

Law, Power and Language: Beware of Metaphors

Jonas Ebbesson*

1	Figurative Expressions in Law and Legal Language	260
2	Personifying Corporations	262
3	Legal Method I: “Finding” the Answer in “Sources of Law”	264
4	Legal Method II: “Balancing” the Interests	266
5	Legal Method III: Providing a Coherent “System”	267
6	Metaphor, a Device for Persuasion	268

* Thanks to Steven Hartman at Växjö University and Paul Schreiber at Stockholm University for useful comments on a draft version of this article.

1 Figurative Expressions in Law and Legal Language

“Metaphor is the rhetorical process by which discourse unleashes the power that certain fictions have to redescribe reality.”¹

Figurative language is essential in legal discourse and contexts. Such expressions are not only found in traffic signs or other symbols with a direct normative content, but also in more subtle, established behaviour and vocabulary of lawyers, often used without much ado or reflection. Metaphors take a particular position in this regard, as found in statutory texts, court decisions, legal literature and legal rhetoric. The use of metaphors reveals how lawyers perceive different situations and contexts. Thus, they shape the legal discourses and, in some sense, determine which arguments are valid in legal reasoning and when legal issues are resolved.

Of course, this is not unique either to legal language or to legal discourse. We can hardly communicate, let alone describe or even understand our very existence or the world around us, without figurative expressions. Physicists, historians, journalists, philosophers and linguists all resort to metaphors to explain complicated or abstract courses of events. Metaphors add to the beauty of language, and they also help us in very concrete ways in daily situations. I would not be able to use my computer or the internet as effectively without metaphors, symbols and icons. They give me the comfortable feeling of recognition when I install “fire walls” in the computer, “surf” on the internet and click on envelopes and paper clips to manage my emails. Symbols and figurative language thus help explain complicated or new situations by means of analogies with which we are acquainted.

Metaphors work in this way also to enrich and facilitate legal communication through useful analogies. Yet, they are far more powerful than that. While they help us see and understand the world, metaphors can also blind us and lead us astray. They make us associate positively or negatively and, at times, accept analogies without further reflection or critical thinking. Through these embellishing and facilitating functions, they bring us mentally to another place, which is what the Greek meaning of *metaphora* indicates. By highlighting certain aspects of a concept, and hiding others, metaphors are useful rhetorical devices, and getting a metaphor accepted may change the outcome of a negotiation, a court procedure or an academic legal debate. New persuasive metaphors may thus give new meaning to an issue, and give a new understanding of our experience.² Metaphors also add to the justification and legitimation of court decisions as well as legal structures and the legal system at large – and this makes them all the more important.

When the power of lawyers is discussed in daily conversations and mass media, the issue usually refers to judges deciding disputes or sentencing people to jail, or to prosecutors bringing the accused to trial. However, for lawyers as a

1 P. Ricoeur, *The Rule of Metaphor* (Routledge, 2003), p 5.

2 See G. Lackoff and M. Johnson, *Metaphors We Live By* (University of Chicago Press, updated ed. 2003), p 10-13 and 139-146.

group the power is rather to be found in the capacity to understand and use the legal language. To communicate “legally” is more than understanding and interpreting statutes. It is also about managing different linguistic fictions, sliding and ambiguous expressions, and about making analogies at the right time. These skills are developed by lawyers of all kinds, not only by elegant barristers when twisting words and using lacunae or loopholes in statutes, as malicious portraits of lawyers often suggest.

Moreover, legal language is important not only for the power of lawyers, but also for their identity and self-image. This may explain why lawyers are one of few professional groups that define the rest of the world through a negation, i.e. as “non-lawyers”. Ever heard of “non-plumbers”, “non-taxi-drivers”, “non-nurses” or “non-teachers”? For the lawyer, however, this division is obvious and the professional language becomes a means to preserve one’s exclusive role.

Laying bare the metaphors and different legal fictions helps reveal the significance of language to the power and identity of lawyers. While linguists, theorists of law and sociologists are well aware of the law-power-language connection, this is rarely taught at law schools. During the four and a half years of studies at Swedish law schools, students are taught some elementary rhetoric and, for instance, how to interpret texts and make conclusions *e contrario* and *ex analogia*. Even so, the more controversial theme of law-power-language is much neglected in courses at law schools.

