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Markéta Štěpáníková
Michal Malaník
Terezie Smejkalová
Martin Škop
(eds.)

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Contents

Foreword

This volume represents a collection of papers accepted to and presented at the 6th International Conference in Alternative Methods of Argumentation in Law (ARGUMENTATION 2019) on October 18, 2019 in Brno, Czech Republic. The conference follows up on the tradition set on October 7, 2011 where the first conference (ARGUMENTATION 2011) took place at the Faculty of Law of Masaryk University. This year follows the line of bi-annual proceedings.

Even though the timeline is changing the main ideas that stood behind the foundations of the conference remain the same. Its main goal is still to bring together researchers representing different scientific perspectives and to create a space in which they could exchange their views concerning the phenomenon of argumentation in the domain of law. Although it aims high, it has been fairly successful in achieving these objectives as previous volumes of this conference proceedings demonstrate.

This volume contains papers that are highly specific in their scope concerning the areas of law, philosophy, logic, literature, art, political science, psychology, ethics or even the patterns of natural sciences to broaden the horizons of legal thinking and offering a helping hand in further development of creative (and alternative) legal argumentation. Moreover, it focuses on legal education as a special connection between all presented papers.

ARGUMENTATION 2019 brings together legal scientists to participate on ensuring the line of these conferences will persist and the International Conference on Alternative Methods of Argumentation in Law will remain recognized scientific event. Let us thus thank to all of the authors whose papers were published in this volume, all members of the Programme Committee and all other people who share our enthusiasm and help us continue the tradition.

Organizing Committee

The element of intuition in legal decision-making

Michal Malaník[1]

Abstract

This paper focuses on the elements that influence judges throughout their decision-making process, namely it tries to point out a few pressing questions about judges' intuition. American legal realists, attempting to disprove certain elements of legal formalism tried to set a light to judges' practice, claiming that judges are deciding cases on the basis of their beliefs and legal hunching (their intuition) instead of blindly following the legal rules and interpretive doctrines, and using their rationalization to bolster their intuitive decision with the doctrinal principles rather than derive the decision out of them. During the last few decades there were various researches conducted studying the decision-making processes of the judges in connection to their political affiliations, race, education, demographics etc., but very few of those were focused solely on the element of intuition. That being said about the American legal space this paper points out that almost no relevant research exists in the Czech legal background. Thus, the paper emphasizes the importance of (further) studies in this field and introduces a pilot research conducted on selected Czech Supreme Court justices focusing on their decision-making process.

Keywords

Decision-Making; Judges; Intuition.

1 JUDr. Michal Malaník, Ph.D. Masaryk university. Faculty of Law. Department of legal theory. The Supreme Court of the Czech Republic.

1 Foreword[2]

"Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge. I wish I might have found the time and opportunity to pursue this subject farther." (Cardozo 1921)

There had been many studies focused on the decision-making process of judges, both theoretical and empirical.[3] Doctrines explaining which steps a judge should take, especially in the field of legal interpretation methodology, to reach the correct and just decision in any legal case, and also empirical investigations uncovering what are the real day-to-day practises of the courts and setting the light to various elements that influence the final outcome of the decision-making process, many of which are taking place at the very basic cognitive level.

This paper follows the trace of the abovementioned almost a hundred years old note and a sigh of Justice Cardozo and focuses on (only) one of these elements that influence the judges at the level below their consciousness – their intuition. Firstly, the paper very briefly informs about the basics of judicial decision-making process in general, with some remarks to Czech legal environment. It also mentions the basic doctrinal, mainly interpretative, rules the judge in the continental system of law should uphold. Clarification about the lack of complexity that come from the doctrinal perspectives without seeking empirical evidence about the social reality comes right after. Hence the paper presents a qualitative pilot research that was conducted on selected Czech Supreme Court justices[4] based mostly on in-depth interviews and shows the preliminary results about their decision-making process with the focus on the element of intuition – a concept that is discussed in further detail in the third section of the paper. It is worth noting that this paper does not contain any representative data – only preliminary findings that open more questions than there are shown answers

2 This paper is largely based on the author's dissertation: Malaník 2019.

3 For example, but not limited to: Guthrie, Rachlinski, Wistrich, 2007. Czarnezki, Ford, 2006. Schneider, 2001. Benesh, Czarnezki 2009. Farnsworth, Guzior, Malani, 2010.

4 It should be pointed out here that a snowball (partial snowball) technique was chosen to select the justices for a pilot study – that is, primarily addressing pre-selected judges based on expectations of their willingness to taking part of the pilot research. Analogically other authors use this technique: See Gluck, Bressman 2013, pp. 13–14.

for, preparing the field for the main research carried out in the future. Due to the lack of similar research in this field of legal space, however, it can be considered valuable anyway.

2 Legal interpretation and the decision-making process of judges

The methodology of legal interpretation as it is currently recognized can be seen as a tool to restrict the arbitrariness of the judge ("judge" and "legal interpreter" will be used *a promiscue* within this paper). A restriction designed to prevent a legal interpreter from making legal decisions what could be subsequently characterized as contradictory to the fundamental principles of a modern rule of law constituted state organization in the continental sense. While there is still a great room to manoeuvre within the general scope of the dogmatic methods, they delimit the framework that cannot be crossed should the judge interpret the law in the cognitivist way[5] (as a continental judge should).

From the point of this paper it is somehow irrelevant whether we would focus on the continental models of legal interpretation stemming from the teachings of Carl Friedrich von Savigny, who advocated the interpretation method construed from four elements – grammatical, logical, historical and systematic[6], latterly enriched by others, namely teleological method[7], comparative method[8], and many more, or should we consider the Anglo-American (or American) model of interpretation that can be introduced in short as a system standing on three interpretive elements – text, intention and purpose [9]. This paper does not ignore the unmistakable differences in the cultural background these systems are coming from, but in the most general sense both methodologies have the same purpose – to guide and

5 See Kühn, 2002, pp. 24, 26.

6 See Savigny 1840, p. 213. Quoted via Wintr 2013, p. 19. It is worth mentioning that Savigny himself latterly developed this basic scheme.

7 "*Purpose is the creator of the entire law*" See Ihering 1913, p. Iiv.

8 Michal Bobek points out that the comparative method of legal interpretation is only a supportive tool that should be used sparingly – only if the interpreter does not achieve a satisfactory result through other interpretative methods. Even in that case, however, the comparative method should only serve as an inspiration to create a new, original decision, not just to take over a decision-making result of other institution without further rational judgment. See Bobek 2013, p. 253.

9 See for example Sobek 2008, pp. 217–218; Sobek 2010. p. 325.

restrict the interpreter. Thus, we can make the generalisation and call them so similar that there is no need to distinguish between them here.

It would be wrong, however, to think that the methodology of legal interpretation is the only restrictive tool, since there are many more such influencing factors that affect the judge during the interpretation process. Some of these factors are of a rather external nature, some are rather internal, but they can be even more decisive for the resulting interpretative output than the theoretical doctrine and they can influence the judge even more effectively (Balkin 2011, p. 21). These influences arise for example from the cultural, social factors, affiliation to a particular group in society, etc. (Balkin 2011, p. 19)

For example, James L. Gibson claims that court decisions are the result of what judges want to do, restrained by what they think they should do, and limited by what they perceive to be possible (Gibson 1983, p. 9). He also draws attention to the fact that it is necessary to distinguish whether a decision is made by an individual or within a structured organization (Gibson 1983, p. 19) because, when decisions are made within an organization, other influencing factors arising from institutional constraints come into play. Consequently, there may be a contradiction between what a judge would do because he thinks he should do and what he is allowed to do within the organization (Gibson 1983, p. 27).

The claim, that doctrine is not supposed to replace the personal attitudes, inclinations and feelings of judges, but is there to provide them with the means to test their intuitions, help them to arrange these intuitions and compare them with the results of other judges, was formulated no later than by the justice Joseph Hutcheson[10]. In addition to this remark, Czech judge Vladimír Lajsek argues that the judge's personality, her foreknowledge, intuition and the purpose of the purpose in law can be included to the non-legal aspects influencing judges' decisions (Lajsek In Kysela, Ondřejková 2012, p. 24)[11]. The purposes of law can be understood in the abovementioned sense pronounced by Rudolf Ihering but can greatly vary from one point of view to another. For the sake of this paper which does not focus on the purposes of law in the philosophical sense we can generally understand the purpose of law as the wish and need of the society to live in peace

10 See for example Powell 2009, p. 1726.

11 See also Olivercrona 1939, p. 179.

(for ensuring its existence)[12]. As for the personality traits affecting the work of the judge, these may certainly include the judges' worldview, temperament, intellect, emotional intelligence, social intelligence, life experience, education, etc. (Lajsek In Kysela, Ondřejková 2012, pp. 25–27) Last but not least the foreknowledge could be characterized as an extent of interpreter's knowledge from which the ability to understand new information stems (Lajsek In Kysela, Ondřejková 2012, p. 29).

Among other things, it is also necessary to examine the socialization of the judge, which is also possible from different points of view. According to Gibson, three phases of socialization of a judge can be identified: (1) socialization of early childhood, (2) socialization in adulthood, and (3) socialization specific to a particular institutional position; all of which have some significance for judicial decision-making (Gibson 1983, p. 21). According to some other authors, the socialization of a judge begins in the first year of law school, where future lawyers encounter methods of legal research and thinking and continues throughout their careers (Lindquist, Klein 2006, p. 137).

While considering the personality of a judge who interprets the law, we are already thinking about the real interpretation process – the process of making a judgment, in which we are interested in a number of psychological factors, and the patterns that modern neuroscience helps us to uncover. Since the task of this paper is to partially relativize the established theoretical concepts of the interpretation process, the claim of psychologist Daniel T. Gilbert that people in general are not able to make decisions that lead to their own satisfaction is worth mentioning. He argues that people are unable to properly assess the likelihood that they will gain "something" through a certain activity, neither they can correctly assume its "value". According to Gilbert, people assess both the potential profit and its value, not according to what could be (what is possible) but according to what they have experienced before (previous events known to them from the past) (Gilbert 2005). Should that in fact be true, we need to ask ourselves a question: If this is true of human decision-making in general, does this also apply to judicial decision-making? What is the influence of the judge's personality and her foreknowledge on the decision-making process and what it actually means?

12 Cf. Holländer 2006, p. 81.

In the context of foreknowledge, which could also be briefly described as a set of all the knowledge that we have at a certain moment available[13], it is necessary to accentuate the role of emotions. If we rely on what we already know, what we have experienced, in short – what we remember, we should know how human memory works. And emotions play a big role in remembering. They colour all the individual's experiences[14], making them pleasant or painful, and they can influence all three phases of memory – ascribing (the process that happens while an event is happening), storing (largely unconscious and uncontrollable process of shaping neural the connection forming a specific memory), and the invocation (voluntary and involuntary recalling of the memory) (Phelps In Nadel, Sinnott-Armstrong 2012, p. 11) This can, of course, have a huge impact not only for example during assessing the reliability of eyewitnesses, but also when the case file is being read by the judge.

For quite some time, various researches have been monitoring the impact of these factors on decision-making, which is based on evidence-based assessment. Generally, it can be evaluated that people interpret the evidence to consolidate their already existing view. This automatically makes all the evidence supporting this view relevant and strong, on the other hand – all the opposing evidence is considered weak and untrustworthy (Lord, Ross, Lepper 1979, p. 2099). It is important to note that the mere presentation of 'objective' evidence/facts is not sufficient enough to change an existing view, especially when it is a socially sensitive topic (Lord, Ross, Lepper 1979, p. 2108).

While this paper tries to mention various influencing factors on judicial decision-making, it believes that a special focus should be put on one of them – the judge's intuition (or also – the ability of imagination). That is, according to Hutcheson, a skill that is used in legal hunch (Hutcheson, p. 280 via Modak-Truran 2001, p. 62), which is according to him the decisive

13 Cf. Lajsek In Kysela, Ondřejková 2012, p. 29. See also Weinberger 1995, p. 157, where he claims that foreknowledge is a qualitative pre-step to pre-understanding. For further details see also Gadamer 2006, p. 269 "*A person who is trying to understand a text is always projecting. He projects a meaning for the text as a whole as soon as some initial meaning emerges in the text. Again, the initial meaning emerges only because he is reading the text with particular expectations in regard to a certain meaning. Working out this fore-projection, which is constantly revised in terms of what emerges as he penetrates into the meaning, is understanding what is there.*"

14 Which is very important in the process of learning anything new. See further: Pinker 1997, p. 143.

factor for a judge – not the rational judgment; judges decide by feeling, not by rationalizing (Hutcheson, p. 280 via Modak-Truran 2001, p. 62). Richard Posner adds that the judge's opinion, which can be based on intuition, must be justified as if it were always based on logical judgment (Posner, p. 253 In Ursin 2009, p. 1286). Judges, like other people, can be influenced, which happens, among other things, at the level of responses to stimuli and related rationalization.[15] Within the reasoning of their decision, judges are expected to explain this rationalization sufficiently. In the Czech environment this requirement is supported both by the provisions of legal acts[16] and the judgements of the Constitutional Court: "*According to the constant case-law of the Constitutional Court, the requirement of a proper justification of judgements is one of the fundamental attributes of a fair trial. Compliance with the obligation to justify a decision is intended to guarantee the transparency and controllability of court decisions and to exclude arbitrariness*" [17] It is worth mentioning, however, that empirical researches are still absent in this area.

