore. As on of the leading scholars of tart-Moscow semiotic circle, B.A. Uspenskij, suggests:

Under the text we could understand besides the pure linguistic information (spoken or written text), paralinguistic, kinetic information etc. In other words the text means language behavior of any particular individual. (Uspenskij 1966:25.2)

In legal semiotics as a general principle when pursuing the task of the disambiguation of dogmatic tenets , different rhetorical devices and structural frameworks are used. The choice of a suitable analytical strategy (including a device and analytical framework) depends on intended purpose. As it has been stated before, within the framework of legal text studies deploying semiotic resources implies the generalization of the concept 'legal text' from its vernacular 'legal' sense and legal connotations. The core problem here is the choice between linguistic system of classification of text and legal theory of text. The former insists that legal text is built upon the special model of language (*the language of the law, language du droit, lenguaje de la ley*). In special –purpose communication the text is formulated in a special language or sublanguage that is subject to special syntactic, semantic and pragmatic rules (Šarčevic 2001:8). The scope of semiotic method as applied to the studies of legal texts is constrained by the semantic and syntactic dimension, because pragmatics reflects messages conveyed in the 'con-text' (contextual trail of action). Such an intrinsic divergence between legal semantics/syntactic and legal pragmatics echoes one of the fundamental assumptions of Lotman's concept of text, which is a further development of the text-model of Bakhtin/Voloshinov (*the text is nothing but a complex phenomenon determined by the set of contexts*). However ,Lotman explained the same idea starting from more structuralist account. Hence when speaking about a model of the text, Juri

Lotman emphasized that the shift between textual functions brings along the logical consequence - the ascription of new semantics and new syntactics to this text (Lotman 1970:78). This process is a starting point for semantic reversal, which allows to generate new meaning.

The transposition of this thesis into the sphere of legal semiotics faces numerous difficulties. Firstly, structuralist legal semiotics is often seen as a revival of the neo-positivist paradigm of analyzing law as a self-contained system of norms without accounting for the social, historical, political context. Whilst Tartu - Moscow semiotic circle argues in favor of pragmatics, the positivist semiotics of law almost always overrides the relevant topic of pragmatics. Thus a positivist doctrine of legal semiotics suffers the logical inconsistency, they often fails to reconcile the lack of pragmatics to instrumentalist theory of legal rationality. The idea of legal *instrumentalist* rationality can be easily reduced to the pragmatic dimension of semiotics, because the latter endorses a pragmatic description of the legal normative texts as the *technical* tools in the solution of problems encountered in the legal environment. As Csaba Varga remarks:

From the point of view of the study of positive law, texts are given as both symbols and embodiments of the legal culture in question. On the other hand, from the point of view of comparative legal cultures, the prime question urging an answer is just learn why texts exist at all in the storeroom of instruments of the law, why and in which way some of these selected items will be referred to in a given case before the court, and now, for this purpose, they are now construed and applied to the case in a way that the court, in the name of the law, can finally met the law's textually set normative requirements (i.e. the law's own internal system of fulfillment), and , at the same time, meet also actually felt social needs that may have been in conflict to necessitate a genuine legal solution. (Varga 1994:406)

Elsewhere more analytical and radical approach is adopted: some legal semioticians seek the solution of law's textuality based upon the pure linguistic classification that adopts either tripartite system (Karl Bühler's classification) or septuple system (Roman

Jackobson's classification). They make a distinction between different text functions: *Darstellungsfunktion* (descriptive function)*, Ausdrucksfunktion* (expressive function)*, Appelfunktion* (connative function) plus metalinguistic function, phatic function, poetic function and communicative function. Descriptive function dominates texts with focus on the description of objects, expressive function dominates texts, main task of which is to give rise to emotions. Conative function is addressee-oriented and is consequently aimed at changing the world provoking the addressee to action. Regulatory texts are conative texts and as such are characterized by frequent usage of imperative (Habermas 1981). In comparasion with linguistic classification, the legal theory relies upon the bipartite system stemming from Kelsen's pure theory of law. It consists of two groups of texts - the group of regulatory (in legal terms *prescriptive*) texts and that one of informative texts (in legal terms *descriptive* texts). Legal texts combine the properties of both groups of texts leading to the emergence of three assembled groups: *primarily prescriptive texts*, *primarily descriptive but also imperative* texts and *purely descriptive*. Primarily descriptive but also descriptive texts clasp judicial decisions and instructions used to carry on judicial and administrative proceedings, such as actions, pleadings, briefs, appeals, requests, petitions. The last group is composed of purely descriptive texts, written by legal scholars.

The first group or primarily descriptive texts include all normative texts – law regulations, codes, contracts, treaties and conventions. These texts prescribe a specific course of teleological action that an individual ought to confirm to. As Hans Kelsen puts it:

 The behavior regulated by a normative order is either a deifinite action or the omission (non-performance) of such an action.(Kelsen 1967:15)

In the papers of Tartu-Moscow semiotic school both approaches have found more or less the same approval. Meanwhile owing to the Russian formalists different structural devices of the text studies, the Soviet semioticians have paid a special attention to

the possible approximation to Bakhtins's (almost) poststructuralist conceptions. Bakhtin, one of the anticipated precursors to Tartu-Moscow semiotics in his article about text notion wrote that text is the immediate empirical reality within which intellectual activity and human sciences can constitute themselves.

Indeed, Lotman's unique treatment have many similarities with Bakhtin's notion of the text, especially in the case of the boundaries of the text. One of the most prominent pupils of Lotman, Peter Torop, speaking about comparative treatment of the notion of the border within tradition of cultural semiotics, wrote in the following passage that:

> Lotman's treatment is related to Bakhtin's attitude to culture in which he indeed excludes bordered territory, but marks borders with significance. In his opinion culture does indeed locate on boundaries: 'One must not imagine culture as a spatial whole that has borders and also an inner territory. Culture does not possess inner territory: it is wholly located on borders, boundaries route everywhere, pierce all its moments, culture's inner unity fuses into atoms of cultural life, reflects like the sun in every of its drops. Every cultural act lives significantly on boundaries: in this lies its seriousness and importance; being separated from borders it loses its ground, becomes empty, tedious, degenerates and decays' (Bahtin 1986: 44). This short comparison allows to maintain that understanding of dynamism of the two scholars is different. For Lotman, it is important to find the border also in the biggest entanglement of boundaries, the dimension of wholeness, and principally it would be possible to create a typology in which boundaries of different level would be in complementary relationship…. In Bakhtin's treatment, the border (like dialogism, polyphony, etc.) is connected with ambivalence, and the notion of boundary is seen as a translation mechanism in both treatments (Torop 1999).

To make the perception of 'text boundaries' easier, Juri Lotman appeals to the example of legal text. He claims that something could be a text from a linguistic point of view without being it from the legal one. Talking about a text in the structuralist sense, it could be remarked that a text is a separate message that is clearly perceived as being distinct from a 'non-text' or 'other text'; it has a beginning, end, and definite internal organization; so far it is not 'an amorphous accumulation of signs'. Thus, any given organized sequence of sentences ('coded message') could be treated as syntactically separable/detached from the previous/next part in some linguistic respect. By virtue of that, this sequence would seem to

be a subject to textual analysis, because it shares formal properties of text (spatial and temporal organization).

But inasmuch as the same coded sequence will presume some legal significance, the linguistic notion of the 'text' will be abandoned to the benefit of legal *textuality*, because linguistic notion of textual boundaries does not overlap the juridical notion of normative closure or *vice versa*. Lotman suggests that for a lawyer the meaningful coded sequence of sentences will be a link to the normative chain, which belongs to the wider legal unity (legal system), otherwise this sequence is 'non-text' (Lotman 1966). As such, legally understood non-texts can not be interpreted because they do not belong to the prevailing system of interpretation within given legal culture. However, it does not mean that non-texts are not worth of studying, as it could be remembered that text emerges there where is no ready interpretation, ready reading. The pragmatic difference between legal texts and legal 'non-text' becomes explicit in the conflict situation of contractual interpretation.

The similar approach to legal textuality could be found in theory of A.Beck who seeks to construct all legal activity as an epiphenomenona of textual interpretative activity. He ends up with the statement that 'law is the interpretation of text': moreover law is a result of interpretation (Beck 1982:201). Following the contingency of such a logic, it is possible to end with the conclusion that the context of normative texts is derived from social and political circumstances of social life. On account of this fact, there is a clearly definable dichotomy between normative texts and social context of real actions (whether they are communicative or interpretative actions). Nevertheless, this distinction is quit the elusive. If there were unavoidable clashes or even more – a fathomless gap – between the text and the context, it would be virtually impossible to acquire the knowledge of normative values contained in written legal texts. In fact, legal semiotics is capable of using different semiotic

'lenses' or 'devices', but usually they become redundant because of strict pragmatical constraints of legal discourse.

The same basic assumption has found its way back in order to turn up as a basic problem of cultural semiotics, which can be re-approached from two different points of view: the point of view of the text as assemblage of signs ('messages') and the point of view of the *dialogic* context. The analysis of textual background assumes the answer to the question: given a particular piece of text (bounded well-formed text), what meaning is attachable to its morphological and grammatical units (this is the so called question of reference). The studying of context brings to light the dynamic process of textual production and its consumption determined by different extralinguistic societal forces, or, as C. Varga called them 'actually felt social needs'(Varga 1994:406). Suffice it to say that borderline between text and context at the same time demarcates borders between the structural domain of the cohesive threads/strings of grammar and the open-ended netlike rhizome, represented by a coherent organic *dialogic fabric of text.* The striking formal difference between textual cohesion and dialogic (narrative) coherence could be end up with the conception, according to which the text is defined rather by consistence to language register and grammatical cohesion (inner order) than the coherence of context. Of course, quite the opposite statement could be found in Halliday, according to whom , the text is the *process*, which is characterized not only by inner cohesion, but also by relation to situation (context) (Halliday&Hassan 1985).

