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Loth, Marc

Published in:

Nederlands Tijdschrift voor Rechtsfilosofie en Rechtstheorie - Netherlands Journal for legal Philosophy and Jurisprudence

Publication date:

2006

Document Version

Publisher's PDF, also known as Version of record

[Link to publication in Tilburg University Research Portal](#)

Citation for published version (APA):

Loth, M. (2006). Crosscultural Communication in Language and Law, reply to Van Brakel. *Nederlands Tijdschrift voor Rechtsfilosofie en Rechtstheorie - Netherlands Journal for legal Philosophy and Jurisprudence*, 2006(3), 285-294.

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Crosscultural Communication in Language and Law, reply to Van Brakel

Marc Loth*

Introduction

How do we understand each other across cultures? And how do we understand the understanding across cultures? The paper of J. van Brakel entails a promising entry to these persistent questions; de-essentialising the use of language is the key to crosscultural communication. There is no need to speak the same language, one could paraphrase his conclusion, starting to communicate in a locally shared world (*Umwelt*) will do the job. The example of first contacts illustrates the point. Van Brakel provides two reasons why this understanding of crosscultural understanding deserves our preference. The first is a theoretical one; it presupposes a more satisfying notion of language than the ideal language syndrome that has haunted our understanding from Aristotle until Taylor. In a perfect Wittgensteinian spirit Van Brakel proposes a picture of language as praxis as an alternative key to the understanding of language use. The second reason why we should prefer this alternative picture of crosscultural communication is a political one. It entails the possibility that all participants start with their own language and end up understanding each other all the same. As far as language is concerned, no preference is needed and no dominance is necessary. This fits well, of course, with democratic ideals of cultural equality. On these grounds Van Brakel defends a de-essentialising across the board.

Let me start with the acknowledgement that I am essentially in agreement with this de-essentialising approach. In fact it seems a perfectly sensible strategy against abstractions such as ‘the clash of civilizations’, which express an essentialistic picture of what a civilization represents. The device of Van Brakel and others is to stay away from these abstractions and focus on the more promising reality of crosscultural face-to-face contacts. So far so good. On the other hand I will argue that the subtitle ‘no need for the same

* Marc A. Loth (1956) is dean and professor of Jurisprudence and Legal Theory at Erasmus University Rotterdam Law School. He has published on law and language (1983), the concept of action in law (1988), Dutch and Antillean law (2000, 2002), and on legal concepts both in civil and criminal law. Besides he did research in the field of legal methodology and legal ethics, especially in the context of the judiciary.

language' is an overstatement; we do need and do in fact use (to a certain extent) the same language – both in intracultural and in intercultural usage – in ways not sufficiently accounted for in Van Brakel's paper. Therefore I have doubts on Van Brakel's identification of the notions of 'same language' and 'ideal language', as both being the result of essentialising language. To me there seems to be a fundamental difference between the two, yet to be explained. So I find myself in the position of agreement with the de-essentialising approach, and disagreement with its application on language. Perhaps we differ on the nature of de-essentialisation, in the sense that Van Brakel gives a far more radical interpretation to the notion than I would do.¹

These remarks concern the consequences Van Brakel draws from the proposed de-essentialising approach. To argue my point I will focus first on meaning and communication. If there is no need to speak the same language, how do we construe meaning as we go along? How do we develop a new shared vocabulary and why is it 'essentialistic' to speak of a shared language in this context? In investigating these questions I will find myself in agreement with Van Brakel on the importance of the practice of language use. This primacy of practice however has other consequences for the role of the law in crosscultural communication, which Van Brakel doesn't mention but which seem worthwhile to explore when we discuss the possibility of intercultural law. In the final part of my contribution I will focus then on law and communication. What good – if any – can law do in crosscultural communication, starting from the primacy of practice? And how should it be arranged to fulfil that promise? Finding answers to these questions will strengthen both Van Brakel's position and mine and may provide insight in the theme of this conference.