3 Uncovering the element of intuition

Recognizing and explaining intuitive processes is at least as valuable knowledge about the decision-making as it is difficult. Although in the field of psychology the decision-making process is studied quite thoroughly, but it is obvious that a lot of sub-processes are not yet well understood, and we do not know how to effectively influence them. This is also caused by the fact that a number of decisions, including the important ones for individuals, are based on feelings that are not entirely under their control.[18] The basic two types of decision-making are called analytical and intuitive

15 See for example Coleman In Beltrán, Moreso, Papayannis 2013, p. 98.

16 For example Art. 36 para 1 Charter of Fundamental Rights and Freedoms (Everybody may assert in the set procedure his or her right in an independent and unbiased cerate of justice and in specified cases with another organ.), Art. 1 of the Czech Constitution (The Czech Republic is a sovereign, unified and democratic rule of law state based on respect for the rights and freedoms of man and citizen), and § 157 para 1 of Code of Civil Procedure (stating the essential parts of a judicial decision, one of which is the justification of the judgement).

17 For example, decision of the Czech Constitutional Court, case no. II. ÚS 1235/11, following the earlier decision of Czech Constitutional Court, case no. III. ÚS 84/94.

18 See for example Hogarth 2003, p. 2.

decisions.[19] While analytical decision-making is based on conscious rationalization, work with evidence, and a great deal of attention and focus (mindfulness), the intuitive processes are of a completely different character. Intuitive processes are characterized by their automaticity, that is, the absence of the need for deliberate rationalization, as this is no longer necessary due to the automation of the process.[20] They are also typical for their speed, simplicity and minimum difficulty. While analytical decision-making is inherent in its difficulty, greater duration and complexity (Guthrie, Rachlinski, Wistrich 2007).

The thought automation of a large number of processes is valuable both socially and evolutionarily. Their subsequent unfolding and rationalization, however, is often difficult. The question then remains whether these efforts need to be undertaken at all. Despite the obvious benefits of an intuitive model of decision-making in relation to the demands placed on the judiciary – that is to say, primarily the speed and low demands for a judge, there are still many difficulties.[21]

An interesting illustration can be seen in Shane Frederick's well-known test. By a set of simple questions Frederick tested proportion of intuitive responses versus the thoroughly rational ones via his Cognitive Reflection Test (hereinafter referred to as "CRT test"). The questions are as follows:

"*(1) A bat and a ball cost $1.10 in total. The bat costs $1.00 more than the ball. How much does the ball cost?* _____ *cents*
(2) If it takes 5 machines 5 minutes to make 5 widgets, how long would it take 100 machines to make 100 widgets? _____ *minutes*

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19 Some authors refer to these two types of decisions as "deliberate" and "tacit". See for example: Hogarth 2003, p. 2 and further; Cf. Guthrie, Rachlinski, Wistrich, 2007, where the authors use the terms "deliberate" and "intuitive". The basis for division between these two types of decision-making stems from the System 1 and System 2 of cognitive operations as described by Kahneman, Frederick 1974, p. 51. *"In the particular dual-process model we assume, System 1 quickly proposes intuitive answers to judgment problems as they arise, and System 2 monitors the quality of these proposals, which it may endorse, correct, or override. The judgments that are eventually expressed are called intuitive if they retain the hypothesized initial proposal without much modification. The roles of the two systems in determining stated judgments depend on features of the task and of the individual, including the time available for deliberation"*.

20 Hogarth 2003, p. 5. Further (p. 7) the author draws the attention to the fact that it is not only the processes learned but also the innate reactions – that is, at the level of unconditional reflexes.

21 See for example Guthrie, Rachlinski, Wistrich, 2007, p. 29.

> *(3) In a lake, there is a patch of lily pads. Every day, the patch doubles in size. If it takes 48 days for the patch to cover the entire lake, how long would it take for the patch to cover half of the lake? _____ days.*" (Frederick 2005, p. 27)

In the original research Frederic administered the CRT test "*to 3,428 respondents in 35 separate studies over a 26-month period beginning in January 2003. Most respondents were undergraduates at various universities in the midwest and northeast* [of USA] *who were paid $ 8 to complete a 45-minute questionnaire that included the CRT and measures of various decision-making characteristics, like time and risk preferences*"(Frederick 2005, p. 28), Frederick found that the percentage of respondents who answered all questions correctly was relatively very low (about 17 %) (Frederick 2005, p. 29). This fact would not necessarily be so striking. What is surprising, however, is the results of the same test performed by other authors and answered by American circuit court judges in civil, criminal, and family court matters. Only 37 judges out of a total of 252 tested, just 14.7 %, answered all three questions correctly (Guthrie, Rachlinski, Wistrich 2007, p. 15), thusly gaining a lower score than previously tested undergraduates. This paper further presents carrying-out of generally the same research in its pilot form on the Czech Supreme Court justices.

The purpose of the CRT test, however, is not to test the intelligence of the tested individuals, but to measure the proportion of intuition in their decision-making – that is, without deeper rational thinking. The questions are then designed firstly trigger an intuitive answer, which is also wrong. Both the original research and the subsequent usage of the CRT test on judges shows that people really do make intuitive decisions to a great extent. This is also shown to be true about judges, both in general and in legal matters (Guthrie, Rachlinski, Wistrich 2007, p. 15).

It should be noted here that this paper does not have the ambition to define the concept of intuition in more detail and in all its forms, as its specific form can depend on evolutionary or cultural determinations. The paper considers necessary, however, to point out this issue in general, as it is important factor influencing the interpretation process or the decision-making process in general and as such it seems very suitable for subsequent empirical research. Although the theory provides a fairly comprehensive insight into the decision-making process of the courts, they are all theories that are not

too often confronted with reality – empirically tested, subjected to reflection and subsequently modified.[22]

According to Ota Weinberger, there are two main phases in legal decision-making process. The first is the phase in which the decision is found – through an intuitive, psychological process. The second phase then comes along with the need to convey the outcome of this process and rationally justify it (Weinberger 1995, p. 167). More generally, three main functions of the human mind can be identified – analysis, synthesis, and evaluation.[23] If we wanted to examine these phases, we would probably be more likely to go into research into the psychological and research of modern neuroscience. This paper however does not have the ambition to provide all the necessary details from those fields of study. Nevertheless, that does not change the fact that judges must evaluate a large amount of data that they must first observe. However, there is a big difference between noticing and understanding. Focusing on the right features is crucial to legal practice. Considering that intuition can substantially affect the sub-processes and thus the whole outcome of the decision-making process, there arises a great need to analyse in what degree, and consequentially to what causal result.

4 Pilot research at the Supreme Court of the Czech Republic

In this section there will be a short recapitulation of a pilot empirical test that was carried out at the Supreme Court of the Czech Republic during the spring and summer months of 2018. This research was primarily focused on finding/constructing an adequate instrument that could be used to empirically reflect on the usage of legal interpretation methodology of the Supreme Court justices. Considering the necessity to study the decision-making process as a complex phenomenon the research hit the field of intuition as well.

From the methodological point of view can be stated that the research considered various ways how to study these aspects and what could be the focus

22 See for example George, Epstein 1992, pp. 323–337, where the authors investigated which of the discussed theories of decision-making – legal or extra-legal – is applicable in practice, with the result that both (p. 333).

23 For more details see: Adair 2007, pp. 9–11.

points. Different research methods have their pros and cons[24], but from our perspective there are mainly two research focus points – judges themselves and their decisions. Thus, it was carefully chosen between textual analysis of the Supreme Court judgements and partially structured interviews with the Supreme Court justices. Thusly there were hand-picked (according to the quota-sample principle[25]) judicial decisions prepared, reflecting the (partially) snowballed sample of judges, for textual analysis – there were several judgments of each interviewed Czech Supreme Court justice prepared for analysis. The textual analysis in connection with the partially structured interview should work sufficiently well in order to let the judges describe what they (think they) do and cross-check these interview findings with the data obtained from the textual analysis telling us what it looks like they had done. The multi-method approach is desirable (Nielsen In Cane, Kritzel 2010, p. 952) in empirical legal research but in the context of our desire to study intuitive processes somewhat imperfect. This imperfection is caused by the nature of the two mentioned research focus points.

Judicial decision, although representing the outcome of court proceeding and on important parts of its sub-parts, is still but an artefact that can be studied and analysed[26], but it cannot be concluded that they contain all the important information about the interpretation process, nor about the judge's understanding of the legal interpretation methodology. Even less obviously it shows whether the judge has decided the case based on her intuition or rational judgment. Hutchesons' concept of intuitive decision-making conflicting with the need for rational reasoning of court decisions corresponds with this claim (Hutcheson, p. 285 via Modak-Truran 2001, p. 62). Even though the decisions can bring insight to whichever method of legal interpretation judges incline to, there is little certainty about whether there was firstly the need for theoretical background to make the decision, or whether the doctrine was used just to support it. The rationale can be tailored to the intuitive decision that had already been made, and the rationalization used in it can be misleading in terms of its creation process.[27]

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24 For more details about the empirical research methods see for example Nielsen In Cane, Kritzel 2010 or Trochim, Donnelly, Arora 2015 or Patton 2015.

25 See Patton 2015. p. 285

26 Textual analysis, or the content analysis of the court decisions with regard to the methodology of legal interpretation studied for example Guthrie, Rachlinski, Wistrich 2007.

27 Abovementioned Posner, p. 253 In Ursin 2009, p 1287.

Although the research considered textual analysis of judicial decisions, it was finally omitted in the pilot testing of the research instrument from the abovementioned reasons. Main focus was put on the interviews with the Supreme Court justices. Questions were tailored to cover the whole decision-making process and subsequent practices that the justices consider relevant in relation with their day-to-day work. There is no point to report on all the preliminary findings here, the paper will now focus only on the intuition focused questions, mainly on the replication of the CRT test.

In order to facilitate the CRT test, it was translated into the Czech language and, for greater clarity and avoidance of unnecessary misunderstandings, the currency in which the first example is given was conversed[28]. Although it would be preferable to use "CZK 1.10" instead of "CZK 110" to maintain a higher degree of authenticity, due to the practical elimination of use of "cents", such an example would lack practicality. It can be argued that given the intuition category defined above – a certain hunch/feeling based on automated processes – this test may not produce relevant results. If there is high degree of analytical thinking among such automated processes, the justices would answer all questions correctly and thus be considered as rationalized, even if they would give their answers immediately. This paper, however, considers it appropriate to try the test despite this risk. Moreover, there is no reason to think, that CRT test should by modified in any way (other than translated) to bring the desired results in the Czech legal environment. It should be reiterated here that for the purposes of this research, it does not matter how many questions the judge answers "mathematically correctly". The paper focuses only on revealing intuitive decision-making processes.

It is also worth mentioning here that the test was not carried out as originally designed – presented as three written verbal tasks, with the interviewees having five minutes to solve them – but some alternations were made. The first was that the questions were read by the interviewer. Only after that the interviewees were offered the possibility of reading the one question they were supposed to answer. Furthermore, no time limit was given, which could have had a double effect in the context of previous immediate response-based questioning. Either a pressure for immediate

28 The Czech version of the question (translated back to English) stands as follows: "*(1) A bat and a ball cost 110CZK in total. The bat costs 100CZK more than the ball. How much does the ball cost?"*

response could be indirectly invoked or, on the other hand, the interviewees could have used a less limited time interval to partially invalidate the test. The second effect did not occur, as none of the interviews exceeded five minutes in any of the interviews. The first effect could have taken place, but extremely unlikely at least with most of the respondents, as they thought a while at least over the second and third questions. Some, however, have answered that they are "unable to answer at this point". However, it is not possible to identify whether they would try a different answer if they knew the time limit in advance, as with this answer they usually concluded their efforts.

Six respondents participated in the test[29]. In a few cases, as the results below show, the wrong answer was immediately identified (the justices said out loud that it was an incorrect answer), and this was usually the case where the correct answer was subsequently made. The results for each question were as follows[30]:

First question of the CRT test, which is the correct answer "5,– CZK"[31], yielded the following results:

- 10 CZK; 10 CZK corrected for 90 CZK; wrong is 10–5 CZK; 10–5 CZK; 10 CZK.

The second question, which seek the correct answer "5 minutes," brought answers as follows:

- 5 minutes; cannot be calculated; 100 minutes; 5 minutes; 20? – I cannot count that now; 5 minutes.

The answer to third question is "47 days" and the following variations occurred in the conversation:

- 24 days; 47 days; it cannot be said precisely; 24–47 days; now I will not calculate; 24–now I don't know.