So, where do we find the metaphors? Anywhere and everywhere: in basic conceptions and notions of law, and in expressions for legal acts, actors, subjects, institutions and legal methods. Some are more subtle than others. For instance, the use of certain expressions in court procedures, such as “defence” and “defendant”, indicates the underlying metaphor of seeing court procedures as acts of “war” that someone has to “win” rather than as a means of, say, reconciliation.³ Thus, certain aspects of the procedure are highlighted, in this case that one party will win and the other party will lose, while other aspects, such as the possibility of an outcome that is beneficial for both parties, are hidden. Our understanding of the court procedure would be quite different if procedures and actors in the procedures were referred to in reconciliatory terms. There are also spatial metaphors in legal language, such as the concepts of “higher” and “lower” courts and of sovereignty, that influence our understanding of law (often reflected in charts where the different “levels” of courts are described).

In the following sections, I will content myself with four metaphorical expressions that in different ways reflect – and indeed shape – our perception of law. The first one refers to the subjects of law, while the other expressions, in one way or another, concern legal methods and more general understandings of what law is and lawyers do.

3 This fits well with the general notion that “argument is war”, analysed by Lackoff and Johnson, note 2, p 3-6 and 77-86.

2 Personifying Corporations

Few lawyers react against giving corporations human qualities. Corporations can be negligent, act in good faith and be guilty and made accountable. They are even bestowed with human and civil rights. In this way, multinational corporations as well as companies partly owned by states may invoke the European Convention on Human Rights and Fundamental Freedoms. Consider the following case: When the Swedish Government in 1998 decided to have the nuclear reactor of *Barsebäck 1* closed down for security and other reasons, the owners of the reactor – large Swedish and German companies in the energy sector – asked the Supreme Administrative Court for a legal review of the decision. The companies then claimed that the Government’s decision violated several human rights and fundamental freedoms set out in the Swedish constitution and the European Convention on Human rights. The companies lost the case, but there was no questioning by the court whether these huge corporations could have human rights in the first place – indeed in its findings the court considered all the human rights invoked.⁴ The European Court of Human Rights has consistently applied the convention also to cases where companies and other entities have claimed that their rights have been violated. In a similar vein, it is generally accepted in the USA that corporations can have civil rights.

The reason why lawyers do not even consider this anthropomorphism is partly found in the legal language. The notion that corporations are “persons”, as the legal lingo suggests, is deeply rooted in lawyers’ thinking; and of course it is easier to accept the human features and rights of corporations if they are consistently being referred to as persons (“legal” persons as opposed to “natural” or “physical” persons) than had they been described merely as “entities”, “institutions”, “organisations” or “apparatuses”. One may consider this anthropomorphism as an analogy-driven re-conceptualisation rather than an implied comparison between dissimilar things.⁵ Yet, it illustrates a kind of metaphoricity by making us understand one thing in terms of another. It also fits in the common usage of metaphorically viewing activities as something quantifiable,⁶ in this case a complex corporate activity as a person. Obviously, everyone sees the difference between human beings and corporations, but that is just how metaphors work: at a closer look the figurative character of the expression is usually apparent. Few of us seriously think that we literally “break” a contract or “carry” a right. Even so, the way we associate, often unconsciously, affects the way we deal with legal issues.

Conceiving corporations as persons has the apparent effect of strengthening their legal protection. There are legal-practical as well as principled reasons for doing so. The drafting of rules is made easier and the legal system more consistent if humans and corporations are labelled and considered in a similar way. Perhaps giving human qualities to corporations has also contributed to

4 See *Regeringsrättens Årsbok* 1996 ref 76.

5 Steven Hartman informed me about the different forms of metaphoricity.

6 See Lackoff and Johnson, note 2, p 31.

economic development. However, it has also had the effect of throwing one of the core rationales of human rights in the shade. While these rights shall protect the little against the huge – the individual (among the collective of citizens) against the power –, the motives for protecting the properties of multinational energy corporations and individuals are hardly identical. Even though effective enterprising requires legal protection, it does not necessarily have to be labelled a human right, with its strong metaphorical blast effect. A corporation has more in common with municipalities (and some states) than with individuals, if measured in terms of economic and political power. Whatever we think of it, we can be certain that the legal development would have been different if corporations had not been given these human features and considered persons.