The construction of meaning

Van Brakel starts with a plea for de-essentialising meanings. 'Meanings are not fixed, but fluid', he writes, and we should de-essentialise them,

'Not to downgrade them, but because we are *always* interpreting, giving meaning, to many utterances, many beliefs, many judgements, many actions, and so on, of many people (including ourselves), and all this *at the same time*.'²

1 Another explanation is that I think we cannot just observe all the variety and leave it at that, but that these theoretical questions are in need of theoretical answers (that is, answers that have a certain level of abstraction). Van Brakel doesn't seem to be very sympathetic to the enterprise of theorizing (p. 6 of the original paper. In the published version the relevant passage is removed).

2 Van Brakel, in this issue at 264.

Meanings are not fixed, I agree, for the simple reason that rules are not self-applying.³ They are not completely fluid either, I would like to add, in the sense that they are invented on every occasion.⁴ 'Meaning requires no more than fluency and effectiveness of dialogue', Van Brakel writes⁵, but shouldn't we rather say that meaning *provides for* fluent and effective dialogue? Van Gunsteren has wonderfully paraphrased the situation by writing that applying rules is always problematic from a *logical* point of view, but that from this it does not follow that they are always problematic from a *sociological* point of view.⁶ In a stable society or a predictable situation the actor just follows the rule.⁷ Only when for whatever reason she finds herself confronted with an unfamiliar situation she (consciously) interprets the rule in the new circumstances. Again, this does not mean that the rule is first invented and then applied in the new case. More common is that the case precedes the rule, in other words, the rule is found in the case ('*ius in causa positum*', as the legal adagium goes). The confrontation with other forms of life (first contacts) seems a limiting case.

In a *NRC Handelsblad* review of the movie *The New World* (director Terence Malick) Bianca Stigter writes about the romantics and the realities of first contacts.⁸ First contacts cause a shock, she writes, but the shock is immediately followed by an attempt to rationalise the experience in familiar cultural categories. When first confronted with Western ships before the American shore the Indians didn't recognize them as such, calling them mountains, trees or birds. The English colonist William Wood reported in 1634 (translation by me):

'They held the first ship for a walking island, the mainmast for a tree, the sails for clouds (...) They rowed over in their canoes to pick strawberries.'

First impressions don't last for long though, at some point the familiar categories run out. When getting oneself familiar with the unknown, one some-

3 Compare the paradox of rule-following, Wittgenstein, *Philosophical Investigations*, at par. 84-88, 198, 201 (Basil Blackwell, Oxford, 2001 [1953]).

4 Compare Humpty Dumpty's question (Lewis Carroll, *Alice's Adventures in Wonderland and Through the Looking-glass*, at 169, New York, 1981), and Wittgenstein, *supra* n. 3, at par. 510, and John Searle *Speech Acts: An Essay in the Philosophy of Language*, ch. 2, par. 6, (Cambridge University Press, Cambridge, 1969).

5 Van Brakel, in this issue at 269.

6 H.R. van Gunsteren, 'The Quest for Control: A Critique of the Rational-Central-rule Approach', *Public Affairs*, at 117-119, (diss. Leiden 1972).

7 Wittgenstein, *supra* n. 3, at par. 87: 'The sign-post is in order – if, under normal circumstances, it fulfills its purpose.'

8 Bianca Stigter, 'Vluchtig als een flirt', *NRC Handelsblad* 21 april 2006.

how tries to incorporate it in ones own categories. ‘Seriously to study another way of life’, Peter Winch writes, ‘is necessarily to seek to extend our own.’⁹

Van Brakel reports a first contact of captain Cook – an experienced man in first contacts, by the way – in which non-verbal behaviour such as trading and the exchange of songs and music played a prevalent role. These were clearly attempts from both sides to make contact on familiar levels of communication, displayed in the simultaneous and mutual attribution of beliefs, motivations and meanings. Van Brakel is right when he writes that some principle of attunement is functioning here, coordinating their mutual efforts and showing a certain willingness to reach understanding. But when he writes that no shared language is needed for crosscultural communication, this seems an overstatement for two reasons.

The first is that we don’t need a shared language (in the sense of one natural language such as English) just because we *do* share a lot of the prerequisites of language, such as non-verbal behaviour, a principle of attunement and a shared ‘humanness’ (as Van Brakel calls it). These prerequisites make first contacts in a locally shared world possible, I agree, but they also constitute a partially shared language. Only if we restrict the notion of language to words and phrases and exclude gestures and attitudes can we defend the thesis that no shared language is needed. But this doesn’t fit in Van Brakel’s Wittgensteinian outlook on language, so I would like to invite him to clarify his notion of language in this respect.