6.The legitimacy as a semiotic problem

The concept of law determined by the will of an individual (be it one person, or rather the collective organ, which possesses a representative mandate) – this is the earliest positivist concept, which historically arose as the counter-current to the doctrine of the supporters of natural law with their concerns of the divine origin of right. As a prove of this, it is possible to quote A.F.Arnaud who himself cited Portalis, one of the early positivists and the author of French civil code: everything in   law, which is connected by means of definition, explanation, or doctrine - has its starting point in science (Arnaud 1973:44). The rest, defined as command, disposition in the narrow sense of this word, proceeds from the laws, which in turn come into being themselves because of legislator's expression of will. This concepts seems to be an axiom of law, since the existence of this will is indemonstrable. Additionally, for juridical voluntarism the source of law is of primary significance, while the material form of law is only auxiliary.

In practice this thesis hardly maintains criticism, since in the conditions of contemporary society, the transfer – or legally speaking - the delegation of mandate to a legislative body, is taking place. It is obvious that the delefation of mandate could be insufficient condition of legitimacy; however, classical positivists are disperse in their points of views on those factors that influence the transfer of mandate. Some of positivist indicate that the main influencing factor is a sovereign status of the possessor of mandate; others consider it as the acknowledgement of legal capacity, expressed within the system of hierarchically higher norms. More recently a question of the transfer of mandate in

the theory of right has been substituted by the concept of legislative competence , a legal concept, which in a some way   is analogous to the linguistic concept of 'linguistic competence', introduced to the scientific community by Noam Chomsky (Chomsky 1968). The combination of these concepts and their transfer into the sphere of discursive activity, makes it possible to speak about the discursive authorities of legislator, which are addressed to the specific generality of people, or, 'semiotic group'(Conklin 1998). Some light on the semiotic view of the legislative mechanics was shed in Hanneke van Schooten's article (van Schooten 1999).

Beginning with general questions of the use of legislation as the instrument of policy of contemporary Western societies, Dutch researcher passes then to the examination of the problems, which appearing in connection with the application of a law and its effectiveness (mainly among them are economic aspect and the decrease of the effectiveness of instrumental legislation) (van Schooten 1999:81-85). However, the most valuable for legal semiotics part of this contribution constitutes the theoretical measurement of the mentioned problems. The mutual proximity of the contemporary theories of legislation and meta-language of legal semiotics in methodological respect is obliged to the focusing of attention in the communicative aspects of the *steering content* of legislation.

Hanneke van Schooten limits the theoretical framework of the study of problem by pointing out to three complementing theories of legislation (van Schooten 1999:83-90) – autopoietic theory in Gunther Teubner's reduction (Teubner 1989); *Dreistufen-Hypothese* (three-levels' theory), proposed by Adam Podgórecki(Podgórecki 1967); and Moore's theory of 'semi-autonomous social fields' (Moore 1978). All three theories to one or another extent proceed from the communicative context of legislative activity. If Teubner characterizes the emergence of a new type of law, so-called 'reflexive law' as a reaction to

the crisis of instrumentalist legislation of 'welfare state', then according to the postulate of Podgórecki, whichever a norm passes three filters - the first on at the level of individual behavior, the second one - at the group's level, and the third one – within the scale of entire legal system. The third theory of the anthropologist Moore claims to explain the self-regulating activity of formal and non-formal groups, as well as the methods of interaction and cooperation between spontaneously appearing group rules and the official law. In Van Schooten's opinion, a deficiency of the mentioned concepts is the result of neglecting questions of the legislative legitimacy. Combining both the semiotic 'dialogue structures' and a model of communication proposed by Wittevin, Hanneke Van Schooten renders the proper of the role of legitimacy (legality) in the context of legislation (van Schooten 1999:93-108). As a result of synthesis the semiotic structure of 'dialogical legitimacy' appears, which includes the two-folded model of law-making (van Scooten 1999:104-108). The first stage model covers the law-making of legislative body, while second one subsequently covers law's application activity of the 'users' of normative norm-program. Therefore juridical rules (which are norms and principles) acquire their final value only due to the process of the synchronic interpretation, i.e., during the process of use, application and appeal to these rules. The synchronic interpretation of laws makes it possible to go hand in hand with the demands of time, transforming thus the obsolete position of law by trimming its position with the current standards of public life. The dialogism of communication increases the adaptability of law and by virtue of this fact, brings forth effectiveness of law. The semiotic base of the theory of dialogical legitimacy can be revealed in the context of the earlier works of Roberta Kevelson (Kevelson 1981). In particular, in her review of the book written by Lawrence M.Friedman 'The Legal System: A Social Science Perspective', Kevelson draws interesting parallels between Friedman's

ideas, from one side, and the semiotic ideas of Mukařovsky and Pierce, from another. For instance, recalling the description of contradictions between the formal and non-formal legitimacy within the structure of lawful system, it is noted that this phenomenon is similar to the contrast of the structures of juridical discourse; this contrast has been already described by Jan Mukařovsky in his analysis of aesthetical text. Even if Bakhtin's theory of dialogism seems to be more encompassing theory, it was Mukařovsky who first came to a reasonable conclusion about the need for distinction between the dialectical opposition of monological and dialogical structures within the text (Mukařovsky 1934)**.** This opposition signifies 'a semantic metamorphosis', which serves as the prerequisite for emergence of new legal signs of 'legal'possibilities (*'rhemes'* as Charles Sanders Peirce called them , see CP 4.560). Professor Kevelson explains, that the conflict between the social groups and the methods of social persuasion entails the advance of legal norms and processes (Kevelson 1981:188). Therefore a social conflict is explained through the optic of Pierce's semiotics; in terms of Piercean semiotics, a social conflict occurs only at the level of Secondness, the level of real existence or the "mode of being of that which is itself in referring to a second subject, regardless of any third subject" (CP 8.328). Consequently the legally relevant ('legally' meaningful)signs – which are dictated by concrete legal processes - appear at the level of Thirdness. In comparison to the common legal signs, among typical examples of the spontaneously emerging signs of Firstness (the level of possibility), Roberta Kevelson place the activity of anarchists, sectarians, dissidents, public activists. From the point of view of legal semiotics, the signs of Firstness could be regarded as potential signs, signs in their formation and development (illustrated by ideas, concepts, principles and rules of the behavior), which in the future –by means of establising of a triadic relation in which an object is referred to by a sign and by an interpretant.- will become legally relevant signs

(laws, decisions, solutions, etc.).

7. The postmodernist background of legal semiotics

The contemporary studies in the field of legal semiotics could be possibly explained within the framework of general postmodern analysis of legal reality (in particular, using so-called *multilevel approach*), i.e., the multilevel theory of the law paradigm: within the framework of this approach semiotics of law is merely reduced to one of the metalanguages of the law's description . In this work another use of a term 'paradigm' is intentionally avoided, since philosophers of postmodernism (Foucault, Rorti, Kuhn) could not determine the paradigm (*epistema*) of jurisprudence. Therefore it is too complicated to speak about any shifts of paradigm. Keeping in mind these considerations, it would be more properly to use an expression 'juridical discourse'.

The fact of acknowledgement of multilevel essence of law by the main contemporary theorists of law confirms their adherence to overall postmodernist attitude of academic discourse. Therefore the characteristics of the postmodern paradigm of law will be simultaneously the background properties of   legal semiotics, or in other words - its theoretical background.

Speaking about the postmodernist juridical reflection it is worthwhile to consider the specific attributes of the theory of law in the epoch of postmodernism, namely the analysis of the emergence of the new forms of law, especially in the field of environmental law , the regulation of the policy of agriculture and creation of the legal codes, which regulate the behavior of a private individual. However, one should not forget that behind the *façade* of new forms of law, still exist the firm pillars of the legal constructions (such as 'contract' and

'responsibility' are hidden). For instance, Jacques Chevalier noted that the crisis of unfinished modernist project has led in the theory of law to an interesting situation, when the postmodernism is understood rather as the anti-modernism than the hyper-modernism (i.e. it is understood as the further development of modernism) (Chevalier 2002).

The ideological transformation of the unfinished project of legal modernism into the postmodernism of law has been marked by the criticism of modernist elitarism, and the thrust of conducting the parallels between the autonomous sphere of art (in particular, the architecture) and other fields of human activity. There is a dichotomy between the general and the particular which assumes an ontological priority for the former over the latter. The two are translated in turn into objective and subjective. Modernist epistemology with its brightest feature - a fear of the ideological, political, moral reification of art, a fear of 'low', contaminated culture and the transcendental autonomy of the easthetic object -supposes that methodology is the instrument by means of which one can escape from the subjectivity of the particular into the objectivity of the general. The breakthrough beyond the limits of the existing forms - as the major task of art - was seen by modernists as the "tendency toward transcendence" (Boyle 1991:489), counterposing the conservative past to the novelty of the aesthetical values of 'contemporary culture'.

It goes without saying that the legal modernism rendered the proper of the architectonics of legal reality, proposing through its brightest representative - H.Kelsen - the notorious model of the pyramid of lawful system as a representation of 'pure' ('aesthetic') theory of right, which is purified of outside influences. In spite of their entire non-acceptance of the 'pure' theory of law (labeled by Kelsen's opponents as the *transcendental nonsense*), American and Scandinavian legal realism had a significant number of purely modernist characteristics. For the crux of *legal realism* (as represented by

Holmes, Llewelyn, Cohen, Corbin, Lundsted) is that non-legal reasons (e.g., judgments of fairness, or consideration of commercial norms) *explain* the decisions. They, of course, explain the decisions by *justifying* them, though not necessarily by justifying a unique outcome (i.e., the non-legal reasons might themselves rationalize other decisions as well).There is also so called Scandinavian realism, which austere views about the ontology of the natural world, conjoined with moral skepticism, led them to unusual conclusions about the semantics of legal propositions.

In particular, legal realists indicated that the orthodox form of legal rights and the entire form of dogmatic style of reasoning disregard the considerations of expediency, since they do not have access to the concrete social information (Cohen 1935). It is interesting to note that similarly to Kelsen - although using a different approach - legal realists have attempted to exceed the limits of the law's casuistry of the past. For the realist movement in law, a sharp line of demarcation between wrongdoing and the rightful claim is drawn not by metaphysics of transcendental premises, but rather shaped by the real social function of contemporary law.