The metaphor of the person does not only strengthen the rights and interests of some personified associations. It may also help explain why other interests are neglected. When I teach courses on environmental law we discuss who may participate in environmental decision-making, and who may appeal decisions and bring them to court. The answer is crucial for framing the interests to be duly considered in the decision-making. According to the general jurisprudence on standing,⁷ an administrative or judicial decision can be appealed by individuals and associations who are affected by the decision in question (as well as by some non-governmental organisations and environmental authorities). However, neither animals nor plants (nor landscapes) in the vicinity can appeal decisions, for instance permits for industrial activities, even though the activities in question may harm them and applicable environmental law is intended to protect these concerns. “Why”, I ask my students, “cannot animals or plants be parties in a legal case? When they have finished laughing and answered spontaneously that “of course they can’t” or “how could that be done?”, I receive more well-reasoned replies. “We do not know what they think” is a standard reply. “But”, I counter, “babies, severely sick elders, and others who are unable to express their view, may appear as a party in court. Of course they may not turn up personally, but they can have someone to represent them. In the same way, can’t we have someone to represent the animals and the plants?”⁸ It is at this stage that I sometimes get the answer: “Animals and plants are not persons, so they can have no such rights.”

The metaphor of person thus contributes to legitimising why some categories are bestowed with human rights without being humans, while other categories

7 As shown by S. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 *Stanford Law Review* (1987-88) 1371, the concept of standing as such is also highly metaphorical. For Winter, standing is the metaphor for individualism. While in some other languages there is no similar term (for instance, in French it would be referred to as the “right to act” (*droit d’agir*) and in Swedish as the “right to talk” (*talerätt*), there are still many similarities in how this right to appear before a court is construed in numerous jurisdictions; see e.g. J. Ebbesson (ed.), *Access to Justice in Environmental Matters in the EU* (Kluwer Law International, 2002) p 24-32.

8 This argumentation draws on C. Stone, *Should Trees have Standing: Toward Legal Rights for Natural Objects*, 45 *Southern California Law Review* (1972) 450. I have developed the discussion about animals’ rights in *Rättigheter i den juridiska praktiken – fokus på miljöfrågor*, in P Hallberg and C. Lernestedt (eds.), *Svenska värderingar?* (Carlssons, 2002), p 11, 126-130.

are excluded, even though the legislation may be intended to protect them (e.g. environmental law and animal welfare law). This will also matter in cases where several conflicting issues are taken into account in decision-making, and certain interests of “non-persons” may have to yield to other interests.

3 Legal Method I: “Finding” the Answer in “Sources of Law”

The influence of metaphors on legal language goes beyond that of including and excluding different categories of subjects through personification. Metaphors also affect our perception of law and legal methods. Numerous scholars of law and philosophy – among them such disparate thinkers as Thomas Hobbes, Jeremy Bentham, Axel Hägerström and Lon Fullers – have helped demystify the law e.g. by revealing the use of fictions or exposing metaphorical elements.⁹ Yet, the somewhat mystical notion that only lawyers know how to find out what is law, seems to remain even in today’s thinking – and that of course is a significant attribute of power (not unlike the power priests used in certain times and contexts (and in some religious communities still use) to maintain their power by insisting on the exclusive capacity to correctly understand sacred scripts). It is not surprising that lawyers, through their experience, become better equipped than others to deal with legal matters. Still, metaphors contribute to this thinking and thus help maintain lawyers’ influential and somehow exclusive, authoritative positions.

Certain expressions in the conceptual apparatus of lawyers are essential to indicate this exclusive capacity to understand the law and what it consists in. The activity of the judge, the prosecutor and the barrister is often described as “finding” the correct answers – arguments and interpretations – by searching in the “sources of law”. While the notion of finding the law in established sources is an essential part of legal positivism, “sources” are also referred to in natural law theories.