The second reason for considering ‘no need for a shared language’ as an overstatement is that though we lack a shared language in first contacts, we *do* need a shared vocabulary as we go along in communication to a certain level of complexity. How could trade develop for example, without shared notions of value, concepts of reciprocity, and even moral-cum-legal reactions in case of undue performance? How could the exchange of songs and music continue without behavioural patterns of recognition, reaction, and appreciation? These examples suggest furthermore that if the participants develop a shared vocabulary as they go along, it is not first contacts that we should look into, but the more interesting next ones. If I am right we have started at the wrong end of the trail.

But it is too early to tell. Van Brakel suggests that the participants in our examples will succeed because they will search and find common grounds

9 Peter Winch, ‘Understanding a Primitive Society’, in: *Ethics and action*, at 33, (Routledge and Kegan Paul, London, 1972).

in their shared world. Still he holds that they don't share a common language because they will 'see' and experience different grounds and will give different descriptions of their shared worlds.¹⁰ Let us picture the situation. There is meaningful communication between participants on common grounds in a locally shared world. Now in this case I wouldn't hesitate to speak of a shared language, even though the participants themselves might give different descriptions (namely each in their own language). Again Van Brakel seems to rely on a notion of language which doesn't seem to fit his otherwise rather inclusive approach. Again clarification is needed.¹¹ Towards the end of his paper Van Brakel gives some examples, which all involve situations where two parties start negotiations in their own language and finish in mutual understanding. This however doesn't justify the conclusion that they don't need a shared language, because in the end they communicate not by one but by two (then shared) languages.

One could say, perhaps, that this is nothing more than a verbal dispute, since Van Brakel and I only seem to disagree on the notion of a language. When Van Brakel uses the phrase 'no need for a shared language' he uses the concept of language in the restricted sense of a natural language (like English, or Dutch). I prefer to use the notion in a broader sense, including communication through gestures, signals, mimics, et cetera.¹² I do think however that there are good reasons to prefer this broader approach of language, which make our disagreement more than a disagreement on definitions. The most important reason is that in our account of crosscultural communication we both rely heavily on (the Wittgensteinian idea of) a shared *Umwelt*. In first contacts for example communication starts by virtue of a context of shared circumstances (the tree over there) and practices (trading, singing). Starting to communicate then is constructing shared meanings, partly by pointing and other ostensive procedures and partly by starting to participate in (then) shared practices. Crosscultural communication starts non-linguistically, in other words, and only later on non-verbal interaction makes place for verbal communication. One can even say that in crosscultural communication it is somewhat indifferent

10 Van Brakel, in this issue at 277.

11 I have three further questions. One is how the persistent denial of any unity in language is compatible with the inclusive, holistic approach of forms of life (which even encompasses empirical as well as transcendental grounding, moral and cognitive basis, and universal as well as local application) (Van Brakel, in this issue at 271-272). The second question is how the denial of a separation of language and reality is reconcilable with the concept of a locally shared world as sufficient ground for objectivity (in this issue at 276). The third is how the proposition that human beings share similar responses to a diversity of forms of human life is compatible with the suggestion that there is no core or essence of human behaviour (Ibid).

12 See for example the work of George Herbert Mead, *Mind, Self and Society*, from the standpoint of a social behaviorist, C.W. Morris (ed.) (The University of Chicago Press, Chicago, 1962 [1934]).

whether it takes place verbally or non-verbally. Why should we then limit ourselves to a restricted notion of language that covers only part of the communication (and not the most interesting part in this context, for that matter)? In my opinion, Van Brakel's restricted notion of language is not fit for his own purpose, which is a better understanding of crosscultural communication.