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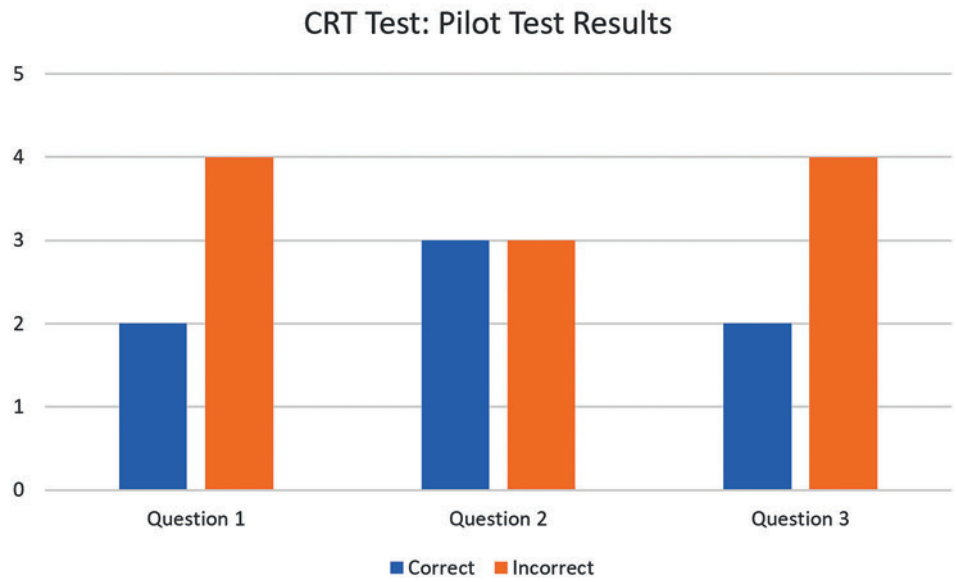
29 Which is about 9 % of the total number of justices at the Czech Supreme Court as can be seen from the yearbook of Czech Department of Justice. See České soudnictví 2016: Výroční statistická zpráva, p. 105. As mentioned above, the sample was created by a partial snowball technique. Out of the 6 participants 2 were female justices, 4 males.

30 The results are presented in random order, so the first mentioned answer to question 1 does not have to be the same person as the first mentioned answer to question 2, etc.

31 See the abovementioned original version of the question. The difference caused by translation is from original 5 cents (*$1.10 in total. The bat costs $1.00 more than the ball.*) to 5 CZK (*110CZK in total. The bat costs 100CZK more than the ball.*) Other questions remain without any substantial change.

For the sake of simpler evaluation of the work, it evaluates all the answers different from the correct ones (albeit the second time) as incorrect, although some did not contain numerical expression. Here's how to answer individual questions as follows:



It can be preliminarily concluded from the pilot research results that the Supreme Court justices tend to decide intuitively. Interestingly, the middle question yielded more correct answers than the others. In the previous research, contrary, the most correctly answered question was the third question.[32] The graphic presentation of the results does not actually clearly show the fact that two justices answered all three questions correctly. So, in fact, three out of six answered all the questions incorrectly, and for one of the interviewees with the 1:2 ratio of correct and incorrect answers. Contrary to the abovementioned results of previous researches, where only 14.7 % of US circuit judges were able to answer all three questions correctly[33], the Czech Supreme Court justices enjoy a higher, one-third success rate.

The test, however, does not show that the justices are bad at math, which would only support the well know half-myth that no lawyers understand math, but its results point out that they can be (and actually are) subjects to heuristic simplifications – creating the illusion of validity by overconfidence in the result based on a good fit between the predicted outcome

32 See Frederick 2005, p. 28. See also Guthrie, Rachlinski, Wistrich 2007, p. 15.
33 See Guthrie, Rachlinski, Wistrich 2007, p. 15.

and the input information (Tversky, Kahneman 1974, p. 1126), or in other words – the judges are a subject to cognitive illusions (Guthrie, Rachlinski, Wistrich 2001, p. 780) just as much as anyone else.

5 Conclusion

All the above-mentioned data represent merely preliminary findings that cannot be considered as relevant results from the whole of Czech Supreme Court. Even from these findings it seems evident enough, however, that intuition plays a significant role in the decision-making process. The pilot results of the CRT Test showed that the Supreme Court Justices in the sample make their decision slightly more on the intuitive basis that on the strictly rational one. They are not immune to the cognitive illusions. While there is a great need for further, more detail-oriented research, questions about the possible legal implications of judgements stemming from cognitive illusions arise. While there is generally acceptable notion that judges depend on their intuition while deciding legal cases, future research can uncover what it actually can cause, and whether there is a need to educate (future) judges to care for this particular influencing factor as well.

A few other questions from the interview were deliberately directed to the intuitive decision-making issue too. At some points during the interviews the Czech Supreme Court justices themselves claimed, in connection with the original primary focus of the carried-out research (usage of legal interpretation methodology by the Supreme Court justices), that they often make certain sub-decisions intuitively[34]. This paper does not aim to conclude whether intuitive-based decision-making is correct in the legal environment or not[35], it just points out a crucial section of legal reality worth of further studies.

The paper shows that there is a large number of doctrinal publications that operate with the premise that judges actually do decide their legal cases

34 Various answers have been given to the question of consciously using interpretative methods. Generally, they reflected that justices consider the interpretation methods, but on an intuitive basis, rather than actively addressing them on a theoretical level. Of course, this does not mean that they do not think of interpretative possibilities. Malaník 2019, p. 110.

35 Although that some other authors clearly state that intuitive decision-making is undesirable, while giving advice what steps to take to avoid it in order to be a better lawyer. See Sussman 2013, pp. 507–508.

based on intuition and use rationalization to support their legal hunching. On the other hand, there are others claiming that judges follow legal rules and there is very little room for exercising their creativity[36] (while ignoring the possibility of non-deliberate sub-processes of their thinking that may be caused by certain cognitive illusions and that may trigger more of these blinders). There are, however, very little empirical researchers who focus solely on the problem of intuition in legal decision-making. Mere fact that judges are often considered as a social group that is not entirely open towards such empirical investigations due to some legal and institutional reservations, thus making the carrying out of the research quite uneasy, cannot be sufficient reason why this crucial part of legal reality should be ignored any longer.

References

Adair, J. (2007). Jak se správně rozhodovat a řešit problémy. Brno. Computer Press, a. s. 2007.

Balkin, J. M. (2011). Living Originalism. London. The Belknap Press of Harvard University Press.

Beltrán, J. F., Moreso, J. J., Papayannis, D. M. (2013). Neutrality and Theory of Law. London. Springer Science & Business Media.

Benesh, S. C. and Czarnezki, J. J. (2009)- The Ideology of Legal Interpretation. Journal of Law and Policy, Vol. 29, 2009; Vermont Law School Research Paper No. 15-13. Available at SSRN: https://ssrn.com/abstract=2265559.

Bobek, M. (2013). Comparative Reasoning in European Supreme Courts. Oxford University Press.

Cane, P, Kritzel, H. M. (eds.) (2010). The Oxford Handbook of Empirical Legal Research. Oxford. Oxford University Press.

Cardozo, B. N. (1921) The nature of the judicial process. New Heaven. Yale University press. Available also at: https://www.constitution.org/cmt/cardozo/jud_proc.htm.

České soudnictví 2016: Výroční statistická zpráva [online]. Ministerstvo spravedlnosti. [Quoted 29. 8. 2018] Available at: https://drive.google.com/file/d/0B9sYB4mdkWmXWG1yM0VicDRBQzQ/view.

36 See for example Rubin 1987, p. 371.

Czarnezki, J. J. and Ford, W. K. (2006). The Phantom Philosophy? An Empirical Investigation of Legal Interpretation [online] Maryland Law Review, Vol. 65. Univ. of Chicago Public Law & Legal Theory, Research Paper Series No. 102. Marquette Law School Legal Studies Research Paper No. 06-05. [Quoted 28. 8. 2018] Available at: https://ssrn.com/abstract=773865.

Farnsworth, W., Guzior, D. F., Malani, A. (2010). Ambiguity about ambiguity: An Empirical Inquiry into legal interpretation. Journal of Legal Analysis. Vol. 2, No. 1. In: HeinOnline [legal database]. [Quoted 25. 1. 2017].

Frederick, S. (2005). Cognitive Reflection and Decision Making. [online] Journal of Economic Perspectives. Volume 19, Number 4. Fall 2005. [Quoted 28. 8. 2018] Available at: http://emilkirkegaard.dk/en/wp-content/uploads/Shane-Frederick-Cognitive-Re%EF%AC%82ection-and-Decision-Making.pdf.

Gadamer, H.-G. (2006). Truth and Method. Second, revisited edition, translation revisited by Weinsheimer, Joel and Marshall, Donald G. London. Continuum.

George, T. E., Epstein, L. (1992). On the Nature of Supreme Court Decision Making. [online] The American Political Science Review, Vol. 86, No. 2, pp. 323–337. American Political Science Association. [Quoted 28. 8. 2018] Available at: http://www.jstor.org/stable/1964223.

Gibson, J. L. (1983). From Simplicity to Complexity: The Development of Theory in the Study of Judicial Behavior. [online] Political Behavior, Vol. 5, No. 1, Judicial Behavior: Theory and Methodology. Springer. [Quoted 25. 8. 2018] Available at: http://www.jstor.org/stable/586347.

Gilbert, D. T. (2005). Why we make bad decisions [online] TED Global. [Quoted 15. 1. 2017] Available at: https://www.ted.com/talks/dan_gilbert_researches_happiness.

Gluck, A. R. and Bressman, L. S. (2013). Statutory Interpretation from the Inside: Method Appendix. [online] Stanford Law Review, Vol. 65, No. 6. [Quoted 29. 8. 2018] Available at: https://ssrn.com/abstract=2331609.

Guthrie, Ch. Rachlinski, J. J., Wistrich, A. J. (2007). Blinking on the Bench: How Judges Decide Cases. [online] Cornell Law Faculty Publications. Paper 917. [Quoted 28. 8. 2018] Available at: https://scholarship.law.cornell.edu/facpub/917.

Guthrie, Ch. Rachlinski, J J., Wistrich, A. J. (2001). Inside the Judicial Mind. Cornell Law Faculty Publications. Paper 814. [online] [Quoted 19. 7. 2019] Available at: https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1734 & context=facpub.

Hogarth, Robin. Educating Intuition: A Challenge for the 21st Century[online] Els Opuscles del REI. No. 13. 2003 Centre de Recerca in Economia Internacional. [Quoted 28. 8. 2018] Available at: https://www.researchgate.net/publication/242486695.

Holländer, P. (2006). Filosofie práva. Plzeň. Aleš Čeněk.

Ihering, R. (1913). Law as a Means to an End. [online] Translated from German by Isaac Husik. Boston. Boston book company. [Quoted 19. 8. 2019] Available at: https://archive.org/details/lawasameanstoan00jheruoft.

Kahneman, D. and Frederick, S. (2001) Representativeness Revisited: Attribute Substitution in Intuitive Judgment. Princeton University (August 2, 2001). Available at: https://pdfs.semanticscholar.org/4069/615a36c33e61ca309b8ceaeb628a10d441b5.pdf

Kühn, Z. (2002). Aplikace práva ve složitých případech, k úloze právních principů v judikatuře. Praha. Nakladatelství Karolinium.

Kysela, J. Ondřejková, J. et al. (2012). Jak se píše o soudech a soudcích: soudní moc v mezioborové perspektivě. Praha. Leges.

Lindquist, S. A. Lindquist, Klein, D. E. (2006). The Influence of Jurisprudential Considerations on Supreme Court Decisionmaking: A Study of Conflict Cases. [online] Law & Society Review, Volume 40, No. 1, p. 135-162. ISSN 0023-9216. [Quoted 28. 8. 2018] Available at: https://doi.org/10.1111/j.1540-5893.2006.00262.x.

Lord, Ch. G. Ross, L., Lepper, M. R. (1979). Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence. [online] Journal of Personality and Social Psychology. No. 11, [Quoted 28. 8. 2018] Available at: http://www.academia.edu/14157235/Biased_assimilation_and_attitude_polarization_The_effects_of_prior_theories_on_subsequently_considered_evidence.

Malaník, M. (2019). Empirical research on legal interpretation methodology [online]. Brno [Quoted 2019-07-19]. Available at: <https://is.muni.cz/th/hg64v/>. Dissertation. Masarykova univerzita, Právnická fakulta. Supervisor Martin Škop.

Modak-Truran, M. C. (2001). A Pragmatic Justification of The Judicial Hunch. [online] University of Richmond Law Review. Vol. 35 [Quoted 28. 8. 2018] Available at: https://dc.law.mc.edu/cgi/viewcontent.cgi?article=1016 & context=faculty-journals.

Nadel, L.; Sinnott-Armstrong, W. P. (eds.) (2012). Memory and Law. Oxford University Press. Oxford. 2012.

Olivercrona, K. (1939). Law As Fact. [online] Humphrey Millford. London. Oxford University Press [Quoted 1. 6. 2018]. Available at: https://archive.org/details/in.ernet.dli.2015.275271/page/n179.