Surprisingly, it is mainly because of the *aesthetical* refining of legal material, the modernist theory of right has lost ground under its feet: the modernist theory of law has lost connection with the social context. Moreover, in the opinion of some scientists, the the washing away of foundation of the established legal forms, has led not only to the crash of the noble modernist project of law, but also to the legal nihilism as well, and thus has contributed to the legitimation of fascism. Actually, the legal positivism, walking hand-in-hand with the modernist program of law had taught the entire generation of jurists, who placed *the Letter of the Law* in the privileged position. The discourse of law for the lawyers of pre-World War II epoch was limited mainly to the analysis of 'law-in-books'. Thus, the

lawyers of pre-war epoch are distinguished by the firm faith in the uniqueness of legal understanding channeled through the legal text. That is why the radical positivism of the1930s was a subject to severe criticism by the pleiad of the legal theorists, who dictated the development of juridical theory in postwar Europe.

An example of extreme positivism is   the jurisprudence of the Third Reich, whose forerunner - Gustav Radbruch - denied moral, subjective side of law (Radbruch 1932) ,referring to the famous Latin dictum *dura lex sed lex* (*the law is tough, but it is law*) - this Latin juridical sentence obtained its ideological rebirth in the ideology of Nazi regime's law (*Gesetz als Gesetz*). Before the second world war, Radbruch, using the argument that any law always incorporates justice, advocated the strict obedience to the Nazi, but in 1945 he has publicly changed his opinion. In the opinion of the professor of G.L.A. Hart, the adherence of the representatives of German legal profession to the spirit of positivism brought about incapacity to resist the crimes of fascism. From the contrary point of view of Arthur Kaufmann, the German legal thought of 30-40s was anti-positivist (Kaufmann 1988): for an instance, one of the most prominent jurists of that epoch, Karl Larenz, the founder of so called 'value jurisprudence' in 1934 described legal positivism as the 'embodiment of intellectual intervention'.

In his debate with H. L. A. Hart, carried on in the pages of the *Harvard Law Review* in 1958, Lon Fuller set out his argument for a 'causal connection' between the positivist tendencies in German jurisprudence and the rise of Hitler: in the seventy-five years before the Nazi regime the positivistic philosophy had achieved in Germany a standing such as it enjoyed in no other country (Fuller 1958).

At the same time, the presence of cultural and social context in the concrete situations – becomes an index of the flexibility of society when society as a whole one has been

aggravated   by the stagnation (Offe 1987). Specifically, the social context of legal constructions makes it possible to experiment with the innovative forms of social relations (deregulation, steering, contracting-out, etc.), i.e., makes it possible to approach the possibility of the interdisciplinary, innovative synthesis of different methods, paradigms, epistems, social practices, procedures. This opens a road to the idea of legal pluralism which is a multifold legal relativity. Under the conditions of postmodernism, the modernist model of the law – which is usually depicted as a hierarchical pyramid - loses its value, keeping out of the way of complex, multilevel, but by far from hierarchical, the model of law. It is rather possible to liken this postmodernist model of law to cells inside the Babylonian tower, which is internally composed of interwined judicial styles, legal strategies, authoritive views, epistemic objects and texts of law and far from identical to each other readings of these texts.

Even from general theoretical point of view it is impossible to discuss analytical uniformity of postmodernist legal thought, - indeed, the clear understanding of backbone composition for postmodernist approach, is nearly absent. For the German theorists of law, undoubtedly, the postmodernist approach will entail the new rhetoric, a theory of legal discourse, the doctrine of legal reasoning and system theory, meanwhile Anglo-American legal scholars will be reserving the 'postmodern' label for the 'critical studies of law' movement, constructivism, feminism and semiotics**.**

Therefore the transition from 'juridical modernism' to postmodernism by marked by the 'change of paradigm' (not in the proper sense of this word, but rather theoretically): legal postmodernism is hereby understood as the negation of modernism; overlooking the modernist system of values and the intellectual regime of modernism, the postmodernism revisits and borrows heavily from the past (Dozuinas&Warrington 1991:14), denying the

concept of the legal system, subjecting to doubt any ideologizing intellectual activity, which leads to the homogeneity and opening thus the new unexplored marignal regions of law. Sketchily presented, the essence of the postmodernist vision of law is reflected by the following keywords: the fluidity, a constant change, a scattering, the plurality and localization. At the same time postmodernism rethinks many concepts of modernism and includes them in its own theoretical apparatus.

The peculiarity of postmodern approach to the analysis of law lies in the fact that under the conditions of postmodernism the obvious switching of attention from the normative and procedural aspects of law to either the meta-normative/inter-normative aspects or the communicative aspects of legal activity is occuring; the integration of the different attributes of lawful activity is achieved because of an attempt at the synthesis of legal dogmatics and social philosophy. The important influence on this synthesis is acribed to adoptions from the theory of complex systems, which very harmonically intertwine with the material of legal thought, because the latter recognizes the plurality and the variety of the constituting elements in the law. An example of a similar approach is the theory of games in that form, in which it is used for the explanation of purely legal phenomena. In the ideal case, the very existence of this approach would indicate establishing the dialogue between the science and the practice of law. But is the law from one side, and science from another, ready for this dialogue? R.Cotterrel answering a similar question claims that the law has the essential absorbing capability for integration and adoption of new doctrines and new ideas, especially in the period of the scientific crisis in the field of jurisprudence (Cotterrel 1992). As the illustration of critical position in the contemporary theoretical jurisprudence it is possible to mention the marginal position, which has been attributed to the legal discourse of terrorism.

The intricacy of the legal treatment of terrorism is caused by fact that the purely political act of violence, such as terrorism, is examined from the position of the system of law's mythology that claims that there is a meaningful difference between law ('the legal order') and unlawful activity ('the disorder'). In law, the notion of terrorism is deprived of its political veil, being reduced thus to the usual unlawful activity, which have been treated as a crime against the state. To actually grasp a thin difference between the terrorism – a crime against the state in the name of political idea - and the simple crime is very difficult. Therefore, the dogmatic figures of terrorism in the criminal codes of different countries are not identical to each other. In the previous Estonian criminal code (*KrK*) the legal definition of terrorism is implicitly absent - Article 64[1] and 65 only limit the circle of terrorist activity and stipulate for this activity the sanction. The romantic spirit of revolution or the enthusiasm of fight for the national self-determination are considered as irrational factors in legal sense, hence, the rational legal discourse tries to leave them without consideration. That is why, for example, a while ago Spanish minister of justice has turned to the French government with the request to treat the members of the Basque terrorist organization ETA as just usual, but not political criminals (Alsina 1981). The same situation has been recently occurred also in modern Russia in regards to the Chechen 'terrorists'. The semiotic core in the study of the problem of terrorism implies the allocation of the attention for the problem of switching between different discources of terrorism.

It is necessary to say a couple of words in regards of the methodology of postmodernist legal studies. Talking about pecularities of postmodernist discourse of law Belgian scholars Ost and van de Kerkhove have distinguished three types of 'crossroads' between the analysis of purely legal phenomena and the studies of the meta-legal and infra-legal phenomena of the law (Ost&van de Kerkhove 1991:5-8):

pluradisciplinarity – that assumes that within the jurisprudence there is a set of 'radical' discourses and new points of view on law's epistemic subjects: the scientific motivation of pluradisciplinary approach has been drawn from the infra-legal field of knowledge, which is exterior to legal knowledge. It seems to be indisputable that the pluradisciplinarity is an appropriate mean of the scientific dialogue bewteen law's 'self-scribing' metalanguages, especially under the postmodern conditions of legal philosophy: to that extent a notorious concept of 'multilegalism' (Le Roy 1998) could be brought into consideration. According to the the thoery of 'multilegalism', law is open to intercultural dialogue, questioning and enrichment, meanwhile it seeks to reduce to nil all static elements of law. Metaphorically speaking, the roots of this theory stretch beyond the limits of the sphere of legal sciences, passing by the boundaries of system theory towards the postmodernist idea of the pluralism of discourses (cf. 'polyphony', Bakhtin's dialogism and further development of his ideas in the works of French poststructuralists), legal anthropology and sociology. The influence of legal anthropology is especially valuable in its connection with the normative model of socialization through norms (codes of behavior or communicative codes) and customs.

interdisciplinarity - within the framework of interdisciplinary analysis, the explanation of legal concepts and phenomena proceeds from the internal position of purely legal sciences: in the course of explanation, it is supplemented by the adaption of computations, concepts and empirical material from the'external' sciences. As a classical example the legal sociology could be recalled, where alongside with empirical studies of legislative activity, the theoretical framing of these studies has acquired a significance (for example, the sociological analysis of legislation from the viewpoint of the autopoietic system theory (Käärik 2000)). The sociology of law aims at the introduction of strictly

scientific empirical techniques to the analysis of law, which for the sociologist of law has been reduced to the product of the historical development of humankind.

transdisciplinarity - assumes that concepts and phenomena, once studied by one science are being transferred into the field of coompetence of another science, where they – being reconsidered - obtain a new value. Legal semiotics is an examply of such a transdisciplinary approach, since it describes typically legal phenomena (norms, prohibitions, permissions, legal code) in its own terms. Hence, the concepts of law, being treated under a semiotic angle, have been reduced to signs or systems of signs. As an example it is possible to recall the concept of law's transformation, understood differently by legal semioticians and lawyers.

7.1.The theory of law : naturalism versus positivism.

It is worth beginning to start from the premise, according to which, any transfer of concepts, which are inherent in the philosophical concept of 'postmodernism', to the legal material would be uneasy task to perform, since the specific essence of law's material should be taken in account. The notorious dichotomy between postmodernism and modernism naturally supplements and develops further the more traditional separation between structuralism and post-structuralism, especially if we consider the clearly expressed French connotations of the latest concept. There is a striking analogy to that explicitly expressed and antagonistic oposition in law. With the fleeting glance on the theory of law, the obvious opposition of positivism and so-called school of 'natural law' has been brought into attention. Despite the fact that positivism and naturalism are treates as primary discourses of

legal thoery, it is obvious that the opposition between positivism and naturalism is undoubtedly opposition of somewhat different kind than that one between modernism and postmodernism. As a more appropriate analogy,   the well-known dichotomy between 'positivism' and 'post-positivism' may be treated, since the latter, completely in the veins of Saussurean semiology, is inclined to proceed from the premise, that the central place in the explanation of law must belong to linguistic theories. The language frames the legal knowledge; therefore *legal* facts cannot exist out of the *legal* language. In the second place, post-positivism in law rests upon the idea of legal rational discourse. Finally, the followers of post-positivist ideas adhere to hermeneutic standards insofar they deal with the interpretation of legal language and legal text. However, even this analogy to a certain extent is conditional, since the post-positivism in law is treated rather as a development of linguistic positivism (predominantly in its Wittgenstein's treatment), than a refusal of the fundamental traditions of legal positivism. It is obvious that a similar perception by no means is equivalent to the concept of postmodernism with the later seen as a dialectical overcoming or a negation of the modernist project.