If I am right that a shared vocabulary is necessary and in fact developed in crosscultural communication, then the question can be raised whether I have reintroduced the detested ideal language syndrome. I do not think so. Van Brakel and I agree that a common vocabulary can be reached against the background of a common *Umwelt* and a shared humanness. This common vocabulary rests on what Van Brakel calls 'contingent, provisional, conventional agreement' (p. 9). This shared position however does not in any sense presuppose the concept of one ideal language (as universalism is supposed to do), or that of many incommensurable languages (as relativism is supposed to do). The difference is that our position presupposes an all together different notion of sameness (or identity), since identity is not regarded as a matter of definition (whether as one, or as many), as well as a matter of contingent fact (with all the in-between modalities).¹³ As long as we stick to this last notion of identity – which could be named a 'synthetic notion' of identity, as opposed to an 'analytic notion' – there is nothing essentialist about the same language discourse. As a matter of fact, languages differ and languages overlap, there's nothing more to it. We can even conceive of more plausible versions of relativism that stress the differences between languages on the basis of observation or experience. The relativist might well say, in a very Wittgensteinian spirit:¹⁴

'Look, I see and hear many languages spoken and there are many misunderstandings. Apparently there are difficulties in translating these languages into each other. Perhaps these misunderstandings can be solved, I hope they can, but I can't tell now.'

This empirist relativist doesn't suffer from any ideal language syndrome, at least not in my diagnosis. One can respond of course that this empirist relativist is not really a relativist (in the true sense of the word), but then we are discussing definitions.

13 See F. Waismann, 'Über den Identitätsbegriff', *Erkenntnis*, 1936, at 56-64.

14 Compare Wittgenstein, *supra* n. 3, at par. 23.

The primacy of practice

The adagium ‘no need for a shared language’ precludes the primacy of practice, as we already conceded. Van Brakel uses the Wittgensteinian notion of a form of life, to drive the point home. ‘To the extent that people understand one another and themselves, this is due to their common participation in certain patterns, modes, or ways of life.’¹⁵ Also in crosscultural communication practice precedes conversation, as is shown in the work of the Princeton philosopher Kwame Anthony Appiah (a defender of cosmopolitanism who himself is born, by the way, from an English mother and a Ghanaese father). Among the Asante, he writes, incest between brothers and sisters and parents and children is shunned as *akyiwade*. You can agree with them that incest is wrong – as a matter of fact, you probably share the same practice – even if you don’t know or accept their explanation why. We do a lot of things just because we do them, without reason or rationale (Appiah’s examples are piercings and tattoos, circumcision, female genital cutting, foot-binding in China). The shifts in these practices are not the result of arguments – then the women’s movement could have been done with in a couple of weeks, he writes – they are just the consequences of getting used to new ways of doing things. If this is true, it constitutes a reason why we should learn about people in other places, take an interest in their civilizations. As Appiah writes, ‘not because that will bring us to agreement, but because it will help us get used to one another.’¹⁶ This offers an attractive though modest perspective for crosscultural communication; getting familiar with one another, with no further ambitions of agreement, let alone on values. This is the deeper meaning of tolerance; not the bleak sense of not minding their business which is rightly criticized in the public debate recently, but the deeper sense of getting to know and learning to accommodate to each other’s practices without necessarily sharing them.

What are the consequences for the public realm? If the public domain is to be the place where all citizens meet on an equal basis, we better focus on actions than on their divergent justifications.¹⁷ Not only because people are more affected by each other’s actions than by their convictions (as the liberal would say), but also because it is both easier and more important to live together than to reach agreement on the principles justifying society. We can live peacefully together without agreement on values, as we can make

15 Van Brakel, in this issue at 271.

16 Kwame Anthony Appiah, *Cosmopolitanism: Ethics in a World of Strangers*, at 78, (W.W. Norton, New York, 2006).

17 For an account of the public domain in this sense compare Hannah Arendt, *The Human Condition*, at 57, (University of Chicago Press, Chicago, 1958).

war while agreeing on values.¹⁸ If we are ever to convince participants in the practice of female genital cutting of the wickedness of that practice for example, it is not to be expected primarily on the ground of arguments and principles, but by exemplifying alternative practices with comparable meaning (transference to adulthood, causes for courage and pride, etcetera). This takes time, of course, there is no quick fix here. Reasoning is not enough, showing alternatives is helpful, and in any case is insult counter-productive. The primacy of practice suggests a policy of constraint in public debate; not everything that can or may be said is prudent to say. I do realise that this line of reasoning is against the current opinion in our country, which tends to sheer hostility in the crosscultural debate. What I would like to suggest as alternative is not some bleak relativism of 'anything goes', but a shift from values to practices. The dominance of philosophers in the debate has not been very helpful so far, we must admit, perhaps it is time to reconsider the role of law.