Patton, M. Q. (2015). Qualitative Research & Evaluation Methods: integrating theory and practice. Fourth Edition. SAGE Publications.

Powell, H. J. (2009). Response to Knight. [online] Duke Law Journal. Vol. 58 [Quoted 22. 3. 2014] Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1735030.

Rubin, A. B. (1987). Doctrine in Decision-Making: Rationale or Rationalization. UTAH L. REV. 357 [Quoted 30. 6. 2019] Heinonline [legal database].

Schneider, D. M. (2001). Empirical Research on judicial reasoning: Statutory interpretation in federal tax cases. [online] New Mexico Law Review, Issue 2. [Quoted 28. 8. 2018] Available at: http://digitalrepository.unm.edu/nmlr/vol31/iss2/4/.

Sobek, T. (2008). Argumenty teorie práva. Plzeň. Aleš Čeněk.

Sobek, T. (2010). Nemorální právo. Praha. Ústav státu a práva.

Sussman, E. (2013). Arbitrator Decision Making: Unconscious Psychological Influences and What You Can Do About Them (December 20, 2013). American Review of International Arbitration, Vol., No. 3. Available at SSRN: https://ssrn.com/abstract=2372307.

Tversky, A., Kahneman, D. (1974) Judgment under Uncertainty: Heuristics and Biases Science, New Series, Vol. 185, No. 4157, pp. 1124–1131. [online] [Quoted 19. 7. 2019] Available at: http://www.its.caltech.edu/~camerer/Ec101/JudgementUncertainty.pdf.

Ursin, E. (2009). How Great Judges Think: Judges Richard Posner, Henry Friendly, and Roger Traynor on Judicial Lawmaking. [online] Buffalo law review. Vol. 57, pp. 1267–1360. ISSN 0023-9356. [Quoted 3. 6. 2015]. Available at: http://www.buffalolawreview.org/past_issues/57_4/Ursin%20Web%2057_4.pdf

Weinberger, O. (1995). Norma a instituce (Úvod do teorie práva). Brno. Masarykova univerzita.

Wintr, J. (2013). Metody a zásady interpretace práva. Praha. Auditorium.

Legal acts and case law

Charter of Fundamental Rights and Freedoms (as amended) – Ústavní zákon č. 2/1993 Sb., Usnesení předsednictva České národní rady o vyhlášení LISTINY ZÁKLADNÍCH PRÁV A SVOBOD jako součástí ústavního pořádku České republiky, ve znění pozdějších předpisů. Poslanecká sněmovna Parlamentu České republiky [online] [Quoted 19. 7. 2019] Available at: http://www.psp.cz/en/docs/laws/listina.html.

Code of Civil Procedure (as amended) – Zákon č. 99/1963 Sb., občanský soudní řád, ve znění pozdějších předpisů. Zákony pro lidi. [online] [Quoted 19. 7. 2019] Available at: https://www.zakonyprolidi.cz/cs/1963-99#cast3.

Czech Constitution (as amended) – ústavní zákon č. 1/1993 Sb., Ústava české republiky, ve znění pozdějších předpisů. Poslanecká sněmovna Parlamentu České republiky [online] [Quoted 19. 7. 2019] Available at: https://www.psp.cz/docs/laws/constitution.html.

Decision of the Constitutional Court of the Czech Republic from 20. 6. 1995, case no. III. ÚS 84/94. [online], NALUS. [Quoted 1. 6. 2018], Available at: http://nalus.usoud.cz/Search/GetText.aspx?sz=3-84-94.

Decision of the Constitutional Court of the Czech Republic from 28. 6. 2011, case no. II. ÚS 1235/11. [online], NALUS. [Quoted 1. 6. 2018] Available at: https://nalus.usoud.cz/Search/ResultDetail.aspx?id=70697 & pos=1 & cnt=1 & typ=result.

Does economic argumentation work within the Polish law? Verification of the Polish legislator' assumptions for the changes to the administrative and court administrative proceedings on the example of mediation

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Abstract:

The article discusses the mediation and character of mediation procedure in Polish general administrative proceedings (based on the Code of Administrative Proceedings from 14 June 1960) and court administrative proceedings (based on the Law on Administrative Courts Proceedings dated 30th August 2002). Administrative mediation was introduced to the Polish

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legal system of court administrative procedure when the Law on Courts Administrative Proceedings entered into force on 1st January 2004; in general administrative proceedings was introduced on 1st June 2017. This legal instrument has been therefore available for over 15 years, however, unfortunately it still remains largely unknown to an average individuals.

Although relations between economics and law have constituted the subject of scientific inquiry for a long time, it was only in the second half of the 20th century that this discussion led to the development of the so-called Economic Analysis of Law (Law & Economics). The ideas generated by scholars of Law & Economics researching in the field have deeply influenced the major disciplines of the law, also administrative and court administrative proceedings. The direction of Law & Economic can change administrative procedure law, creating interdisciplinary research, which provides the scholars with completely new development opportunities.

Keywords

Economic Analysis of Law; Law and Economics; Mediation; Administrative Proceedings; Court Administrative Proceedings.

1 Introduction

The aim of this paper is finding the answer to the question whether economic argumentation used for the so called economic analysis of law, works within the law of Poland and allows for the verification of normative assumptions of the Polish policymaker and also for the creation of optimal legal solutions. Owing to the restricted framework of the survey and the need to ensure integrity of the study, the institution of mediation within the general administrative proceedings and administrative court proceedings in Poland has been focused on in particular. In my opinion, the chosen example indicates the occurrence of a big discrepancy between the legislator's assumptions and the administrative practice as well as actual expectations of the society. To put it in other words: despite a great interest on the part of the legislator, government authorities, media and the lawyers' environment, in both proceedings mediation does not actually occur and is not very popular in Poland. Changes to the mediation introduced in 2004 and 2016 were mainly focused on the maximising of benefit for the individuals and administration authorities as well as administrative courts. They were

aimed at making the proceedings shorter and contribute to the modification of the relationship between the administrative authorities and proceedings participants driving at the creation of a more "partnership-like", less formal and bossy approach by the administrative authorities and administrative courts towards citizens. Those regulations were, however, formulated with no consideration given to the realistic advantages resulting from such solution, of which more comment later, or "missing empirical basis" (Kmieciak 2017, pp. 323 et seq.).

A statistic method was implemented additionally for the purpose of the verification of the legislator's assumptions.

2 Economic analysis of law

The economic analysis of law, also called *Law and Economics, Law & Economics* (Bełdowski, Metelska-Szaniawska 2007, pp. 51–69), is one of the most influential trends in the contemporary law studies. It involves the examination of provisions of law using the economy methods and with the use of respective tools (Gintowt 2010, p. 3)[2]. This discipline specifically emphasizes the study of the effectiveness of the legal regulations. Its main issue is the conviction that by using the methods applied in economic studies it is possible to rationalise legal procedures of law application. However, it is not possible to regard this method of economic analysis of law as the only coherent research programme. Some theoreticians of law treat it as a bunch of opinions containing the thesis and a number of secondary theorems. Other regard it as a school understood as a community of scholars accepting some general theses and research methods[3].

Until 1960 s, as a rule the studies concentrated on the legislation directly referring to the economy and market (competition law, labour law, finance law) while the so called new economic analysis of law, the onset of which is associated with the application of Coase's theorem for the study of the American law of torts in 1960 (Gintowt 2010, pp. 3–4), deals with the complete legal system, the administrative law procedures including. Thus, the contemporary methods of economic analysis of law should have a universal application

2 See also Pomaskow 2015, p. 209.

3 See for example Guzik 2017, p. 30, Stankiewicz 2011, p. 32, Posner 2005, pp. 1 et seq.

in truly every domain of law, also in the areas generally staying at a distance from market occurrences. It is because the logic of law fairly often depends on the market logic. With this approach, law and its norms are considered first of all as a system of incentives and stimuli which are supposed to lead to the maximum effective solutions basing on the assumption of rational human choices (Gintowt 2010, p. 3) [4]. Thus, the economic analysis of law, in the positive approach, drives at manifesting the utility of particular legal norms in the allocation pattern. This leads to assigning the employers among the examined institutions thus directed *ratio legis* (Gintowt 2010, p. 3)[5].

The study of legal norms is based, among others, on a transaction costs theory, a cost-benefit analysis theory or game theory (Pomaskow 2015, p. 209). Legal proceedings (also administrative and court administrative proceedings) can themselves be conceptualized as games, governed by their own peculiar system of rules, entitlements or costs. Many of the underlying conflict situations giving rise to legal proceedings can also be understood as games (Goetz 2006, p. 4).

The economic analysis of law casts new, fresh look at the law which for centuries had been observed primarily as the idea of justice. It enables the extension of the research perspective and looking at legal rules in the same way as at prices, as at an impulse to change behaviour and tools for effective political activity (Pomaskow 2015, p. 214).

There is a three-stage scheme of the application of the economic analysis of law. The first step is the economic valuation of a given case (the so called "economisation of the case") (Guzik 2017, pp. 32–33). The second step involves a search for a relevant mathematical model which would include all parameters vital for the case. The last stage takes drawing the right conclusions from the applied model for the given case (Guzik 2017, pp. 32–33). One of the aims of the economic analysis of law is the development and economic results of legal institutions analysis (Balcerowicz 1993, p. 8).

4 See also Stroiński 2002, p. 551, Posner 2003, pp. 23−26.

5 See also Bator 2007, p. 25.

3 Work on the changes to the Code of Administrative Proceedings and the Law on Administrative Courts Proceedings

During the work on the Constitution for Business, the priority programme for the Council of Ministers in 2017[6], it was also decided to make significant alterations to the Code of Administrative Proceedings dated 14th June 1960 (hereafter "CAP") and the Law on Administrative Courts Proceedings dated 30th August 2002 (hereafter "LACP"). For nearly six years (2012-2016) the team of experts were working on the draft of the changes to both Laws. The ready version – specifically the CAP one – contained many solutions unknown until then to Polish administrative procedures (at times almost literally copied from foreign systems, such as administrative agreement or specific procedure for issuing general administrative acts) and also some that were completely imprudent, selected randomly with no justification (the participation of so called "interested person" in the proceedings and their entitlement to have an access in the case files). Just as the designers admitted themselves, those suggested changes to CAP and LACP were created with no prior, even basic, research in terms of economy or statistics nor with social survey. J. Wegner-Kowalska explained: "The inspiration for including the institution of mediation in the Code of Administrative Proceedings were the doctrine based opinions, foreign countries' regulations and European *soft law*" (Wegner-Kowalska 2017, p. 76). It was possible to bring remarks and comments to the draft and some remarks (submitted by experienced practitioners from different administrative authorities) were later adopted by the Polish parliament gaining great popularity just after they had come into force (such as objection or waiver of appeal) and thus leading to the elimination of the most imprudent institutions.

On the other hand, majority of the suggestions by the Team of Experts, which will be discussed further in this survey, proved to be completely irrelevant. Perhaps, if the persons responsible for the draft of the legislation solutions had used more worthy proposals of the economic analysis of law concerning the issue of shaping up the selected legal institutions, the result would

6 See Konstytucja Biznesu (Constitution of Business). Available at: https://poradnikprzedsiebiorcy.pl/-konstytucja-biznesu-pakiet-zmian-dla-przedsiebiorcy

have been better. During the consultations, the Minister of Justice expressed a similar opinion saying that "the introduction of new institutions should have been preceded by a consideration of realistic advantages such solutions give" (Kmieciak 2017, p. 318). Further, the General Representation of Local Colleges of Appeal (Kmieciak 2017, pp. 323 et seq.) (second-grade authorities in local government matters) also expressed their negative opinion on the Report by the Team of Experts, indicating "lack of empirical base giving grounds for the amendment" and also their objection to "the proposition of a transfer to the Polish administrative proceedings solutions from – firstly – many legal systems, and secondly – different systems which gives the impression of accidental choice with no guarantee that they would fulfil their aims listed in the Report in this exactly composition." (Kmieciak 2017, pp. 323 et seq.)

4 Mediation in the administrative court proceedings

Mediation is an alternative way to settle the dispute allowing for amicable solutions to the matters with the participation of a neutral, unbiased mediator[7]. It was implemented in the administrative court procedures along with the LACP coming into force (Art. 115-118 LACP), i.e. 1st January 2004. The aim of mediation was specified as the arrival of the parties (the plaintiff and the administration authority) at an agreement with the aid of a mediator with no litigation. In the legislator's view, the mediation was supposed to shorten and facilitate the proceedings – they were announced as the key advantages of the mediation.

The administrative practice proved far from theory. In 2004, in all Poland the administrative courts received over 67 thousand complaints. However, only 679 mediation proceedings (1 % of the cases), and only 170 were heard (0,25 % of all cases)[8]. Majority of the cases were submitted for mediation by the Regional Administrative Court in Warsaw: 423, of which only 148 reached the positive end; i.e. 87 % of settled cases in all Poland[9]. In 2005,

7 About history of the mediation in civil law see Cybulko 2018, pp. 24 et seq.

8 See Informacja o działalności sądów administracyjnych w roku 2004 r. Warszawa April (2005), p. 139. Available at: http://www.nsa.gov.pl/sprawozdania-roczne.php.