The validity of this conclusion has been proven by the contemporary reconsideration of the debate between two philosophers of law, namely, between H.L.A.Hart and R.Dworkin. It is most certainly that Hart attacked 'true juridical positivism', especially in its connection with the separation of moral from law as it has been clearly expressed in the study of the prewar positivist philosophy of law (Hart 1961). Similar views of Hart allowed certain scholars to perceive him as a first 'legal postmodernist'. But indeed as often such a pioneer of legal postmodernism has been traditionally considered Ronald Dworkin, the main opponent of Hart, who questions the existence of general 'right to the moral freedom' (Dworkin 1986), - a right, which is, according to Dworkin, free from the utilitarian context.

When Dworkin expresses his doubts in actuality of Bentham's and Mill's utilitarian heritage, he renounces the 'sacred cow' of juridical positivism; by virtue of that fact he could be considered not only as a post-positivist, but also as an anti-positivist. Thus, these scholars, who consider Dworkin a postmodernist, insist at the same time that the Hart's doctrine of law is nothing but the revised positivism (so called 'soft positivism'), which is , in fact, just another label for 'post-positivism'.

However, any identification of major paradigms of the contemporary legal philosophy (be it positivism *versus* naturalism, or modernism *versus* postmodernism) is far from being prompt. The concept of postmodernism is somehow unthinkable without the concept of 'modernism', while an adherent of legal positivism can easily avoid any reference to the notions of 'natural law'. It is common sense, that in fact positivism and naturalism are just two sides of one medal: in spite of their seeming antagonism, 'mutually contradictory' thesises of positivism (*positivisme juridique*) and naturalism (*jurisnaturalisme*) supplement each other, forming together single whole. Any researcher of law, who adheres to empirical approach, could be easily regarded as a positivist, even if the methodology of empiric analysis is underlied by theoretical model, borrowed from the natural law, for example, the notion of human rights (Grzergorczyk&Michaut&Troper1993:27-28). Positivists deny classical ontology of law (opposition 'oughtness'-'being') and classical epistemology (the major thesis of positivist - 'the reality is unrecognizable'). By these denials the positivist method finds its 'scientific nature', but in the positivist tradition this claim has led only to the emphasizing the 'accuracy' of law's theories. However, in the context of semiotics of law, traces of a long-lasting dispute between followers of natural law and the positivists may be found in the dilemma of distinguising between natural (or invariant) and possible (variant) inside any given legal culture (Jackson 1987).Bernard Jackson, being an exemplary

follower of A.Greimas, unconditionally assumes the attitude of the latter towards existence of the natural, universal invariants of the structures of meanings, and transfers these universalities into the sphere of law.

It goes without saying that almost all positivist doctrines of law have something in common with legal semiotics, but it is also obvious that there is a plenty of differences between legal semiotics and legal positivism , in general. The need for the delimitation of the field of studies for the positivist science of law and semiotics has been caused by the criticism, allegedly maintained by positivist model of legal semiotics. Indeed, from a semiotic point of view, fundamental theses of legal positivism reflect invariants of universal structures of legal knowledge, marking by virtue of this fact, the basic structures of both law and legal theory. Determining its own   relation to those positivist thesises, legal semiotics can simultaneously determines its place within the framework of general semiotic theory.

Some legal scholars claim that legal semiotic (especially in its 'Greimasean' categorisation) has   "greater affinities to positivist tradition than to postmodernism" (Freeman 1994:1158): it appears to be logical to imply that other versions of semiotics may be more compatible with realist movement and for critical approaches (Hunt 1986). Other scholars seek to construct all semiotics as positivist: for them rhetorics and hermeneutics are the prefered explanatory models (Goodrich 1987, Schreckenberger 1978) because semiotic privileges the text in just the same was as does legal philosophy of positivism (Goodrich 1988) with only difference that legal semiotic uses "a   different, more abstract, meta language" (Jackson 1991:178). There is a common agreement between legal scholars that legal semiotics is equated with formalism because it offers quasi-logical representation of underlying structures of signification. Legal dogmatics privileges legal in such a manner that

the strategy of interpretation always remains secondary to the production of an answer to a legal problem, while semiotics is in itself entirely neutral as to the content of messages it seeks to analyse, its analytical concern is with the process, not the result. From another side, semiotics and legal postmodernism ('critical legal studies') differ at the epistemological – both semiotics and critical legal studies claims to provide their own discursive framework of knowledge, within which it seeks to locate the other: however, while legal semiotics take language seriously, 'critical legal studies' treat ideological language as a smokescreen, a legitimation of liberalism. Some legal scholars from critical legal studies movement appear to accept linguistic referentiality and the possibility of making truth-claims within legal discourse, while other being influenced by Levi-Straussian categorization are unhappy with 'communicative' universality of semiotics: they see legal structures of communication and legal structures of exchange as opposed categories (Arnaud 1973).

In terms of Tartu-Moscow cultural semiotics, the 'communicative' act is inherently social: the 'interpretation', the 'meaning' is not generated by the but by it's interaction between author and 'other', therefore all participants in the communicative act must have some experience of communication. The 'communicative' act is thus being seen he not as a plain transmission of information, but rather as a 'translation' or as an 'overcoding' (Lotman 1973:195). In comparasion to the claims of Greimassean legal semiotic, that legal meaning is the referential attribution of a specific 'legal' quality to a rule, Tartu-Moscow semiotics would assume that the 'legal' meaning is generated not by means of referential 'ascribtion', but rather due to the dialogical interpretation of specific legal 'texts' within a semiosphere, which is defined as a "the semiotic space necessary for the existence and functioning of languages, not the sum total of different languages" (Lotman 1990:123). The above-mentioned definition of 'meaning' has affinities with 'semantic' definitions of 'meaning',

proposed by Peirce: meaning is "the translation of a sign into another system of signs" (CP 4.127) and "the meaning of of a sign is the sign it has to be translated into" (CP 4.132) To that extent, the 'interpretation' could be treated as a 'meaning-generating' device of translation of a sign into another system of signs. Because of its assymetry, the semiosphere includes mutually translatable as well as mutual untranslatable languages and metalinguistic structures (Lotman 1990:124-125). The principle of assymetry makes it possible to conclude, that the interpretation is always result of conflict between more or less competing languages of the semiosphere. The more complex semiosphere is, the more complex is its 'interpretation', because there is an immanent 'tension' ('conflict') between different languages of cultures: this inner 'tension' betwwen competing languages could be slowed down, when 'self-dscription' or the development of a metalanguages takes place (Lotman 1990:128): in case of legal system (which is understood here as 'semioshere' of law) is a vitally necessary condition for preventing the confluctual disintegration of the law's semiosphere .

8.Conflict of laws in interpretation of contracts

The notion of 'conflict' is one of the most important concepts of legal semiotics in general and Tartu-Moscow cultural semiotics (in which 'conflict' is substitued by 'tension'), in particular. This chapter aims to provide a semiotic excursus into the existing legal practice of contractual interpretation in Estonian legal order. In order to investigate the semiotic essence of contractual interpretation and its limits, this paper narrows its focus on a notion 'conflict of laws' (as developed by Roberta Kevelson (Kevelson 1990). By conflict of law is meant a depiction of incompatibility or conflict of co-existing legal practices, the conflict, which is both internal and external to Estonian legal system. From inner perspective of Estonian legal order, the conflict of law is subsequently reduced to the conflict in law, and being analyzed on the grounds of contract law, the conflict of legal rules, in fact becomes a issue of contractual interpretation. It is claimed, that there has been a fundamental incompatibility between objective and subjective approaches to interpretation of contracts: in the optic of Tartu-Moscow semiotic both objective and subjective interpretation are treates as competing 'languages' of the semiosphere of law. As later as 19th century, with the development of a systematic legal science, an apparent confusion of objective and subjective approaches was becoming transformed into an open and growing system of law, based on a fusion of both methods, resulting in the development of a 'self-describing' metalanguage of the contractual interpretation. This claim lays theoretical grounds for a practical test, which could measure the exact level of legal integrity (understood as a relation between legal system's 'heterogeneity' and 'monosemiosity') between different elements of

legal system.

As a legal discipline, *Conflict of Law* is that part of the law in each state, country, or other jurisdiction that determines whether, in dealing with a particular legal situation, its law or the law of some other jurisdiction will be applied: it deals with choice of law, choice of jurisdiction and recognition. An alternative term, widely used in Europe, is 'private international law.' Private international law is the body of conventions, model laws, legal guides, and other documents and instruments that regulate private relationships across national borders. Private international law has a dualistic character, balancing international consensus with domestic recognition and implementation, as well as balancing sovereign actions with those of the private sector.

Conflict of law is coming to be viewed as consisted of three separated layers of conflict :

1.Conflict in law involves different kinds of choice-of-law procedures and justifications of such choice, the problems of conflict of laws assumes the existence of incompatibility between different frames of legal reference between different legal systems.

2.Conflict as a hermeneutical pattern represents in its essence a competition among various types of interpretations or interpretative methods, techniques, approaches –with each types to elevate itself to the status of the only valid one at the expense of others in order to demonstrate its particular value and promise of its own insights. The conflict of interpretations is somehow constrained by outer limits of their presuppositions and the greater the closure of such limitations, the wider range of competing interpretations will incorporate different variants of the dueling exegeses in themselves.

3.Conflict as a theoretical construction points up the underlying paradoxical structure of all sign systems, such as law, which are dynamically evolving and are open-ended. Paradigmatic of the paradoxical structure which characterizes inquiry into all sign systems and their development is that one beginning with the perception of an indeterminate legal situation. This situation is a relationship of the defined (established legal practice, a statue, a norm) and the vague(foreign).