Relevant sources may include legislation, preparatory works of legislation, legal literature and legal precedents in courts. This figurative language is frequently used and for some situations it is actually an accurate description of lawyers’ activities: they really search in statutes, hand books and court decisions, and then use established legal norms in concrete cases. Still, the “finding” is clearly a simplification of what lawyers do, not least in higher courts. Courts are far more active and constructive than this conception indicates. As the following Swedish case reveals, there are situations when courts go at length in their search for arguments, and the “finding” becomes quite amusing.

When the Swedish Supreme Court, in the *Tsesis* case,¹⁰ applied the Act on Liability for Oil Damage at Sea (now replaced), it really got to the bottom of the preparatory works of the statutes in order to “find” the correct answer. Under

9 See, for instance, the useful essay on legal language and the impact of fictions by L. Fuller, *Legal Fictions*, in 25 *Illinois Law Review* 1930-31, p 363-399, 513-546 and 879-910.

10 *Nytt juridiskt arkiv* 1983 p 3.

Swedish law, as well as the 1969 International Convention on Civil Liability for Oil Pollution Damage that the statutes were intended to implement, the ship owner is strictly liable for oil pollution damage at sea. However, there are some exceptions to the strict liability, one being when the damage was wholly caused by the negligence or other wrongful act of the coastal state responsible for “the maintenance of lights or other navigational aids”. The ship owner in this case argued that he should be free from liability on this very ground, since the Swedish state – here represented by the Maritime Agency, aware of the ground – had failed to mark it out on the nautical chart.

The question before the Supreme Court was thus whether this exception applied to the case, i.e. whether nautical charts constitute such navigational aids that may exempt the ship owner from liability. Since in the Court’s view, neither the Swedish statutes nor the preparatory works gave a clear answer, it consulted the underlying 1969 Convention. This did not help the Court, so it continued its search and investigation into the preparatory works of the Convention, including English case law (among them a case from 1677!) since the Convention was drafted in English and with English conceptions.

The Supreme Court finally held that the history of the provision in question did not provide any guidance. Instead it considered the objective and the practical function of the rules that made an exception from the strict liability. And yes: finally the Supreme Court “*finds* ... that failing to report the discovery of the ground, which was the direct reason why it was not marked until after the grounding of *Tsesis*, amounts to such a neglect of the fulfilment of the Maritime Agency’s obligations to care for the maintenance of navigational aids as intended [in the provision providing for an exception from strict liability]” (my emphasis). The conclusion of the Supreme Court is of course correct – it is hardly possible to navigate with an oil tanker in the Swedish archipelago without such a “navigational aid” as a decent nautical chart – but its outcome is not the result of some “finding” of the answer in the “sources of law” after much searching. Indeed, one can imagine all kinds of “findings” if a Swedish court in the 19th century were to rely on some kind of “sources” that refer to English court decisions from the 17th century. Rather the conclusion of the Supreme Court was based on its cunning and rational reasoning.

While most lawyers know that the “finding” of legal answers is a simplified description of what lawyers do, the fiction is kept alive even at universities and law schools.¹¹ In real life, however, not least in cases concerning commercial disputes and issues of property law, the legal development is not the result of legislation by parliament, but by the creation of norms by the judiciary. The courts not only apply the law, but actually make it. Then, rather than “finding” the rule in some “source”, they are indeed “manufacturing a fresh legal rule.”¹²

This is sensitive stuff. Do we really accept that the court, although within bounds, acts as the law-maker? It runs against predominant notions of modern political theory, not least reflected in Montesquieu’s model for the separation of

11 Thus, one of the standard text books used in introductory courses at Swedish law schools is titled *Finna rätt: juristens källmaterial och arbetsmetoder*, by U. Bernitz et al (Norstedts juridik, 2004). Translated into English the title, which is a play with words, means *Finding the Law [or: Finding What Is the Law]: Lawyers’ Source Material and Working Methods*.

12 R. Dworkin, *Taking Rights Seriously* (Harvard University press, 1977), p 17.

powers. We take it for granted in a democratic society that the parliament makes the law, while the courts apply it. Would the courts, then, be mandated to create rules as well? Yes, indeed, in some cases – and this is not very remarkable, nor undemocratic. The legislator obviously cannot predict all situations or possible legal conflicts, and in such situations the courts must develop legal concepts and effective norms to be able to deal with cases before them. Even so, this does not have to be justified by some cryptic notion about the court “finding” the law, just as we do not need theoretical fictions about the “will of the legislator” when interpreting statutes.