9 See Informacja o działalności sądów administracyjnych w roku 2004 r. Warszawa April (2005), p. 139. Available at: http://www.nsa.gov.pl/sprawozdania-roczne.php.

204 proceedings were initiated and 117 were heard. The latest, fairly positive year for mediation was 2006, where 172 mediation cases were initiated and 66 were settled. Since 2013, the number of initiated mediations had not been more than 10 a year in all Poland (of which from 0 to 5 cases were settled). There is no doubt that the presented data clearly show no interest in mediation in the Polish society. Although since 2002, the time of the discussion on the draft changes to LACP, there appeared critical opinions saying that this institution did not work within the Polish administrative courts, no research has been carried out to find out the reason for this occurrence.

The Team of Experts (mentioned above) had been appointed to put forward new assumptions the mediation was supposed to base on. The said Team's findings said one of the reasons for no interest in mediation was the fact that the sessions were conducted by judges or court referendaries (i.e. bodies involved in the trials). The Team recommended the need to introduce a mediation model where the mediator is a Third Person. However, the said Team did not make use of valuable economic analyses concerning the conclusion of extra-court amical compliances at the pre-court stage which might make indirect indication for the shaping up of court mediation. They did not make use of valuable and solid tips which might help in shortening and facilitating the process of the parties' arriving at an agreement in particular cases (which was the primary aim of mediation) and at the same time – concluding a dispute in an economic way (Guzik 2017, p. 35).

During the amendment of LACP in 2016 (came into force on 1st June 2017) the model of mediation procedure was altered introducing a classical model where the mediator is a Third Person (Szewioła 2018). Yet, no attention was paid to the still complicated and very formal way of regulating mediation which discourages people from using it. Mediation does not end in compromise approved by administrative court. Merely minutes of the session are made where the possible concessions by both parties are noted. Then, the body issues another decision (another act) which contains the mediation statements. It indicates at the same time that a party is not sure whether those statements will be reflected in the new act and the only method of the body control is, in this situation, submitting a new complaint to the administrative court (Szewioła 2018). This kind of procedure obviously makes the proceedings longer and more complicated. Mediation also means the necessity of incurring additional costs by the parties which makes quite an important argument due to the fact that about 51,8 % of the

Polish population's remuneration oscillates belove 5000 PLN (1176 €), and 30,2 % from 5.000 to 10.000 PLN (1176 – 2353 €) (Jurczak 2019).

The results of the amendment, on the basis of official statistics, are devastating for the legislator: the information on the administrative courts operations for 2017 has it that the said courts received over 72 thousand complaints[10]. As few as one was submitted for the mediation procedure which concerned the right to access to public information. No case was settled within this type of proceedings (nor 8 other, submitted in 2016). In 2018, 6 cases were subjected to mediation of which 1 was settled with a positive result[11].

The reports on administrative courts operations in 2017[12] and 2018[13] mention the reason for the reluctance to use the mediation, giving *expressis verbis* the pace and the effectiveness of trying the cases in usual procedures. Thus – after a dozen years since the introduction of the mediation procedure – it turns out to be useless in making the proceedings easier or faster. It occurs that the parties to the disputes seem to be afraid that implementing the mediation procedure will make the court proceedings longer (Szewioła 2018). Two years following the change to the mediation model where the participation of an independent arbiter was imposed, no increase in the application of mediation was observed. The said manner of regulation (complicated and cost consuming) was not in the position to make the proceedings less formal, to reduce the costs (which, in the court procedures, is one of its main advantages) or to create a partner-like approach to the parties. This clearly proves the legislator's assumptions erroneous and ill-conceived (Szewioła 2018).

It seems that one can use solutions from the theory of games to assess whether mediation before the administrative court is useful and necessary. A standard dictionary definition of a game is: "a contest… according to set rules, undertaken for amusement or for a stake." (Cooter, Ulen 2016, p. 62) Two elements of that definition should be especially noted. One is that games are explicitly defined as behavioral situations governed by rules (Goetz 2006, p. 3). The second is that game theory deals neither exclusively nor even primarily with con-tests undertaken for amusement; rather, it analyzes the behavior of "players" in serious conflict situations, frequently for heavy stakes (Goetz 2006, p. 3). Administrative law usually confronts

10 See Informacja o działalności sądów administracyjnych za 2017 r.
11 See Informacja o działalności sądów administracyjnych w 2018 r., Warszawa. 2019, p. 17.
12 See Informacja o działalności sądów administracyjnych za 2017 r., p. 15.
13 See Informacja o działalności sądów administracyjnych w 2018 r., p. 16.

situations in which there are few decision-makers and in which the optimal action for one person depends on what the other person chooses. A legal dispute arises when someone claims to have been illegally harmed at the hands of another. It is possible that the both individuals can resolve their dispute themselves, but sometimes they cannot (Cooter, Ulen 2016, p. 62). These situations are like games in which people have to decide on strategy (Cooter, Ulen 2016, p. 33). The game theory deals with the description of various situations in which entities are involved that consciously make certain decisions. As a result of these decisions, there are resolutions that may change their location. It should be noted that strategy is a plan of action that responds to the reactions of other persons. Game theory applies to every situation where strategy is important and it can increase our understanding of certain laws and institutions (Cooter, Ulen 2016, p. 33).

Let's consider an example – application for access to public information. We have two players: a person who wants to get access to public information about the construction of a housing estate, an area containing a large number of houses or apartments built close together (Player 1) and an authority who does not want to provide it (Player 2). What is their strategy? The strategy is a complete description of the player's behavior in every situation he may be in.

Player 1	Player 2
access to public information	access to public information
no access to public information	no access to public information
partly access to public information	partly access to public information

Do the rows abels above encompass all of the relevant possibilities both for the choosing individual's own choice and the administrative authority's choice? If so, then the resulting cells correctly represent the possible outcomes of conflict resolution between them. Such a representation of the possible choices and outcomes is an important first step in modeling. In more formal language, this proc-ess is frequently called identification of the "choice space" or "opportunity set" (Goetz 2006, p. 8).

All strategies are assigned appropriate payouts for individual players. Payouts can take different forms: cash (f.e. profits made, costs incurred) and non-monetary (f.e. quick court judgment, sense of a fair trial, explanation

of doubts). It is important to assume that each player wants the best for itself, that is, maximizes its profits or minimizes losses.

All possible payouts are presented below, including those that are not available in Polish court administrative proceedings now (last 3 lines)

Player 1	Player 2
long-lasting court proceedings ……...-1	long-lasting court proceedings ……..-1
payment of costs of the mediation . -1	payment of costs of the mediation -1
uncertain result of the proceedings ……-1	uncertain result of the proceedings ……-1
explanation of doubts …..……..1	authority friendly to the induviduals ……1
access of public information allows to take a further actions……1	access of public information does not allow to take a further actions -1
costs of lawyer ……-1	costs of lawyer ……...-1
refund of the court registration fee ……..1	refund of the court registration fee …… …..1
tax relief or tax cut ……1	award from the supervisor……..1
refund of the costs of the mediation ……...1	refund of the costs of the mediation ……..1

Once the possible outcomes are thus identified, the implications of each outcome can also be indicated. In table this is accomplished by placing a number in each cell to denominate the "payoff" (Goetz 2006, p. 9). The resulting matrix model does give a concise kind of "Picture" of the situation faced by any court (decisionmaker) (Goetz 2006, p. 9). Having analyzed the exchange of information we move to the bargaining to reach an agreement between parties (Cooter, Ulen 2016, p. 60). Procedural law does not prescribe a time for bargaining to settle disputes. Rather, bargaining can occur at any time in the legal process (Cooter, Ulen 2016, p. 399). The administrative court or out-of-court mediator can apply other Law and Economic theories to a number of specific game classes, such as bargaining with transaction costs; trade involving one seller and several buyers;

two-person bargaining with incomplete information on one side, and on both sides. We shall see that these concepts from game theory can play an important role in our understanding of legal rules and institutions.

One should remember that models are almost always abstractions and simplifications of reality (Goetz 2006, p. 9). Still, within appropriate limits, models are powerful analytic tools because they help clarify what forces are at work and how these forces interact. Hence, it is properly cautious to think of models as formalized descriptions of "what tends to emerge" under specified behavioral conditions and factual assumptions (Goetz 2006, p. 9).

5 Mediation in the administrative proceedings

Although the mediation procedure did not prove effective in administrative courts, the Team of Experts insisted strongly on implementing this institution in the administrative proceedings; i.e. proceedings before administration authorities. Chapter 5a of Section 1 "Mediation" was introduced to CAP Theoretically, mediation can be implemented in all cases the nature of which allows for it. It mainly refers to those cases where there appear parties with disputable interests (a dispute between neighbours) and cases where we are faced with a complicated factual situation. Generally speaking, the purpose of mediation in the administrative proceedings is to explain and consider the factual and legal circumstances and to arrive at an agreement concerning its settlement within the current law, including the issuance of a decision or compromise. Following the principle of amicable settlement of disputes (Art. 13 CAP), the public administrative authorities always drive towards amicable settlements of disputes, particularly by initiating actions encouraging the parties to compromise. The public administrative authorities also initiate all possible actions reasonable at the given stage of the proceedings which facilitate the use of mediation or conclusion of agreements; in particular they provide explanations on the possibilities and advantages of amicable settlements. It must, however, be emphasized that mediation is optional. Following the CAP, the proceeding body or the parties to such proceedings may become participants of the mediation.

The criticism of the solutions introduced into CAP in 2017 gives clear opinion that the said solutions had not been carefully considered and appeared incompatible with other provisions of the Code (Goetz 2006, p. 9).

It is worth mentioning here that there exist significant differences in reference to the position of the participants in the administrative proceedings, administrative court and civil ones. In the administrative court and civil proceedings there is the principle of parties' equivalence while in the administrative proceedings, the party is "subjected' to the authority. Such authority sets the rights and duties in reference to material law in a one-sided and binding way (Goetz 2006, p. 9). For this reason it is not possible to regulate the institution of mediation in the general administrative proceedings in conjunction with the assumptions of administrative court and civil proceedings.

In the administrative court proceedings alike, mediation in fact causes the proceedings pending longer. It is following Art. 96e § 1 CAP that referring the given case to mediation, the authority of the public administration postpones the trial for the period of up to two months. Under a joint appeal of the mediation participants or due to other vital reasons, the date specified in § 1 may be prolonged, yet no longer than by one month (Art. 96e § 2 CAP).

The procedure aiming at instituting mediation is also complicated as it requires the issuance of several decisions at specific intervals. As a matter of fact, mediation calls for costs. The content of Art. 96 l § 1 CAP provides that a mediator is entitled to remuneration and reimbursement for expenses in connection with conducting the procedure unless they gave their consent for no fee. The expenses covering the mediator's remuneration and cost reimbursement are borne by the public administrative authority and in the cases where a compromise can be achieved – parties in equal parts unless they decide otherwise (Art. 96 l § 2 CAP).

There is no data on the websites of the Local Colleges of Appeal concerning the number of the pending mediation proceedings or settlements. The Local College of Appeal in Gdańsk does not even mention the settlements at all; the Local College of Appeal in Warsaw informs of only 4 settlements concerning the charges for perpetual usufruct; the Report by the Local College of Appeal in Kraków mentions 782 cases of mediation. The said settlements are not administrative; they are a kind of agreements based on civil law.

6 Whether experiences in mediation in civil and penal procedure were used?

It is also worth mentioning here that the problem of mediation ineffectiveness is also known to court procedures (civil and criminal law) (Cooter, Ulen 2016, p. 9)[14]. This type of mediation is, on the other hand, very carefully examined and analysed. To give but one example: a research on the use of mediation in practical terms was conducted to the order of the Section for Victims of Crime and Mediation Promotion of the Department of International Cooperation and Human Rights of the Ministry of Justice within the "Promotion of Alternative Methods for Dispute Solutions" programme implemented as part of the Operational Programme entitled "Building up of the Institutional Potential and Cooperation in the Area of Judicial System / Improvement of Judicial Effectiveness" co-funded by the Norwegian Financial Mechanism 2009-2014 (Rudolf et al. 2015, pp. 1 ff.). The following methods and sources of the data were used in the Report: the analysis of existing data (legal deeds, scientific surveys, information materials, such as mediation centres websites; mediation training programmes); the analysis of the statistics data on the number of matters referred to courts and number of mediations; results of a quantitative study with the mediators, judges and prosecutors' representatives; results of quantitative examinations of a representative sample of Poland's citizens over 16; a quantitative survey among the probation officers, representatives of high schools, non-government organisations, solicitors and barristers self-government, social workers; focused intensified interviews with the target groups: potential mediation participants (representatives of businessmen and the society), mediators, representatives of Social Care Centres, Local Centres for Family Aid, prosecutors, judges, policemen, probation officers; intensified interviews on the phone with mediation coordinators in provincial and local courts and a blog which gathered information and opinions from major investigated groups (Rudolf et al. 2015, p. 5).