A proposition is vague when there are possible states of things concerning which it is *intrinsically uncertain* whether, had they been contemplated by the speaker, he would have regarded them as excluded or allowed by the proposition. By intrinsically uncertain we mean not uncertain in consequence of any ignorance of the interpreter, but because the speaker's habits of language were indeterminate.(Peirce 1902:738)

It is the component of vagueness or that which is seen as new and not yet classified as a general idea/sign, not yet named and thus symbolized, which presents to the inquirer a phenomenon of a paradoxical nature that elements of contradiction (law as a system of contradictions).The concept of paradox as a intrinsic structure of thought is closely related to problems of contradiction, incompatibility and repugnancy in law. As it flows from Kevelsonian legal semiotics, the main paradox in Conflict of Laws - is a claim made by legal actors, individuals and organizations –which involves reference to two or more distinctly different generally acknowledged and usually observed legal rules, procedures or practices within the one legal systems: in modern open innovative legal system there is no single type of interpretation that could claim universal validity of its assumptions, representing, let say, grandstand view on how legal contracts should be translated (Kevelson 1990:44-45). To add here an external dimensions of this paradox in Conflict of Laws which falls under the scope of relationships between local legislation and private International Law.

The conflict *of* law for Estonia is constituted by the rules on legal interpretation of international contracts are subject to 1980 The Vienna Convention on International Sales of Goods (further reference *CISG*) and – from European supranational perspective - The Principles of European Contract law (further reference *PECL*). Meanwhile, a much less apparent conflict *in* law, or rather in terms of Kevelsonian semiotics - a 'repungancy' between legal norms within the Estonian national legal order: this is a logical inconsistency between legal rules about interpretation in Law of Obligations Act §29

The basic similarity between CISG and PECL rules on interpretation of contracts is considered to be the combination of the subjective and objective methods of interpretation. Both the Convention *Art.* 8(1) and the Principles *Arts. 5:101(1)* and *5:101(2)* instruct the judge or arbitrator to start by establishing the intention of the parties, and only exceptionally to interpret the contract in the way intended by one party (PECL *Art. 5:101(2))*, while the CISG does not refer to the common intention of the parties at all, but only to intent of an individual party. Interpretation according to the meaning which would be given to the words by a reasonable person in the same situation is the basic rule in some systems – for instance, English law applies the normal meaning of the words in the context in which they were used, unless it is clearly established that the parties shared a different intention. If there are no indicators of the parties' true intentions, both the Convention and PECL instruct the court circumstances. This serves as a basis for introducing to law a special legal fiction –*an objectified 'intention'.*

The purpose of introducing this concept was the reduction of legal efforts regarding establishing the intentions of the parties. That is why when a common intention cannot be discovered and contradiction cannot be eliminated in any other way, the judge should apply

criterion of reasonable intention, i.e. attribute to contract the meaning that reasonable persons placed in the same circumstances as the parties would have given to the contract and by virtue of that to perform a closure on any particular dispute. The current principles of contractual interpretation hold more advanced but still non-exhaustive list of techniques in defining the situation of shifting between the subjective to objective approach. Most of them deals with cases when no intention different from the literal meaning of the words can be established. In order to ease the task of legal interpretation of contracts: good faithand fair dealing, the nature and purpose of the contract, the interpretation which has already been given to similar clauses by the parties, the meaning commonly given to terms and expressions in the branch of activity concerned and the interpretation that similar clauses may have already received. As Professor Matthias Storme has observed:

in the French and Belgian traditions, for example, the primary function of good faith is traditionally seen as 'interpretative' (the interpretation of contracts, not of the law, and, more specifically, interpretation according to the common intention of the parties). Paradoxically, however, this function is historically a form of correction in relation to an older rule favoring a literal interpretation (Storme 2003:20).

In the semiotic background of the solution to this *hidden* paradox lies an abduction or hypothetical reasoning in discovery of working premises. According to Peirce, it is through discovery that one realizes that the situation at hand which evokes discovery procedures is a paradoxical construct: a relationship of the vague and the definite (CP 6.191). To discover means to define this relationship of the vague (ambiguous) and the definite and that is thought to be a task of interpretation. Being more specific about semiotic notion of interpretation it is important to remark here that in contract law a process of constituting a relationship of the vague and the definite is two-fold: it starts with framing the needs for

contract interpretation establishing (*or sometimes intentional omitting*) pragmatic rules of interpretation.

An important methodological observation should be done here - there is a tension that is discernible in many legal systems, this tension is inherent in the very nature of the interpretative process, between the antithetical horns of legal interpretation -the objective and the subjective approaches. However, in the context of modern legal systems, this tension should not be exaggerated, since this 'tension' is unavoidable propierty of ervy semiotic space. Nevertheless it is impossible to think of this conflict as an actual adversarial conflict between two or more historically distinct and even competing systems of contract. The provisions on interpretation in certain civil codes could appear to be deceptive ones because in fact they are not so subjective as they might appear at first sight.

Moreover, following the majority of laws of EU Member States, modern legal systems usually attempt to establish balance between the general rules on interpretation, which combine the subjective method, according to which pre-eminence is given to the common intention of the parties, and the objective method which refers to objectified in legal fictions criteria, such as reasonableness, good faith. Some of them apply only to contracts, where there is more room for an approach based on common intention. Even there, the common intention of the parties is not the same as their individual subjective intentions. And the apparently subjective initial provisions are supplemented by other, more objective, provisions. It is well recognised in civilian systems that there often is no ascertainable common intention of the parties to a contract; that judges cannot be allowed, under the guise of interpretation, to rewrite a juridical act; and that the interests of those who rely on the apparent content of a juridical act cannot simply be ignored.

The truth is that in the most of modern *balanced* legal systems this problem is solved in a pragmatic way accommodating these different interpretative techniques to the needs of legal system. Some legal systems have detailed legislative provisions on interpretation – compare, for example, French, Belgian and Luxembourg Civil Code. Arts. 1156 - 1; Spanish Civil Code Arts. 1258 and 1281 - 1289; Italian Civil Code arts 1362- 1371, also UNIDROIT Arts. 4.1-4.8. In France and Luxembourg the rules of interpretation are sometimes considered to be mere guidelines which do not have to be followed. Other legal systems content themselves with statements of general principle, like German BGB § 133 and 157 Greek Civil Code Arts. 173 and 200, Portguese Civil Code Arts. 236-238 (the difference here is that, in Germany interpretation is the question of fact, while in Greece and Portugal interpretation is a question of law). The final group of legal systems deliberately omits rules of interpretation as being too general and too well-known techniques to be found in the case law: in the Nordic countries rules of interpretation are to be found in case law and doctrine. Common law rules of interpretation are case law and are not clearly distinct from rules of evidence and rules about mistake.

The modern German law of obligations also tends to follow a more objective, or normative, approach; the emphasis is not so much on what a party may have meant, but on how a reasonable man would have understood his declaration. There is no room for an inquiry into the 'true intention' of the parties if the justifiable reliance of the addressee deserves protection.

On the other hand, it is well recognised in English law, and in the systems which have been heavily influenced by it, that there are cases where it would be absurd to ignore a special meaning which the parties to a contract had attached, by mutual agreement, to an expression; or to ignore the apparent actual intention of a testator where there was no the

way of resolving an ambiguity as to the identity of a legatee; or to ignore the context of an expression or the circumstances surrounding the making of a juridical act. It is most certainly not the case that the literal meaning of an expression is always followed.

8.1.Different approaches: a historical conflict between verba and voluntas

The interpretation of juridical acts is, on the surface of things, one of the fault lines between civilian systems and systems derived from Common Law. In the development of Roman law from archaic stage to *Corpus Juris Civilis* there appears to have been a constant shift from a objective to a more subjective approach to interpretation. As we know from historical sources, in the early Roman law the emphasis was supposedly on outward form and there was a tendency to shape every legal act with a definite form. Because the law was thought to be of sacral origin, and that is why legal acts and transactions (contracts among them) had to be scrupulously performed with the utmost, even meticulous precision:

Precisely set forms of words had to be uttered with great punctiliousness. The smallest mistake, a cough or a stutter, the use of a wrong term invalidated the whole act. The actional formalism corresponded to a similarly strict formalism in the interpretation of those ancient legal acts; what mattered were the verba used by them. The more rigid the interpretation, the more care was, in turn, bestowed on formulation of the formulae. The drafters had to try to eliminate every risk of ambiguity. This led to scrupulous attention to details, to cumbrous enumerations and to the inclusion of standard clauses such as '*quod ego sentio*'. Anyone who failed to employ such devices ran the risk of having face unwelcome and unexpected consequences: as was experienced, for instance by those who had taken the wow to sacrifice '*quaecumque proximo vere nata essent apud se animalia*'. Not only animals but their own children also were taken to be covered by those words.(Zimmerman 1991:322-323)

Later classical Roman lawyers still considered legal acts and transactions as a whole, without creating complex stereotypes of contract as being composed of mutual declarations of intention, both of which are subdivided into internal component (the intention, *voluntas*) and the external one (the declaration, *verba*).

In the Byzantine period the emphasis was more on subjective intention. The contrast between objectivity and subjectivity was then encapsulated in the antithesis of verba and voluntas. In the intervening classical period there was something of a 'happy equilibrium' between the two approaches. The writers who influenced the content of the major European civil codes placed the emphasis on the actual will, in accordance with the theory which was then dominant. This emphasis found its way into, and is still apparent in, a number of civil codes. By contrast English law has, at least since the early nineteenth century, placed the emphasis on the ordinary, objectively determined meaning of the words used and has discouraged attempts to seek actual intention.

8.2. Interpretation of contracts : a discursive twist of hermeneutics

Contracts are interpreted in order to determine their contents. This is particularly the case, when the contract contains a clause which is ambiguous, obscure or vague; that is, when one cannot immediately see the exact meaning. But interpretation will also be necessary if clauses which seem clear enough in themselves contradict each other, or cease to be clear when the general setting of the contract is taken into account. When a contract contains lacunae which need to be filled, the process is sometimes referred to as completive

interpretation . The rules on interpretation of contract, i.e., of the parties' statements and conduct constituting the contract, are necessary when the meaning of certain provisions is ambiguous, or when the different clauses of a contract contradict each other. Determining the exact meaning of the contract may be necessary before it can be determined whether the contract is valid or whether there has been a non-performance. Similarly, the rules of interpretation apply to contracts made on general conditions or standard forms. Interpretation may be needed for the whole or part of a contract – in this case legal interpretation resembles the circular movement from a part to the whole.