Yet it is tempting for many lawyers, judges in particular, to describe their activity as merely finding the rules or interpretations in given sources of law, and then applying them in a specific case. If the court only “finds” in the “sources of law” how a text should be interpreted or applied, or a case resolved, it becomes immune to criticism – in other words it is not to blame for deciding a case in this or that way. The metaphors of “finding” and “source” help maintain this view of the courts, while it does not fully describe what judges do.

4 Legal Method II: “Balancing” the Interests

In addition to the mentioned metaphor, a frequently used concept to describe the work of courts is that of “balancing of interests” and “weighing of interests”. Such weighing occurs e.g. in private law, administrative law and environmental law. This sounds like a reasonable task for the court. Yet, we should not underestimate the impact of the figurative language.

The balancing of interest is sometimes explicitly set out in legislation, sometimes established through the jurisprudence of courts. A case of balancing, essentially developed by case law, are the various “proportionality principles” established by the European Court of Human Rights, the European Court of Justice and national courts. Proportionality indicates that measures taken for the promotion of certain public interests (such as the protection against terrorism, the detention of criminals, and the protection of health and the environment) shall be balanced against restrictions and infringements affecting individuals. The Swedish Environmental Code provides an example of a balance of interests prescribed by statutes. When the Environmental Court examines a permit application for “water operation” it can only grant the permit “if the benefits from the point of view of public and private interests outweigh the costs and damage associated with them.”¹³ That sounds fine, and it makes good sense that a court should not permit activities where the costs and damages outweigh the benefits.

The question is how such weighing should be carried out. According to which criteria? Of course nobody thinks that the judge, during the deliberations, is sitting with a pair of scales in front of herself. Yet, the metaphor adds to the image of exactness and justice in the weighing and in legal reasoning; also shown in the allegorical personification by Lady Justice (Iustitia), wearing a

13 Environmental Code, Chapter 11, Section 6.

blindfold and scales. The weighing of interests and concerns, reinforced by this icon, suggests that the court is able to objectively and precisely balance one interest against the other – as if put on scales. The metaphor, thus, helps legitimising the work of the court.

In reality the scope for considering policy and political aspects within the weighing differs quite substantially from one situation to the other. In such cases, the judge cannot avoid that his or her own values affect the decision. The outcome will in part be influenced by political elements. In the given case, where the Environmental Court must balance the advantages against possible costs and damage in examining a permit application, it may have to consider the public interest of having adequate roads – of, say, constructing a double lane motorway that may cut down the commuting time by half – against the public interest of protecting a beautiful small lake or a sensitive breeding site for birds. Through this legislative structure, the legislator has in fact conferred on the judge the task of making some political consideration, and the weighing hardly follows any precise criteria. This does not mean that the judge is fully free to weigh or consider whichever interest at his or her own discretion. The principles imply a certain direction in the decision-making and thus limit the scope of discretion. In addition, other relevant legal principles, such as fair trial, due process, equal protection under the law and impartiality, also restricts the scope of examination. Even so, law is often portrayed as being more exact than it is – and the metaphor of the scales adds to this picture.

5 Legal Method III: Providing a Coherent “System”

A fundamental feature of law, as taught and understood by most Western lawyers, is its structure of a system, where legal norms are connected and somehow related to each other. Thus, through the metaphor of a system, we understand – as a matter of truth – that different norms are not independent and autonomous, but parts of a greater whole. If there is an obvious lack of norm to guide us, we refer to that as a *lacuna* in the system, because the presumption is that of a whole and coherent system. Many legal scholars see it as their main task to create coherence in the system through their writings and research. Indeed much of the theories presented in academic writings concerns the ordering of different norms and “sources” in such a coherent system. To be sure, the notion of law as a system, rather than consisting of independent norms with no relation, provides for one of the truly paradigmatic elements in legal thinking.