The Report showed that the level of mediation usage by civil and criminal courts is very low. The percentage of Commercial Law cases referred to mediation by local court in 2014 was 0,25 % of all court proceedings (provincial courts – 2,1 %), family law – 0,17 %, civil law – as little

14 See also Cybulko 2018, p. 13.

as0,023 % (in provincial courts – 0,68 %)[15], labour law – 0,21 %, and criminal law – 0,16 %[16]. Especially in penal procedure, many people, even if they are familiar with this form of alternative dispute resolution, cannot imagine either the opportunity to meet with the alleged perpetrator of the crime out of court, or the possible reconciliation talks resolving the dispute and finding a way to compensate for the damage caused (Rudolf et al. 2015, p. 5)[17].

At the same time the Report indicates uneven distribution of the figures in the particular districts. It is possible to notice that mediation was more popular in the southern parts of our country, less commercial law based matters, in which case mediation was more frequently applied in North-Western regions of Poland (Rudolf et al. 2015, p. 5).

The problem of a small percentage of cases referred to mediation is not typical only of Poland; it concerns the whole of European Union (Rudolf et al. 2015, p. 5). There are analyses which demonstrate that only less than 1 % of civil and commercial cases have been subjected to mediation. In terms of mediation numbers, Poland is in the fifth position (along with Hungary) following the countries where the institution of mediation has a long tradition (Germany, Holland, England) or the first meeting with a mediator is of an obligatory nature in selected types of cases (Italy) (Rudolf et al. 2015, p. 5). The absolute number of mediations does not give the general image of the situation. It is not until this number is matched with the number of all court cases that the result gives the actual outcome stating that Poland is one of the twenty in Europe. The countries making most use of mediation are Germany, Italy, Holland, Great Britain and Hungary (Rudolf et al. 2015, p. 5).

Those reports show also that one of the low interest in mediation on the part of common court judges is their conviction of their own mediation skills and a very well-worn way of thinking and proceeding (Rudolf et al. 2015, p. 6). The only measure to get rid of this barrier is continuous education. Further, the judges very often do not have a good command of practical knowledge

15 Mediation in civil law is regulated in Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters; the Act of April 23, 1964 – Civil Code, the Act of 17 November 1964 – Code of Civil Procedure, the Act of 28 July 2005 – Court Costs in Civil Matters and others.

16 See further Sułkowski 2017, p. 83, Skrobotowicz 2016, pp. 51 et seq.

17 See also Skrobotowicz 2016, p. 70.

to decide which cases are mediation worthy (to explain the doubts they would need a direct exchange of experience between judges and mediators) (Rudolf et al. 2015, p. 6).

Is the intricacy and expense of the legal process the unavoidable cost of justice, or is it the tribute extracted from the public by a powerful legal profession (Cooter, Ulen 2016, p. 382)? The attitude of lawyers does not contribute to the promotion of mediation as their representatives often look at mediators as at competition because referring by them cases to mediation is not beneficial for them from the economic point of view (the remuneration system for the lawyers representing their clients in courts is such that they are interested in proceeding the cases as long as possible). Such barrier of lack of confidence between the environments of lawyers and mediators can only be demolished by constant educational events which should be made part of law schools curricula (Rudolf et al. 2015, p. 10).

The report also shows lack of knowledge by parties to the process in understanding what mediation in fact is and what advantages it can bring, as well as no will to participate in mediation. Parties to the process expect courts to give ruling rather than to independently decide about the manner of conflicts settlement (Rudolf et al. 2015, p. 10). There are also no sufficient incentives of economic and taxation nature of the type applied in Italy where the mediating parties are entitled to a tax relief in the amount of € 500 if they arrive at compromise and in the situation of no positive result – the half, i.e. € 250 (Rudolf et al. 2015, pp. 7, 10).

7 Conclusions

It is certain that the economic analysis of law may make a very useful tool for law dogmaticians, particularly at the stage of legislative works when a process of a given legal institution economic optimalisation must be made (Guzik 2017, p. 32). Mediation in general administrative procedure and court administrative proceedings as a legal instrument has been therefore available for over 15 years, however, unfortunately it still remains largely unknown to an average individual, especially the party of the proceedings. Furthermore, some people, even if they are familiar with this form of alternative dispute resolution, cannot imagine either the opportunity to meet with administrative authority or the possible reconciliation talks resolving the dispute and finding an settlement. The procedure aiming at instituting

mediation in general administrative procedure and court administrative proceedings is also complicated as it requires the issuance of several decisions at specific intervals. As a matter of fact, mediation calls for costs. The criticism of the solutions introduced into mentioned procedures in 2017 gives clear opinion that the said solutions had not been carefully considered and appeared incompatible with other provisions of the acts. Mediation in the administrative court proceedings is pointless as it does not match this kind of proceedings. Proceedings at administrative courts are supposed to state whether the given administrative deed (other deed) is compatible with the current law or not; thus a question arises: what should be the subject of negotiations or mediation?

There still exists no study of the lack of will by the Polish society to mediate. The daily legal press maintains that an information campaign would be a good idea along with economic incentives, such as reimbursement of court fee (Szewioła 2018) should the mediation prove effective or mediation cost borne by the administrative courts (not by parties).

References

Balcerowicz, L. (1993). *Systemy gospodarcze. Elementy analizy porównawczej*. Warszawa. Szkoła Główna Handlowa.

Bator, A. (2007). Instrumentalizacja jako założenie ekonomicznej analizy prawa. In: Stelmach, Jerzy, Soniewicka, Marta (eds.). *Analiza ekonomiczna w zastosowaniach prawniczych.* Warszawa. Wolters Kluwer.

Bełdowski, J. and Metelska-Szaniawska, K. (2007). Law & Economics – geneza i charakterystyka ekonomicznej analizy prawa. *Bank i Kredyt*. No. 10, pp. 51–69.

Cooter, R. and Ulen, T. (2016). *Law and Economics*. Berkeley Law Books.

Cybulko, A. (2018). *Mediacja cywilna i rola mediatora w ujęciu psychologii społecznej*. Warszawa. Uniwersytet Warszawski Instytut Stosowanych Nauk Społecznych.

Goetz, Ch. J. (2006). *Law and Economics Cases and Materials*. Charlottesville. University of Virginia.

Gintowt, M. (2010). Asymetria informacji jako ratio legis instytucji rękojmi w świetle ekonomicznej analizy prawa. *SEAP Working Paper.* No. 4, pp. 2–18.

Guzik, T. (2017). Ekonomiczna analiza prawa jako metoda prawoznawstwa. *Internetowy Przegląd Prawniczy TBSP UJ*. No. 8, pp. 25–36.

Informacja o działalności sądów administracyjnych w roku 2004 r. Warszawa April 2005. Available at: http://www.nsa.gov.pl/sprawozdania-roczne.php

Informacja o działalności sądów administracyjnych w 2017 r., Warszawa May 2019. Available at: http://www.nsa.gov.pl/sprawozdania-roczne.php.

Informacja o działalności sądów administracyjnych w 2018 r., Warszawa May 2019. Available at: http://www.nsa.gov.pl/sprawozdania-roczne.php

Jurczak, K. (2019). *Podsumowanie Ogólnopolskiego Badania Wynagrodzeń w 2018 roku*. Available at: https://wynagrodzenia.pl/artykul/podsumowanie-ogolnopolskiego-badania-wynagrodzen-w-2018-roku

Kmieciak, Zbigniew (ed.) (2017). *Raport Zespołu Eksperckiego z prac w latach 2012–2016. Reforma prawa o postępowaniu administracyjnym*. Warszawa. NSA Naczelny Sąd Administracyjny.

Konstytucja Biznesu (Constitution of Business). Available at: https://poradnikprzedsiebiorcy.pl/-konstytucja-biznesu-pakiet-zmian-dla-przedsiebiorcy

Pomaskow, J. (2015). Ekonomiczna analiza prawa – alternatywa dla głównego nurtu ekonomii. *Zeszyty Naukowe Uniwersytet Szczeciński, Współczesne Problemy Ekonomiczne.* No. 11, pp. 209–216.

Posner, R. A. (2003). *Economic Analysis of Law*. New York. Aspen Publishers.

Rudolf, A. et al. (2015). *Raport Końcowy: Diagnoza stanu stosowania mediacji oraz przyczyn zbyt niskiej w stosunku do oczekiwanej popularności mediacji*. Warszawa. Agrotec Polska sp. z o.o. and Ministerstwo Sprawiedliwości.

Skrobotowicz, G. A. (2016). Mediacja w zmienionym modelu postępowania karnego. Zagadnienia wybrane. *Roczniki Nauk Prawnych*. No. 1, pp. 51–70.

Stankiewicz, W. (2011). *Historia myśli ekonomicznej*. Warszawa. PWE.

Stroiński R. T. (2002). Ekonomiczna analiza prawa czyli w poszukiwaniu efektywności. *Kwartalnik Prawa Prywatnego.* No. 3, pp. 88–102.

Sułkowski K. (2017). Mediacja w polskim prawie karnym. *Studenckie Zeszyty Naukowe*. No. 35, pp. 83–96.

Szewioła P. (2018). Mediacje w postępowaniu przed sądami administracyjnymi martwe, choć z potencjałem. *Gazeta Prawna.* 15. 03. 2018.

Wegner-Kowalska, J. (2017). Mediacja (art. 13, art. 96a-96 g). In: Zbigniew Kmieciak (ed.). *Raport Zespołu Eksperckiego z prac w latach 2012-2016. Reforma prawa o postępowaniu administracyjnym*. Warszawa. NSA Naczelny Sąd Administracyjny, pp. 73–82.

Legal acts and case law

Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (OJ L 136, 24. 5. 2008, p. 3–8)

Civil Code of April 23, 1964, consolidated text Dz. U. from 2019, item 1145 with further amendments

Code of Civil Procedure of 17 November 1964, consolidated text Dz. U. from 2018, item 1360 with further amendments

Act of Court Costs in Civil Matters of 28 July 2005, consolidated text Dz. U. from 2019 item 785 with further amendments

Law on Administrative Courts Proceedings dated 30th August 2002, consolidated text Dz. U. from 2018, item 1302 with further amendments (hereafter "LACP").

Code of Administrative Proceedings dated 14th June 1960, consolidated text Dz. U. from 2018, item 2096 with further amendments

List of 50 Legal Literary Fictions in Czechoslovakia

Markéta Štěpáníková

Abstract

When John Wigmore wrote his first List of Legal Novels, he started a phenomenon, which occurs through the whole 20th century and was revisited many times. It is almost a tradition to create a new list for each sub-area of Law and Literature. However, most of them are related to common law system and literature of areas as Central Europe are not usually included.

This paper aims to introduce a list of literature influential for forming of Czechoslovakia and its legal culture in a wider sense of the term.

List of fifty Literary fictions relevant for law and lawyers is introduced and rules of its forming are explained. Authors of selected fictions are introduced, and translations of selected works are listed too in order to make these texts available for foreign audience.

In conclusion, three main topics of these fictions are determined, and they will serve as a system for further analysis of selected works. This paper is a first step in a long-term project[1] focusing on Law and Literature in Czechoslovakia.

Keywords

Law and Literature; Czechoslovakia; Central Europe; Kafka; Hašek; Musil; Langer; Čapek.

1 Project GA19-12837S Law in Literature: Qualitative Analysis of the Image of Law in Literary Fiction at the Turn of the 19th and 20th Century

1 Introduction

When John Wigmore wrote his first List of Legal Novels in 1908, he started a phenomenon, which occurs through the whole 20th century. It is almost a tradition to create a new list for each sub-area of Law and Literature. Lists of Legal Movies (Brust 2008) or Legal Series (Ward 2009) are just a small demonstration of this practice.

It is a basic knowledge for all scholars of Law and Literature field nowadays that the original list included just novels and no plays, essays or short stories etc. (Wigmore 1907, p. 574) It is also well known that this list was very conservative, so it did not include any meta-genres of literature, e.g. detective stories. There is also quite wide understanding, that the list was very Anglo-centric.

Thus, it is no surprise that new versions of the list were created afterwards. In the seventies, Weisberg and Kretschman introduced a new, largely re-evaluated list (Weisberg, Kretschman 1977, pp. 94–103). This new version was inspired by and explained by almost revolutionary change of Law and Literature discourse instigated by James Boyd Whites Legal Imagination (White 1985).

Since then, many things changed. Among them it was a vast spreading of Law and Literature to the continental Europe (Olson 2010, pp. 338–364). Despite the fact that connection between Law and Literature used to be natural for many civil law systems and especially German lawyers, they probably needed a reminder (Mölk 1996). In the nineties, Law and Literature started to assimilate even in the Central Europe, which (because of cultural and political reasons) have not participated before (Klusoňová 2013, pp. 77–87).