Classical general hermeneutics as applied to the reading of legal texts will certainly retain some demarcation or '*liminal space*' or '*fundamental gap*' between intention and literal meaning, or between sentence meaning and speaker's meaning, to account for observable linguistic phenomena such as ambiguity. At the same time, in semantics of text, it is claimed that a vague clause could be described as having at the same time two or even more different 'meanings,' and it is very possible none of them is so called 'intended' meaning (Iser 2000:5-6). Legal theorists usually points out that question of fact, which concerns an explanation of ambiguity or a vague clause/ sentence inevitably precedes the question of law or deciding which meaning is intended one.

The duality of current legal techniques of interpretation –which are subjective, objective or combination of both - arises out of theoretical hallmarks of different hermeneutical methodologies, such as '*intentionalism*', '*interpretivism*' and '*indeterminism*'. As a matter of fact, the initial discrepancy between objective and objective methods of legal interpretation has recently been doubled by assimilating multifacety of current hermeneutics within the framework of law. The intentionalism is important insofar as it holds for true that account of intentional meaning always has the advantage over circular

hermeneutical interpretation, which links interpreter and interpreted text and that actual meaning of a legal text is found in the intention of its author. Umberto Eco proposes two concepts of interpretation: on one hand, to interpret means to consider the 'objective' nature of a text (Eco 1990a:36), its essence, its independence; another concept represents an approach , which derives its concept from hermetic tradition, i.e the text as something open to infinite 'unlimited interpretation' (Eco 1990a:36).

The main advocate of this approach is Jacques Derrida who offered a concept of 'infinite deferral' or 'infinite drift' of meanings, which leads to the deconstruction of text (Derrida 1978 :268). The result of deconstruction is to show *not* that texts are meaningless but that they are open to many conflicting meanings. For deconstructivism, whatever closure is reached in legal interpretation, it is due to something outside the text, because it is not an original meaning which is vested in a text, but rather reminiscent of meaning we can trace. This position held by Derrida and his followers is the main target of Eco's criticism (Eco 1990a:35-37) he claims that certain 'modern interpretive theories of deconstruction' have gone too far in allowing the reader to blur *intentio operis* granting interpreter with unconstrained opportunity to upon a text (Eco 1990a :36).

Infinite drift is different from Peirce's 'infinite semiosis', Eco refers to the Peircean notion of 'habit', which, being fixed by community convention, underlines the intersubjective character of interpretation (Eco 1990a :35). In line with his cautions regarding the theory of unlimited semiosis, Eco asserts the primacy of a 'common-sense' reading based on a text's literal meaning: "the interpreter must first of all take for granted a zero-degree meaning" (Eco 1990a :36). A respect for this level of literal meaning, plus a belief in the principle of 'internal textual coherence', the belief that any portion of a text can be used to conform or reject an interpretation of any other portion, can guide the

interpreter along the straight and narrow path in the realm of understanding into the *dialogic* direction of the interpretive act: from author's intention through text's intention to intention of reader. Each of those 'intentions' are actual interpretants of any kind of text.

Eco's specifications concerning the Peircean notion of 'unlimited semiosis' appeal to the dialogic character of interpretation as proposed by Russian theoritist Mikhail Bakhtin, who first recognized that the relationship among interpretants is essentially dialogic. This implies that an interpretant sign cannot constrain the interpreted sign. To understand the Peircean chain of interpretants in terms of dialogism means to escape the risk of considering the interpretation process as being equivalent to a free reading in which the will of the interpretants (and with them of the interpreters) beats the interpreted "into a shape which will serve their own purposes" (Eco 1990b:18). Eco argues for the possibility of interpretive agreement based on a view of interpretation as involving a dialectics between fidelity to canon and freedom, i.e between conservation and creativity - between respecting the text's intentional interpretation and opening up new, even bad ones, readings.

The interpretivism rejects literalist and subjectivist interpretations while simultaneously assuming that the legal interpretation has to unfold the only one objective solution to any situation of legal indeterminacy (compare Nerhot's opinion that "the anticipation of meaning that guides our understanding of a text is not an act of subjectivity" (Nerhot 1993:42).

On contrary to it, the 'indeterminism', which maintains that legal interpretation is intrinsically indeterminate - therefore, that legal 'interpretation' is in reality policy-making or a self-adjudicating reference (Raz 1996) to the authority of canon or tradition (Marmor

1991).

Legal interpretation has evolved in 19th century and is grounded in exegetical studies of the Justinian Codex and Savigny's systematical elaborations on the method of legal interpretation. Legal hermeneutics being classically exposed to the legal method, represents a something that might be called a recursive loop of interactive interpretations of the law and legal rules which are established in the cognitive medium of the complex social interaction among the interpreter of legal rules, on one side, and his/her presuppositions evaluated against the status of linguistic and real worlds, on another side. This approach had been later developed into *juridical exegesis* (at the basis of the methodology of this positivist trend of legal philosophy lie the positive principles of interpretation of a legal text; however, in its very nature juridical exegesis is rather similar to the views of the representatives of natural right). There is a distinction between two equally important types of interaction between parties – interpretation (with or without its emergent subclass 'substantive reasoning') and application ('use' or even 'usage'), which is particularly important in relation to the relevance or purpose of subsequent events and conduct. This distinction constitutes theoretical frame of reference, to which limits of interpretation highlighted.

Interpretation is the dynamical process of deciding what an expression means. As we will see later, subsequent conduct is in general irrelevant to that process. Systematically speaking the process of interpretation starts with considering the linguistic context (context of a natural language) and then dynamically shifts to the context of the social-legal structure (institution), to which interpretive text belongs as well as to the purposive context of evaluation of one possible interpretation over another interpretation. This is a pivotal notion for the institutional theories of law (Hauriou, Mc Cormick, Weinberger) -institutional theory seeks to locate sources of law at institutional levels that may be more appropriate

to solving particular contemporary social problems. This theory combines insights from analytical legal theory as espoused by Kelsen and Hart, and linguistic transaction theory as developed by John Searle (Searle 1995), as well as theory of institution developed by Maurice Hauriou (Hauriou 1925). Thus, tasks of interpretation basically rely upon the general maxim of semantics: meaning is dependent on contextual reading, so context is highly relevant to the process of interpretation and interpretation transpose a meaning of something to another meaning of something else. At the same time application is the mere process of attributing the accepted or determined meaning to the established facts and by virtue of this attribution applicant does not interpret fact, but rather creates a new dimension to it.

The practical difference between interpretation and application of law becomes evident in cases, when ordinary contracts fall to be applied to fact situations which vary over time and depend on the conduct of one of contractors. Thus, even if the interpretation of the contract may be straightforward and its meaning perfectly clear from the beginning as well as establishment of value towards achievement of contractual goals - its application *could* depend on subsequent conduct and recognition.

Getting back to the general typology of legal interpretative methods, it is of great value to note here that most suitable framework of explanation has been developed by Jerzy Wroblewski who identifies three main nodes of interpretative instruments in law: *sensu largissimo* (semiotic or linguistic), *sensu largo* (systematic) or *sensu stricto*(theological-evaluative) (MacCormick & Summers 1991:26). It means that the whole context in which contract has meaning could be accurately divided into the linguistic(semiotic), the systematic, the theological *plus* the intentional element (as we will see later, the last one

seems to be prevailing component for deciding the meaning of contract).

Sensu largissimo or semiotic/linguistic interpretation, which is used to cover all possible sorts of 'understanding of cultural objects' (MacCormick & Summers 1991:12) is a favorite playground for both analytical philosophy (philosophy of logic and philosophy of language) and semiotics. Theoretical backgrounds for this well known legal interpretative technique spring from different conceptual sources. One of them is the recent preoccupacy with the problem of linguistic indeterminacy in law which have stemmed in Wittgenstein's observations on rule-making. If words, and legal rules composed of words, have no intrinsic meaning and hence cannot, in and of themselves, constrain legal reasoning, then it must be interpreters who supply such meaning via the process of interpretation.

An extreme variant of migration into philosophy of law for this interpretative technique could be found in Ronald Dworkin's book (Dworkin 1985), where Dworkin takes recourses to that the law is made of propositions and artfully expressed that interpretation of these propositions is driving engine of law. Moreover the law is not only interpretative concept, but interpretation of law in itself may reveal something relating to the nature of law, which we must not neglect. Thus the importance of interpreting law goes beyond the interpretation itself and leads interpreters towards the furthest horizons of natural law. He developed the 'aesthetic hypothesis,' in which a legal text (being a cultural objects) is said to be like a literary work produced by many authors, each of whom is determined, as of one mind, to create 'the best work of art.' Literary interpretation is "an interpretation of a piece of literature [that] attempts to show which way of reading … the text reveals it as the best work of art" (Dworkin 1985:149).

Actual investigations of the parallels and divergences between interpretation in law and interpretation in literature made its possible for Dworkin's adherents to draw a consequent conclusion: there is the legal equivalent of 'a work of art' that would be a legal proposition or chain of propositions that exhibits what Dworkin calls 'legal integrity.' On this model the right interpretation of a legal text would be that which shows it in the best light possible with respect to the 'the deep structure' of law, legally speaking - to the coherent sets of principle of integrity. However, this integrative approach seems to be efficiently applied only to the domain of public law and especially rules of legal procedures, since the public statute, which is usually deprived of intentional element and the most of contracts could not be deduced to plain propositions, which lack the intention .