The legal system I have in mind starts with respecting different practices and is flexible to shifts in these practices. Contextual law will serve this purpose, that is, law that leaves room for adjustment to the specific circumstances of the case. As Stephen Toulmin has pointed out the *locus of moral certitude* in matters of practical rationality is to be found in 'a shared perception of what (is) *specifically* at stake in particular kinds of human situations (not in 'an agreed set of intrinsically convincing *general* rules or principles)'.¹⁹ People tend to disagree about the principles, but can agree on the facts of most cases. Disagreement tends to disappear as soon as relevant information on the facts comes in.

In the last chapter of his book on legal traditions Patrick Glenn refers to the same phenomenon. Opposing principles only serve to define the field of play, he writes, 'to find the middle ground you need more information'.

'If you know enough of what went on, goes the argument, a solution will eventually suggest itself. The solution will be for *this case*, which will have inspired its own form of resolution.'²⁰

18 Overstretching demands of solidarity, empathy or even intimacy has as paradoxical consequence the exclusion of groups of people from society (compare Richard Sennett, *The Fall of Public Man*, at 1-24, 266, (W.W. Norton & Company; Reissue edition, New York, London, 1992). This is well captured in the sardonic German saying: 'Und willst Du nicht mein Bruder sein, so schlag' ich Dir dein Schädel ein' (Appiah, *supra* n. 16, at p. 145).

19 Albert R. Jonsen & Stephen Toulmin, *The Abuse of Casuistry: A History of Moral Reasoning*, at 18, (University of California Press, Berkeley, 1988).

20 H. Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law*, at 334, (Oxford University Press, Oxford, 2000).

Experienced lawyers will recognize this, Glenn rightly remarks, even though the legal theory of their tradition tells them that cases are decided by application of a single, pre-established rule. These observations, though important in themselves, are even more relevant in modern Western society where legal conflicts tend to reflect conflicts of values (translated in the language of constitutional rights). How to deal with them? In this line of reasoning it seems sensible, in any case, to bring them down to the specific circumstances of the case.²¹ It is a mistake therefore, to regard law as a context-independent phenomenon, and a serious one. Of course law can regulate by 'hard and fast rules' which determine legal consequences independent of the specific circumstances of the case (for example speed limits in traffic). But even those cases the judge will contextualize the rule when the going gets tough (does it apply in case of an emergency?). At the end of the day law is always potentially dependent on context, and therefore ultimately tied up with practices.

Some years ago Cass Sunstein has built a constitutional theory on this proposition, which he has named *judicial minimalism*. Courts settle disputes, but they leave many things undecided. By doing so they not only minimise the burden of decision and reduce the change of error and damage, but they also enhance further reflection and democratic deliberation. They make what Sunstein calls a 'constructive use of silence'. He summarizes then that it

'makes a good deal of sense when the Court is dealing with a constitutional issue of high complexity about which many people feel deeply and on which the nation is divided (on moral or other grounds).'²²

Again we recognize the wisdom of restricting yourself to the case at hand, minding the particulars of the case, and striving for local agreement. Not to avoid democratic deliberation but to encourage it, though in due time and on the basis of relevant facts.

Conclusion

Van Brakel's de-essentialising approach to problems of crosscultural communication is a promising one, both from the perspective of a philosophy of language and from that of a social philosophy. However, it doesn't justify the conclusion that we don't need a shared language in crosscultural com-

21 'The most effective technique is that of examination of particular problems in detail and given the circumstances of each country' (Glenn, *Ibid.* at 336).

22 Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court*, at 5, (Harvard University Press, Cambridge, 1999).

munication, at least not without serious modifications. We do share important prerequisites of language – such as non-verbal behaviour, a principle of attunement and a shared humanness – and we do make up a common vocabulary as we go along. Van Brakel is right though, that practice precedes language, and this has even more direct consequences for crosscultural communication. It means that getting used to one another by engaging in shared practices is of primary importance and that the legal system should start right there. In starting with respecting practices, dealing with one case at a time, and striving for local agreement our legal system can contribute to crosscultural communication.