Still, there are some difficulties with Law and Literature research in the Central Europe even today. Mainly, there is a language barrier. Besides that, our jurisprudential tradition is still strongly based on Kelsen's normative theory and in the Czech Republic in connection to that, to František Weyr's Ryzí nauka právní (Kühn 2011). A strong influence of Soviet jurisprudence does not help either (Mańko, Škop, Štěpáníková 2016, pp. 4–28). Obviously, any extra-legal influences have quite a complicated position in the Central Europe.

In 2018, Czech and Slovak nations celebrated 100th anniversary of the beginning of their first modern, democratic state – Czechoslovakia. In 2019,

Masaryk University, founded as a flagship of Masaryk's vision of new, better state based on civil rights, gender equality and cultural cooperation of nations, celebrated its 100th anniversary too. One can presume that this ambitious vision for both the state and the university would find its mirror in culture and art. It did, both before the founding of Czechoslovakia and after. Still, not many foreign scholars know about literature, which helped to create initially a dangerous idea of Czechoslovakia, or about literature, which played an influential role in writing a narrative of Czechoslovakia in its early years.

This paper aims to introduce a list of literature influential for forming of Czechoslovakia and its legal culture in a wider sense of the term.

2 Creating a new list of Czech literature relevant for law – methodological point of view

This list a necessary first step of our project. We have chosen a method of textual analysis of literary fiction. It is probably the most traditional method of Law and Literature studies worldwide (White 1987, p. 739), but it is not usually properly carried out in the Czech academia, which often relies more on intuition than on scientific approach with a transparent methodology.

In our textual analysis, we will focus on answering the following questions:

1. How is the role of law in the process of transformation of Czech society in the late 19th century presented (in literature)?
2. How is the relationship of law to other actors – who are not part of the legal field – described?
3. How are the legal field and its actors in this period characterized?

We aim to identify literary works with a possible impact on the legal consciousness of a society and determine, especially with respect to their display of the law, actors associated with the law and relations that they hold towards the actors and elements outside the legal field. We hope to link the results of the literary analysis with changes in legal consciousness of society in order to show the interconnection between them. In conclusion, we will identify the importance of contemporary literature and its manifestations in law for forming a cultural (legal) identity of the society.

First, texts for analysis must be chosen. A process of their selection must be transparent, so we have picked several qualitative criteria stemming from the above-mentioned research questions and based on the presence in the literary canon and relevant reflections of legal topics.

Creating a corpus of literature was conducted through the method of theoretical sampling (Draucker et al. 2007, pp. 1137–1148). Theoretical sampling (opposed to random sampling) can be defined as "*the process of data collection for generating theory whereby the analyst jointly collects codes and analyses his data and decides what data to collect next and where to find them in order to develop his theory as it emerges.*" (Glaser, Strauss 1967, p. 45)

The project supposes to create and then to analyse corpus comprising at least 50 selected pieces of fiction literature produced in Czech (-German) milieu of states that were going to transform into Czechoslovakia (emphasis on Czechia, Moravia and Silesia).

Every such list is necessarily subjective because a personal taste of its author, her familiarity with existence of certain works and her actual knowledge of their content. For the sake of impartiality, objectivity or at least transparency of the selection, one of literary canons was used as a key source. It was a three-volume survey of the Czech modern literature (Papoušek 2010, 2014, 2017). We added texts written before 1905 based on a literature studies article focusing on matters of guilt and punishment (Hanuš 2011, pp.196-206) published in an academically acclaimed series of conference proceedings about culture of the 19th century.

To be more specific and transparent in our election criteria, we have also added language and impact of audience to our criteria. Henceforth, the final list of criteria was following:

1. Geography
2. Time
3. Language
4. Impact of audience
5. Topic

As for "geography", we looked for those authors who lived for at least part of their life in a region of Czechoslovakia, which is nowadays in the Czech Republic. Reason of this decision is not ideological but stems from a literary canon, which unfortunately does not include any authors of Slovak literature writing about topics connected to law.

As for "time", we have decided to choose those works, which were written between 1885 and 1925 (the criterion is the time of origination not necessarily the year of publication). Reason for this limitation is an influence of realism and naturalism in Czech literature, which came later than to for example English or French literature. Realism and naturalism are traditionally appreciated in Law and Literature studies because of their obvious connection to matters of society and its norms. It is not a coincidence that many texts included in Wigmore's list are written in such style.

As for "language", works written in both Czech and German language had to be considered because due to political history of Czech lands and especially German being an official administrative language for the Austrian part of Austro-Hungarian monarchy (Evans 2004, pp. 1–24).

As for "impact on audience," the corpus incorporates texts of commonly known presented authors (e.g. Čapek, Čapek-Chod, Čech, Hašek, Kafka, Klostermann, Mrštík brothers, Preisová, Šlejhar, etc.), it also contains some examples of the so-called easy-readings, e.g. crime stories. Those pieces of literature cannot be missed out because of the importance for readers at that time.

As for topic, it is more closely linked to Law and Literature studies tradition, so we use a traditional key Wigmore used in his list. Therefore, inspired by Wigmore, Weisberg and Kretschman, we have looked for those texts, in which:

a) a trial scene is described;
b) legal professionals (as judges, attorneys etc.) are portrayed;
c) methods of law or legal application are depicted;
d) some crucial point of law or general legal rule (in its relation to an individual) is presented.

Each text has to fulfil all conditions to be included to our list.

Next part of this paper presents the list and more detailed explanations for chosen authors and texts. For a better accessibility for those Law and Literature scholars who are not fluent in Czech, there are also English or German titles included.

3 List

1. **Jaroslav Hašek**
   - V zázemí (1921) – *Behind the Lines* (Hašek, Sadloň, Joyce 2009)
   - Na frontě (1922) – *At the Front* (Ibid.)
   - Slavný výprask (1922) – *The Glorious Licking* (Ibid.)
   - Pokračování slavného výprasku (1923) – *The Glorious Licking Continues* (Ibid.)
   - Dobrý voják Švejk před válkou a jiné podivné historky (1922) – G*ood soldier Švejk before war and other stories* (Hašek, Lada 1981)
   - Karel Vaněk: Švejk v zajetí (1923) – *Švejk in Captivity* – *Die Abenteuer des braven Soldaten Schwejk in russischer Gefangenschaft* (Vaněk, 1927/28)
   - Karel Vaněk: Švejk v revoluci (1923) – *Švejk in Revolution* (not translated to English or German)

Jaroslav Hašek is one of the most famous Czech writers of all times (Pytlík 1967, pp. 193–216). He is well known internationally, and his work is part of literary studies both in Anglo-American and German tradition (Němcová Banarjee 1985, pp. 14–17). His attitude to war, bureaucracy, power and army has become a ground stone of the Czech culture and even of the European identity (Wintr 2018, pp. 101–112). His stories about soldier Švejk express his anarchistic worldview and criticize war in a typical sarcastic way (Davies 2000, pp. 301–315) often connected to a national Czech sense of humour and describes somehow ambiguous Czech national character (Giorgi 2014, pp. 103–116).

Hašek's study of power and its use and misuse, portrayed in a context of wartime to highlight its absurdity, can be read both as a criticism of Austro-Hungarian monarchy and its bureaucracy and a criticism of war in general. It can by also interpreted as a study of Czech national identity and as such used as a source for critical thinking about Czech role in European community. It tells a story of Central Europe and its complicated relationship to authorities. It also shows in a form of brilliant comedy how an "idiot" can unveil systems idiocies such as military or social customs (Weitzman 2006, pp. 117–147).

Hašek himself was an anarchist, a man without higher education or high tastes (Chalupecký 1991, pp. 28–40). However, he was without any doubt a very accomplished observer of small details of everyday life

of middle-class people. He was successful even during his lifetime, was friends with many intellectuals of his era and even founded a political party called The Party of Moderate Progress Within the Bounds of the Law, which campaigned satirically for election to the Imperial Council (Hašek, Lada 1981).

There is no doubt that stories about Švejk are crucial for understanding Czech culture, including Czech legal and political culture. Main character is not a lawyer and he is also not involved in any trial but there are questions of justice, power and authorities present. One may conclude that they belong to the third and fourth group of Wigmore's list. Hašek spoke and wrote Czech, he has a Czechoslovak nationality and identified himself as Czech. His books are internationally known, are translated to many languages and are published and staged even today (Parrott 1986). In conclusion, Hašek's stories about soldier Švejk are without any doubt part of our list.

Books Švejk in Captivity and Švejk in Revolution were not written by Hašek, but by Karel Vaněk after Hašek's death. Still, they are involved in our list because they fulfil all criteria and Švejk's narrative would be incomplete without them.

2. **Karel Čapek (sometimes with co-author Josef Čapek)**
   - Boží muka (1917) – *Wayside Crosses* (Čapek, Comrada 2002)
   - Trapné povídky (1921) – *Painful Tales* (Ibid.)
   - Továrna na absolutno (1922) – *The Absolute at Large* (Čapek 1975)
   - Krakatit (1922) – *An Atomic Phantasy: Krakatit* (Čapek 1925)
   - Povídky z jedné kapsy, Povídky z druhé kapsy (1929) – *Tales from Two Pockets* (Čapek, Comrada 1994)
   - Loupežník (1920) – *The Robber* (Čapek, Koreis 2008)
   - R.U.R. (Rossum's Universal Robots – Rossumovi Univerzální Roboti, 1920) – *R.U.R* (Čapek, Novack 2004)
   - Ze života hmyzu (1921) – *The Insect Play* (Čapek 2014)
   - Věc Makropulos (1922) – *The Makropulos Case (or The Makropulos Secret)* (Ibid.)

Brothers Josef Čapek and Karel Čapek in particular were prominent figures of Czechoslovak culture in the inter-war period. They were members of the most prominent artistic groups and influenced both art and politics, especially due to Karel Čapek's friendship with Tomáš Garrigue Masaryk, the first president of Czechoslovakia (Bradbrook 1998).

Čapek wrote in Czech and lived in Bohemia but both are internationally well known (though Josef Čapek more as a painter) and besides that popular even nowadays for a huge audience of readers (Klíma, Comrada 2002). Their works are considered part of a literary canon and many of them (and all of them included in our list) deal with issues of justice, truth or moral rules. Moreover, a trial is depicted in The Makropulos Case and one of the Tales from Two Pockets, The Last Judgement.

3. **Franz Kafka**
   - Ortel (1913) – *Das Urteil* (The Judgement) (Kafka, Josipovici 1993)
   - Proměna (1915)- *Die Verwandlung* (The Metamorphosis) (Ibid.)
   - Před zákonem (1915) – *Vor dem Gesetz* (Before the Law) (Ibid.)
   - Bratrovražda (1917) – *Ein Brudermord* (A Fratricide) (Ibid.)
   - V kárném táboře (1919) – *In der Strafkolonie* (In the Penal Colony) (Ibid.)
   - Popis jednoho zápasu (1905) – *Beschreibung eines Kampfes* (Description of a Struggle) (Ibid.)
   - Proces (1915) – *Der Process* (The Trial) (Kafka 2016)
   - Zámek (1922) – *Das Schloss* (The Castle) (Kafka, Howe 1992)

Franz Kafka is undoubtedly one of the most analysed authors of the Law and Literature movement. His texts were not included in Wigmore's list, but since their publication is hard to imagine such list without Kafka.

Franz Kafka was a Bohemian Jew writing in German but fluent in Czech, born in Prague in Austro-Hungarian empire, but he had a Czechoslovakian nationality after the WWI. In conclusion, we can include him to our list culturally and geographically.

Kafka himself successfully finished his legal studies and even worked as a lawyer for some time. In his works, there are characters of lawyers, trials are described, and matters of law, justice or norms in general are parts of a plot.[2] Thus, we can include his works to our list also as for content of his works.

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[2] See for example: Minkkinen 1994, pp. 349–363, Litowitz, D. E. 2002, pp. 103–137, Teubner 2013, pp. 405–422.
Kuna 1974, Ost, Lapidus 2006, pp. 3–19, Deleuze 1986, Finet 1988, Litowitz 2011, pp. 48–65. Posner 2010, pp. 207–215, Corngold 2011, Mladek 2003, pp. 223–249, Banakar 2010, pp. 463–490, Glen 2007, Litowitz 2002, pp. 103–137, Van Houtum 2010, pp. 285–297.

4. **Robert Musil**
   - Die Verwirrungen des Zöglings Törless (1906) (Musil 1911) – *The Confusions of Young Törless* (Zmatky chovance Törlesse [Musil 2011a])
   - Der Mann ohne Eigenschaften (1930-1943) (Musil 1975) – Man Without Qualities (Musil 2011) (Muž bez vlastností [Musil 1998])

Robert Musil is an author with obvious importance for the Law and Literature academia, but as Jeanne Gaakeer notes: "*attention to Robert Musil has been relatively scarce within law and literature studies*." (Gaaker, Simonsen, Skålevåg 2013, p. 1) Nevertheless, he is one of the most valued modernist literates in general and his Man Without Qualities is usually seen as a masterpiece of German literature (Thiher 2009).