Different attempts have been made to develop alternative theories, for instance “polycentric” theories, which question the coherence and consistency of law.¹⁴ Other metaphors used to describe law are games and sports (chess,

14 H. Zahle, *Polycentri i retskildelæren*, in A. Bratholm (ed.), *Samfunn, rett, retferdighet – festskrift till Torstein Eckhoff* (Tano, 186), p 752, mentions the metaphorical element in the concept of legal source by comparing it with the image of a water source. See also H. Zahle and H. Petersen, *Legal Polycentricity: Consequences of Pluralism in Law* (Dartmouth Publ., 1995) and, for an introduction to different theories challenging the traditional paradigm of law a system, J. Dalberg-Larsen, *Retten enhed – en illusion?: om retlig pluralisme i teorien og i praxis* (Akademisk forlag, 1992).

football), with norms, actors, competing interests and sanctions (and even judges and umpires). While the game metaphor obviously fails to adequately describe the multiple aspects and elements of law, nor does the notion of a national “system” of law succeed in explaining the structure of law in areas where the nation state has lost much of its practical relevance (for instance certain aspects of trade and commercial activities, environment protection, information technology). In these cases, either the systematic understanding of law must expand so as to include inter-, supra- and transnational normative aspects in a grander system, or law will have to be explained and understood through alternative theories, e.g. on polycentricity, where the systematic element is diminished.

6 Metaphor, a Device for Persuasion

The list of figurative expressions in legal language can be further expanded, but it is not possible to generalise as to the metaphorical value of the concepts. As indicated, in some cases it could be questioned whether an expression is really metaphorical or rather a re-conceptualisation. In other cases expressions lose their figurative impact,¹⁵ and the metaphorical features of an expression may differ from one context, place and time to another. Of course, a metaphor in one language does not always fly when translated into another language. For instance, the concept of “standing”, discussed above, is highly metaphorical in American law and language, but does not translate into many other languages (where the same issue is rather referred to as the right to act or right to talk in a court).¹⁶ One might also argue that the metaphorical value of some of my examples is not that great; that “this is simply what you say.” Yet, although the impact differs from one segment of society to another, it is clear that some expressions have a significant effect on our understanding and legitimation of law and lawyers’ work.

New metaphors may replace old ones. We refer to “sources” of law because we can imagine the sources of water. From the perspective of the legislator this metaphor may also be seen as suggesting that all sources stem from one common spring. Maybe the sources of law will be replaced by a more up-dated expression. In German and Scandinavian languages the concept of “law bank” (*Rechtbank, Rättsbank*) is well established, and suggests a conceptual, metaphorical shift with regard to the availability of legal material. “Law server” (*Rechtserver, Rättserver*) would imply yet a different means of storing and retrieving legal information, which in the long run may affect our thinking with regard to legally relevant material.

15 Even the term “person” has a metaphorical background. It draws on the Roman “persona”, meaning mask and disguise.

16 See reference to Winter in note 7. In another study, S. Winter, *The Meaning of ‘Under the Color’ of Law*, 91 Michigan Law Review 323, analyses yet another metaphor which is closely linked to the language and jurisprudence of one country, but does not necessarily work when translated to another context and language.

Whatever the linguistic change, metaphors continue to affect law and lawyers. As Lon Fuller put it more than 75 years ago in a eloquent essay about legal fictions:

Metaphor is the traditional device of persuasion. Eliminate metaphor from the law and you have reduced its power to convince and convert.¹⁷

But of course we cannot. Such an attempt to eliminate metaphors would be vain since they are necessary linguistic devices. Metaphors are even fundamental elements in forming our understanding of the world, within as well as outside the legal realm. Moreover, the legal language would be stodgier and poorer without figurative expressions. While some metaphors adequately define events, structures and concepts of law, others are more questionable. Thus, the conclusion is that rather than trying to avoid metaphors – which we cannot – we should learn (and teach) how to see – and see through – them. We should know how to appraise and criticise rhetorical uses of metaphors, when they fail to correctly describe what lawyers do and when they lead us astray. Thus, we can understand the “art” of legal communication, the rhetorical power of lawyers, and the impact of traditional legal concepts on our thinking. That is an essential element in any endeavour to critically study law and lawyers.

¹⁷ L. Fuller, note 9, p 380.