For example, how could it be possible from Dworkin's viewpoint to interpret a contract which is intentionally drawn up in two or more language versions none of which is stated to be authoritative and there are significant divergences between the different linguistic versions? The reasonable normative solution to this dilemma can be found for example in Principles of European Contract Law (Article 5:107) - in case of discrepancy between the versions, a preference for the interpretation according to the version in which the contract was originally drawn up, since it is likely to express best the common intention of the parties. Consider a contract drawn in French and in German. The contract contains an arbitration clause. The French text provides that the arbitrator '*s'inspire*' from the rules of the ICC, i.e. he may follow them, while the German version provides '*er folgt*', i.e. the arbitrator must follow the ICC rules. The French version was the original and this is the one which should prevail. If the contract provides that the different versions shall be equally authoritative, the 'will theory' as applied to the contractual interpretation (infamous 'common intention principle') comes into force. Because it is unclear, whether one

version has a precedence to another, an arbitrator or a judge should decide which linguistic version better fits to the expression of common intention of the parties or, *if this cannot be established, what reasonable persons would understand*. The nearest provision to Article 5:107 is UNIDROIT art. 4.7, which deals only with discrepancies between versions which are stated to be equally authoritative. The national laws do not appear to contain any rules on the points covered by the Article applying specifically to contracts.

The interpretation in sensu largo whenever one speaks of the 'interpretation' of language or any other system of (intentional) communication, meaning no more than that the person who receives or intercepts a message is able to understand it as having a certain contextual or discursive meaning. Borrowing from Mikhail Bakhtin, Goodrich describes the language of the law as a system of usage/application that translates social reality into its own interpretative terms in order to control it - so the force of the law is independent of its sense, meaning or interpretation, but rather bound to institutional and sometimes historical (diachronic) context of legal communication or legal discourse. Peter Goodrich claims that legal discourse "is a discourse which should ideally be read in institutional terms of control—of dominance and subordination" (Goodrich 1986:20).

Interpretation in its narrow sense (*sensu stricto*) is a sub-class of interpretation *sensu largo* and occurs where there are doubts in the understanding of a language, when it is used in a legal context in an act of legal communication. Where one or more persons engage in dispute as to the meaning, which ought to be ascribed to some particular communication, the choice of one or other possibility assumes an act of communication. However you resolve this doubt (and perhaps even if you do so by asking me for a clarification), you make a perpetual interpretative choice among non-linear even bifurcating possibilities which you view as conceivable but conflicting senses the message (sequence of legal premises and

arguments) may convey to you. This process of legal interpretation is reflected as an oscillating metaphor of non-linear process – and being a non-linear process it could be described in the categories of hermeneutic circle (Leyh 1992). Though legal interpretation is non-linear, its result in the form of a written record eventually becomes linear and – metaphorically speaking – it spreads itself into the realms of any legal concept's core meaning. Legal rules, whether enacted by legislative act or couched in legal terms of the contract, besides the broad and heterogeneous range of connotations, intrinsically have a core of plain meaning.

The evaluative choice among fluctuating alternatives in a setting of real doubt or dispute is a case of theological interpretation *'sensu stricto'*(MacCormick&Summers *1991:12)*. This is a borderline class of interpretation next to application and being a pragmatically oriented, an interpretation in this strict sense often occurs in law. A person, to whom a contractual offer is addressed, could notice an ambiguity and respond to it on the basis of the seemingly most reasonable interpretation in view.

Even if in his inmost mind a party had no intention to be legally bound, most of the laws will hold that he is bound if the other party to whom the statement or other conduct was addressed had reason to assume that the first party intended to be bound. Another example of such evaluation could be drawn from PECL Article 7(2), which declares that an interpretation which renders the terms of the contract lawful, or effective, is to be preferred to one which would not. The contract parties must be treated as reasonable persons who in their inmost mind assume that their contract should be fully effective (magis ut res valeat quam pereat). In this case,if a clause is ambiguous and could be interpreted in one way which would make it invalid or another which would make it valid, the latter interpretation should prevail (favor negotii): the rule in favour of full effect is to be found in several Civil

codes: French, Belgian and Luxembourg Civil Code Art. 1157; Italian Civil Code Art. 1367; Spanish Civil Code Art. 1284. However ambiguous concepts, words of contracts would call for further interpretation, and it is apparent, that under critical angle of view, the author or authors who shaped the wordings of contracts, after signing it, have no more privileged access to the sentence meanings than does any other interpreter (usually a lawyer, a judge or an arbitrator). The most generally accepted principle, which flows from the will theory of contract is that of interpretation according to the common intention of the parties, complemented sometimes by the warning that 'one should not simply take the words in their literal meaning' (compare French, Belgian and Luxembourg Civil Codes Art. 1156 and German BGB § 133; Austrian ABGB § 914; Italian Civil Code art. 1362; Greek Civil Code Arts. 173 and 220).

The judge is thus encouraged to start by looking to see what was the parties' common intention at the time the contract was made. This is normal because the contract is primarily the creation of the parties and the judge should respect their intentions, expressed or implicit, even if their will was expressed obscurely or ambiguously. In seeking this common intention the judge should pay special attention to the context of transaction (as it stated in PECL Article 5:102 relevant circumstances) and to common intention of parties which even could have a precedence over written letter of the contract (PECL Article 5:101) – in case of conflict between written word and intention, the latter must prevail.

In her article in the *European Review of Private Law*, Marietta Auer set forth semiotic guidelines for inquiry the private law institutions: taking in account a particular legal institute of 'good faith', she observed that 'good faith', as well as every conceptual entity in Contract Law, typically has three dimensions:

first, a substantive dimension of justification of good faith duties in terms of, for instance, contractual ethics; second, a formal dimension concerned with its structure as a vague standard; and finally, an institutional competence dimension raising the question of judicial freedom and constraint in adjudication based on open standards such as good faith.(Auer 2002:279).

Having applied this three-dimensional framework one could further elaborate on what all three dimensions correspond to in terms of 'legal interpretation' – for instance, the substantive dimension would stand for purpose of the contractual activity, formal dimension would concentrate on relations between definite and indefinite parts of the term to be interperted – and, finally, institutional competence (which is in semiotic context the same as discursive competence) dimension will cover various topics, which concern the question of contractual freedom(as a principle of 'private autonomy') and its limits, set by the fidelity to legal canons.

Thus, a seeming dychotomy or disparity between different techniques, methods and approaches in field of legal interpretation could be fruitfully overriden by pragmatic approach to paradox of legal interpretation. The evolution of modern civil law from its Roman foundations to his modern supranational form provides us with a brilliant illustration of what impact could 'conflict in law' or 'conflict of laws' have on creation of new law – it keeps open a new possibility for further re-interpretation, further evolution of law. As we have seen from previous chapters, in the long *historical* course of competition, an antagonistic mode of competition between two contradictory frames of reference - the subjective and objective ones, has resulted in still-viable juncture of both approaches.

A real political or social struggle was successfully exculded from by current legislation from the background of law, leaving only a bleak trace of this infamous conflict. A theoretical counter-part to the contractual interpretation – so called 'legal hermeneutics' – in its modern form represents the fusion of methods from a wide range of

humanities: from history to lingusitics. Here a pragmatic approach to solving the legal disputues has been culminated in the form of purposive interpretation of a contract, which is a useful tool where the purpose can be identified with reasonable certainty. Hower, this technique could not be used to rewrite the contracts – but because of discursive/institutional limits it is usable only in order to fulfill the reasonable expectations of the contractual parties and to point out the real significance of the words of the contract that is the outward manifestation of a particular determination.The ability to add new value and thus to contribute to the legal semiosis (the growth of legal meaning) is the most important *semiotic* feature of legal interpretation, which one:

links together the author and the reader, technical language and everyday language, past drafting and present application, the subjectivity of the author and the objectivity of the message he produces, the abstract nature of a rule and the concrete nature of a single situation; interpretation itself is a linking of the parts to the whole (the word and the sentence, the sentence and the chapter, the chapter and the complete book); even more fundamentally, interpretation sets up a mediation between a primary, explicit but not entirely satisfactory meaning and a second meaning more in line with a given expectation, such as the justice of the solution.In all these cases, the process is never one of decoding pure and simple, of a strict matching of equivalents. In the course of the process there is transformation and therefore production of meaning - deconstruction and reconstruction. (Ost & van de Kerkhove 2004)

Conclusion

This thesis seeks to demonstrate the existence of possible affinity between the current scholarly developments in legal semiotics and the cultural semiotics of Tartu-Moscow semiotic circle by setting out some 'parallels', both in the methodological apparatus and the re-conceptualization of 'legal discourse'. The structure of this thesis has been reflected in a passage from the historical introduction into the development of that may be called Tartu-Moscow 'legal semiotics' (Chapter 1), through discussing the different notions of legal system (Chapter 2,3,4) and general questions of the current legal theory (Chapter 5,6,7), towards the paticular problems of legal hermeneutics and contractual interpretation (Chapter 8).

Chapter 1 aims at describing the historical interchange between members of Tartu-Moscow semiotic shool and some legal scholars, who were interested in application of Tartu-Moscow cultural semiotics to legal discourse and - by virtue of that fact - used legal semiotics to create a type of 'alternative theory' within legal discourse. The aforementioned historical exchange is represented in this thesis both as a real historical mediation and as a migration of ideas between Lotman and legal community, which was very promising both in its aspirations and in the effects it sought to produce.

Chapter 2, Chapter 3 and Chapter 4 provide an overview of those thoroughly selected concepts taken from Tartu- Moscow cultural semiotics, which ones are 'applicable' to the pluralistic description of legal system (with a special attention to the models of 'semiosphere' and 'secondary modeling system') and 'comparable' to the modern system approaches in legal theory (among others, theory of dissipative structures, autopoietic theory

of law and reflexive theories of law). It is suggested that the concept of law as a 'special type of semiosphere' (*pravosfera*), which have been developped by Ants Frosch, who was mainly drawning on Lotman's works, - could be easily aligned to the current developments in legal theory, that maintains the plurality of legal systems against the previously dominated understanding of 'law-as-a-unity': say, critical legal studies and Tartu-Moscow semiotics of culture would agree that law could be supplemented by other normative discourses, of which there are many, and in fact it is always being supplemented by them. That is one consequence of the interpermeability of legal and political discourse (which could be described in terms of Tartu-Moscow semiotics as 'dominant').In fact, the comparative extrapolation of these concepts and methods into the description of law can bring essential benefit both for the jurisprudence and semiotics, enriching theory of analytical jurisprudence from one side, and the methodological apparatus of Tartu-Moscow cultural semiotics, from another.

In Chapter 5, Chapter 6, and Chapter 7 the general problems of postmodernist theory of law have been concerned, especially in connection to the postmodern discourse of law, law's legitimacy and the textuality of law; the task of this chapter was to provide a reader with a general idea about the postmodernist background of semiotics of law, as well as about the initial, basic concepts that would both connect semiotics of law to other 'branches' of postmodern jurisprudence. The representatives of 'critical legal studies' (which is just another synonym for 'postmodernist jurisprudence') have reproached the legal positivism for privileging a written norm as a sole source of 'legality' and neglecting other socially constructed forms of normative discourse. In this thesis, this criticism have been compared to the tradition of Tartu-Moscow semiotics and drawning from Tartu-Moscow semiotics of culture, an important (even though obvious) conclusion have been made that legal text is

everything that is capable of conveying of the specific legal meaning. The re-conceptualization of 'legitimacy' in terms of Tartu-Moscow cultural semiotics would eventually lead to the same observation that this reconceptualization is similar to that one of 'critical legal studies' and different from that one of legal positivism, since the latter assumes the 'monological' essence of 'legitimacy', while both 'critical legal studies' and Tartu-Moscow semiotics of culture would claim the existence of 'dialogical' structures within the discourse of 'legitimacy'.

Chapter 8 intends to discuss the concepts and arguments of modern legal hermeneutics, which has been developed to be in full accord with existing legal interpretative techniques. For the sake of clarity, the basic concepts of legal hermeneutics (among others, the most important concept of 'conflict', which could be described in terms of Tartu-Moscow legal semiotics as 'tension') are being illustrated by the two historically established technicques of contractual interpretation (which, in contrast to the statutory interpretation, is more preferable to demonstrate the similarities and the differences between literary interpretation and legal interpretation). It is suggested that the importance of interpreting law consists in fact that interpretation is constitutive of law and –much alike to the point view, proposed by Tartu-Moscow cultural semiotics – the specific 'legal' meaning is not vested in the 'legal' sign, instead the 'legal' meaning is a result of interpretative process.

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Resümee

Magistritöö teemaks on "Mõningaid paralleele õigussemiootika kaasaegsete arengusuunade ja Tartu-Moskva kultuurisemiootika vahel": nagu nähtub ka eessõnas püstitatud töö ülesandest on käesoleva töö eesmärgiks esitleda ja käsitleda võimalikke paralleele ehk analoogiat kaasaegse õigussemiootika ja Tartu-Moskva semiootika vahel ja lisaks sellele lühidalt tutvustada "iseseisva" Tartu-Moskva õigussemiootika väljaarenemise ajaloolist dimensiooni. Töös käsitletud teemade ring on küllaltki lai: peale puhtsemiootiliste küsimuste hõlmab see semiootiliselt relevantset teemastikku, mis on otseselt seotud õigusloogika, normi olemuse, õiguse süsteemse ja tekstuaalse (hermeneutilise) käsitluse.

Antud töö on mõeldud peamiselt võrdlevaks uuringuks, mis annaks paremat võrdleva ülevaade viimasel ajal kiiresti areneva õigussemiootika Tartu-Moskva kultuurisemiootika traditsiooniga "haakumise" kohta.   Magistritöös on korduvalt rõhutud õiguse kommunikatiivse külje tähtsust: õiguse kommunikativse olemuse olulisus on seda enam tähtis, kui võtta arvesse seda, et õigussemiootikale (eriti A.J.Greimas'i tekstisemiootikale toetavale õigussemiootika) on palju ette etteheidetud kriitikute poolt õiguspositiviistlikku tausta ja seda põhjusel, et õigussemiootika, samuti kui analüütiline õiguspositivism, on peaaegu samastanud õiguse mõiste "õigusteksti" mõistega. Antud töös on asutud seisukohale, et "kommunikatiivsus" on õigussemiootika üks olulisemaid lähte- ja pidepunkte ning just Tartu-Moskva kultuurisemiootikale omane "teksti" mõiste lai käsitlemine, olles rakendatud õigussemiootikas, annab suurepärase võimaluse õigussemiootika kriitika ületamiseks, sest tekst muutub vahendiks, mille abil on võimalik analüüsida kultuuri (ja

õiguse kui kultuuri osa) erinevaid aspekte kui piiritletud struktuure, mille piirid on aga samas selle kultuuri tõlkemehhanismid.

Esimeses osas (esimeses peatükis) on lühidalt tutvustatud Tartu-Moskva kultuurisemiootika ja õigusteaduse vastastiku kontakti ajaloolist dimensiooni ning lisaks sellele on pelgalt käsitletud Tartu-Moskva "õigussemiootika" järjepidevuse küsimust. Käesolevaks ajaks on erinevates "õigussemiootilistes" traditsioonides saanud heaks kombeks rõhutada tuntud õigusteadlaste ja semiootikute ajalooliste kontaktide tähtsust: mõned õigussemiootikud lähevad nii kaugele, et tuntud õigusteadlaste ja semiootikute töödes teatavate "analoogiate" leidmine õigusteaduse "semiootilise" ümbersõnastamisega kõrvuti ongi kõige viljakam viis õigussemiootika teadusliku identiteedi loomiseks. Seda teed on mindud nii Peirce'i semiootikateoorial põhinev õigussemiootika traditsioon (mille esindajad on kindlal arvamusel, et Ameerika "realism" oma rajaja Oliver W. Holmes'i näol võttis omaks norminihilistlikke mõtteid Charles Sanders Peirce'i pragmatitsismist), kui ka Saussure'i semioloogia poolt mõjutatud õigussemiootiline lähenemine (mis on endale teadvustanud teatavaid paralleele Saussure'i semiootika ja Hohfeld'i õiguspositivismi vahel). Antud töö kontekstis on püütud kasutada analoogset võtet Tartu-Moskva semiootilise koolkonna ja tollaegse õigusteaduse teadusliku kontakti otsingul.

Teises osas (mis temaatiliselt hõlmab teist, kolmandat ja neljandat peatükki) on käsitletud õigusteadusesse ülekantuna mõningaid Tartu-Moskva kultuurisemiootika põhimõtteid ning eriti põhjalikult on vaadeldud "semiosfääri" ja "sekundaarse modelleeriva süsteemi" mõisteid. Esitledes neid mõisteid kaasaegsesse õigusteooriasse ülekantuna, on tõdetud, et just need Tartu-Moskva semiootika põhimõisted kujutavad endast väga täpset analoogiat tänapäevase (õigemini öeldes postmodernistliku) õigusteooriaga, mis tunnustab ühelt poolt õiguse (kui fenomeni) mitmesüsteemsust (nii nagu seda teeb Peirce'i

"õigussemiootika") ja teiselt poolt lähtub eeldusest, et tegelikult ei ole õigus harmooniline ega suletud täiuslik normisüsteem, kus on võimalik iga üksikjuhtumit paigutada ühe või teise normi alla. Igas reaalses õiguskorras ("õigusruumis") asuvad üksteise kõrval omavahel konflikteeruvad erineva poliitilise, kultuurse, ideoloogilise taustaga õigusdiskursused ehk õiguse allsüsteemid, mis arenevad erineva kiirusega ja just nende kogum moodustabki tegeliku õiguse.

Kolmandas osas (mis hõlmab viiendat, kuuendat ja seitsmendat peatükki) on käsitletud postmodernistliku õigusfilosoofia üldküsimusi (eriti tähelepanuväärsed küsimised on õiguse legitiimsus ja õiguse tekstuaalsus). Selle osa eesmärgiks on esitleda lugejale õigussemiootika postmodernistlik taust, millest lähtuvalt on võimalik põgusalt järeldada, et kõik postmodernistliku õigusteooria põhiomadused on vaikimisi päritavad ka õigussemiootikas. Antud töös on omaks võetud traditsiooniline arusaam õigussemiootikast kui osast Frankfurti koolkonna analoogial nii nimetatud Ameerika Ühendriikide kriitilistest õigusuuringutest (viimase alla kuuluvad muuhulgas "feministlik" õigusteooria, "juriidiline" dekonstruktivism, õigusfenomenoloogia). Kriitiliste õigusuuringute üks põhilisemaid uurimussuundi oli legitiimsuse e. seaduslikkuse olemuse dekonstrueerimine ja käesolevas diplomitöös on püütud näidata, et legitiimsus jääbki aktuaalseks uurimisobjektiks õigussemiootika jaoks. Legitiimsuse mõiste eriline sisustamine annab aluse eristada õigussemiootilist käsitlust õiguspositivistlikust lähenemisest, sest viimase jaoks on seaduslikkus sisuliselt võrdne seadusandja (kui "rahvavaimu kandja") tahtega ning sellest tulenevalt kujutab endast monoloogilist struktuuri. Õigussemiootika (ja seda enam Tartu-Moskva kultuursemiootikale toetuv õigussemiootika) seevastu eeldab, et legitiimsuse struktuuris alati leidub "dialoogilisi" elemente, tõsi küll, aga osa neist põhineb "autokommunikatsiooni" mudelil.

Viimane kaheksas peatükk ja ühtlasi viimane osa keskendub kaasaegse juriidilise hermeneutika ja lepingute tõlgendamise analüüsile, kusjuures lepingute tõlgendamist on vaadeldud just läbi juriidilise hermeneutika prisma. Kõnesoleva peatüki asjakohasus käesolevas töös on tingitud sellest, et juriidilise hermeneutika näitel on püütud näitlikustada seda, kuidas reaalses situatsioonis "toimib" olemasolevate õiguse eridiskursuste (ehk kasutades Tartu-Moskva koolkonna mõisteid, õiguse kui semiosfääri erinevate tasandite) konflikti ("pingestamise") mahavõtmine. Lisaks sellele on vastavalt Tartu-Moskva kultuurisemiootika traditsioonile rõhutud, et "õiguslik" tähendus tekib üksnes õigusteksti (antud juhul lepingu) tõlgendamise tulemusena, sest nagu näitab reaalne õiguspraktika õiguslikku tähendust ei saa tuletada empiiriliselt antud üksikust normi-õigusmärgist (mis on omane Peirce'i käsitlusel põhinevale õigussemiootikale) ega õigussuhtest (Saussure'i traditsioonist pärinev õigussemiootika), õigusliku tähenduse saavutamine on võimalik läbi interpretatsiooni.