Robert Musil spend parts of his childhood and youth in the Czech part of Austro-Hungarian Empire and shared the same cultural space as for example Franz Kafka. However, he wrote in German and after WWI, his nationality was Austrian. Still, his works should be included in our list, because his main topic is power and its abuse, which is one of the crucial focuses of Law and Literature studies.

5. **František Langer**
   - Periférie (1925) – *The Outskirts (Langer, 1928)*
   - Svatý Václav (1912) – *Saint Václav* (not translated to English or German)
   - Snílci a vrahové (1921) – *Dreamers and Murderers* (not translated to English or German)
   - Zlatá Venuše (1910) – *Golden Venus* (not translated to English or German)
   - Velbloud uchem jehly (1923) – *The Camel through the Needle's Eye*[3]

František Langer is an author who systematically dealt with questions of guilt, justice and punishment in his works. He was a Jew, lived mostly in Bohemia, wrote Czech and had a Czechoslovak nationality after 1918. He studied and practiced medicine, was member of the Czechoslovak Legions in Russia during the World War I and a brigade general for the Czechoslovak army abroad in the World War II (Brázda 2012).

Nevertheless, most importantly for our project, he wrote several plays, which were highly esteemed by critics and popular for the audience,

3 There is an English translation for theatre. Unfortunately, it was not published

both in Czechoslovakia and abroad (Warren 1983, pp. 123–136).[4] Two of them were used for scripts for popular movies too. In conclusion, plays by František Langer fulfil all conditions for our list.

By the way, Langer knew personally and was friends with Jaroslav Hašek, knew Čapek and was a member of Karel Čapek's literary group and knew Kafka probably quite well. Obviously, world of the Czechoslovak literature was not very large during that time.

All previously mentioned authors are known internationally.

6. **Alois Jirásek**
   - Temno (1913–1915) – *Darkness* (not translated to English or German)
   - Jan Hus (1911) – (not translated to English or German)
   - Lucerna (1905) – *The Lantern*[5] – *Die Laterne* (Jirásek 1906)
   - Pan Johanes (1909) – *Mister Johanes* (not translated to English or German)

Alois Jirásek was a Czech writer and historian and is known mostly in the Czech Republic nowadays (Locke 2005, pp. 86–112). His works are not very popular today, however in his time, they were. Thus, it is not surprising that many of them were made to movies.[6] He was a public intellectual who worked enthusiastically for Czechs and Czech culture his whole life. Because of his belief in Czech identity and Czech culture, topics of his texts are mostly based on Czech history, especially Czech issues with Habsburg monarchy as an authority.

Alois Jirásek worked as a high school history teacher and became a senator it the National Assembly in 1920. He wrote in Czech, lived his all life in Bohemia and was a strong supporter of Czechoslovak autonomy (Novák 1930, pp. 213–216).

7. **Hugo Vavrečka**
   - František Lelíček ve službách Sherlocka Holmese (1908) – *Lelíček in the Services of Sherlock Holmes* (not translated to English)

Hugo Vavrečka wrote his only published literary work, a crime story variation on Sherlock Holmes, under a pen name Hugo Vavris. He was a journalist, a diplomat, a successful manager of Baťa Company and Minister

4 See also: Parish 1977, pp. 55–67, Komporaly 2011, pp. 129–143, King 2007, p. 147.

5 There is supposedly an English translation from 1925 but there is not a reliable scientific source for this claim.

6 See *Lantern (1925) or Jan Hus (1954) or Darkness (1950)*

of Information in the last Czechoslovak government before the Nazi invasion.[7] He wrote in Czech and had a Czechoslovak nationality. His text included in our list is a crime story and as such, portrays methods of law. A movie directed by Karel Lamač is based on this book.[8]

8. **Gabriela Preissová**
   - Gazdina roba (1890) – *The Farm Mistress* (not translated to English or German)
   - Její pastorkyňa (1930) – *Her Stepdaughter* (not translated to English or German)

9. **Marie Pujmanová**
   - Povídky z městského sadu (1920) – *Stories from the city orchard* (not translated to English or German)

10. **Brothers Mrštík**
    - Maryša (1894) – *Marysha* (not translated to English or German)

Ad 8, 9, 10)

Female authors and heroines were a rarity in Czech literature in the end of the 19th century, however they told a crucial narrative of gender emancipation in Czechoslovakia (Pallasvuo 2014). Plays by Preissová (Jusová 2005, pp. 63–78) are played on stage even today and Maryša too. They are parts of literary canon and popular too (and adapted to movies and operas).[9]

All mentioned authors lived in Czech lands and wrote in Czech. Issue of gender equality is fundamentally legal and strongly linked to political situation in a new republic, which gave voting rights to women in 1920 (Musilová 2012).

11. **Jiří Mahen**
    - Jánošík (1910) – *Janosik* (not translated to English or German)

12. **Josef Karel Šlejhar**
    - Vraždění (1910) – *Slaughter* (not translated to English or German)

13. **Karel Matěj Čapek-Chod**
    - Kašpar Lén Mstitel (1908) – *Kaspar Len. Der Rächer* (Čapek-Chod 1957) (not translated to English)

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7 And he was grandfather of Václav Havel, but that is another story for Law and literature studies.

8 See *Leliček in the Services of Sherlock Holmes (1932)*

9 Compare Cheek 2016 or Tyrrell 2014 or Tyrrell 1988, p. 119.

14. **Julius Zeyer**
    - Dům U Tonoucí hvězdy (1897) – *House at the Drowning Star* (not translated to English or German)

15. **Karel Václav Rais**
    - Kalibův zločin (1892) – *Kalibas Verbrechen* (Rais 2018) (not translated to English)

16. **Jindřich Šimon Baar**
    - Jan Cimbura (1908) – *Johann Cimbura: Eine südböhmische Idylle* (Baar 1941) (not translated to English)
    - Poslední soud (1911) – *The Last Judgement* (not translated to English or German)

Ad 11–16)

All authors mentioned in this section of the list wrote in Czech and lived mostly in Czech lands. Style of their texts is a range from romanticism (Zeyer) through realism and naturalism (Šlejhar) to expressionism and decadence.

All of them are known only in Czech area but are considered important literary authors especially in connection to Czech culture and identity (Pytlík 1984, pp. 203–215). In all chosen texts, trials or legal methods are depicted and legal issues are part of a plot.

17. **Karel Klostermann**
    - Rychtářův syn (1890) – *Der Sohn des Freirichters* (Klostermann, Dvorak 1998) (not translated to English)
    - Ze světa lesních samot. Roman (1891) – *Aus der Welt der Waldeinsamkeiten* (Klostermann 1993) (not translated to English)
    - V ráji šumavském. Roman (1893) – *Die Erben des Böhmerwald-Paradieses* (Klostermann, Dvorak 2002) (not translated to English)

Karel Klostermann lived most of his life in Bohemia, but Bohemia that was a part of Habsburg monarchy. He strongly believed in co-existence of Czechs and Germans and wrote his texts in both Czech and German. He lived in Šumava, ie. Bohemian Forest and it became main topic of his texts. In all his texts chosen for our list, he dealt with legal issues in everyday life in Šumava.

4 Next steps

The texts will be processed using interpretative analysis method and analysis of the literal discourse (Webley 2013, p. 938), which we will use in the spirit

of classic grounded theory method (Glaser, Strauss 1967). For grounded theory method the theoretical sampling is quintessential. The principle of the chosen method is the search for a theory firmly grounded in empirical data, which in this case represent fictional texts. To the grounded theory method more consistently, the aim of the project is to go deeper than to the thematic description of the texts. The objective is to find and describe the types of connections, influences and meanings that are attributed to the legal field, its actors and relations and the actors beyond them. The texts will be analysed according to their content related to law (Finnegan 2006, p. 146) and coded according to results of preliminary research. According to analysis of texts and their symbolic values anthropological methods should be used – e.g. synepeia analysis (Fikentscher 2016, p. 2018).

Technically, we will proceed by the method of encoding, as described in the research literature (Glaser, Strauss 1967)[10]: After the first reading of texts we will follow through the method of open coding, which will result in corpus of meaningful expressions and a themed set of the basic concepts that describes them will be further analysed. In parallel with this analytical process, critical scientific literary review (Boell, Cecez-Kecmanovic 2010, pp. 129–144).

This have two goals: (1) Get an overview of professional degree of knowledge for the wider context of the results in the latest analytical phase and (2) simultaneously as a source of knowledge about possible texts included in the corpus of literature intended for analysis during theoretical sampling.

Answering the above-mentioned research questions (see letter b) has more goals. Besides general contribution to a more thorough description of the specific period in the Czech legal history, it is mainly the following:

1. Identify the mechanisms by which fictional texts work with the theme of "law".
2. Evaluate the possibility of their use in communicating legal issues in the public space.
3. Assess the use of the acquired knowledge to the development of critical thinking in the field of law, but also in other disciplines of social science that focus on social changes in the period of modernity (sociology, literary criticism, cultural history, etc.).

10 See also Strauss, Corbin 1998, Řiháček, Čermák, Hytych 2013 or Charmaz 2014.

5 Conclusion

There are three main groups of literary texts relevant for our research project, based topics included in their plot:

1. modernity
2. identity (state/nationality/gender)
3. everydayness.

Each text included in our list will be analysed concerning those three topics. In result, we hope to determine how identities were created in Czechoslovakia based on its representation in literature, how society became modern (especially concerning law), how everyday life looked like, and how its portrayal influenced Czechoslovak legal culture.

Still, our list is a list of literary works each Czech lawyer should know if she wants to be familiar with our legal heritage and legal culture. Of course, there is still almost hundred years of literature left between 1925 and today and for example, Milan Kundera, Bohumil Hrabal or Václav Havel are definitely authors relevant for Law and Literature studies.

But that would be (and hopefully will be) another part of a Czech list of legal literature.

References

Baar, J. Š. (1941). Johann Cimbura: Eine S*üdböhm. Idylle [Die Übers. aus d. Tschech. besorgte Josef Blau]*. 1.-3. Tsd. Leipzig. Kreisel.

Banakar, R. (2010). In Search of Heimat: A Note on Franz Kafka's Concept of Law. Law & Literature. No. 3, pp. 463–490.

Němcová Banerjee, M. (1985). Maria Němcová. Czech Laughter between Hašek and Kafka. World Literature Today. No. 1, pp. 14–17.

Boell, S., Cecez-Kecmanovic, D. (2010). Literature Reviews and the Hermeneutic Circle. Australian Academic & Research Libraries. No. 2, pp. 129–144.

Bradbrook, B. R. (1998) Karel Čapek : In Pursuit of Truth, Tolerance, and Trust. Sussex Academic Press.

Brázda, O. (2012). Lékař a spisovatel František Langer. Prakticky Lekar. No. 8, pp. 477–482.

Brust, R. (2008). The 25 Greatest Legal Movies. ABAJ.

Chalupecký, J. (1991). Podivný Hašek. *Česká literatura*, pp. 28–40.

Cheek, T. (2016) Jenufa: Translations and Pronunciation. Rowman & Littlefield.

Corngold, S., Wagner, B. (2011). Franz Kafka: The Ghosts in the Machine. Northwestern University Press.

Čapek, K. (1925). Krakatit. Translated by Lawrence Hyde. London. Geoffrey Bles.

Čapek, K. (1975). The Absolute at Large. New York. Garland Pub.

Čapek, K., Comrada, N. (2002) Cross Roads. North Haven, CT: Catbird Press.

Čapek, K., Comrada, N. (1994). Tales from Two Pockets. North Haven, CT: Catbird Press.

Čapek, K., Koreis, V. (2008) R.U.R. (Rossum's Universal Robots) & THE ROBBER: Two Plays by Karel Čapek. Brisbane. Booksplendour Publishing.

Čapek, K., Novack, C. (2004). R.U.R. (Rossum's universal robots). New York. Penguin Books.

Čapek, K. (2014). Capek Four Plays: RUR; The Insect Play; The Makropulos Case; The White Plague. Bloomsbury Publishing.

Čapek-Chod, K. M., Lén, K. (1957). Der Rächer. Aus dem Tschechischen von Peter Pont. Artia Prag.

Davies, Ch. (2000). The Savage Style of Jaroslav Hašek: The Good Soldier Švejk as a Politically Incorrect Comic Masterpiece. Stylistyka. No. 9, pp. 301–315.

Darkness (1950) – Filmový přehled [online]. Directed by Karel Steklý [vid. 2019-07-24]. Dostupné z: https://www.filmovyprehled.cz/en/film/396119/darkness.

Deleuze, G. (1986). Kafka: Toward a Minor Literature. University of Minnesota Press.

Draucker, C. B. et al. (2007). Theoretical Sampling and Category Development in Grounded Theory. Qualitative Health Research. No. 8, pp.1137-1148.

Evans, R. J. W. (2004). Language and State Building: The Case of the Habsburg Monarchy. Austrian History Yearbook, pp. 1–24.

Fikentscher, W. (2016). Law and Anthropology. Munich. C.H.Beck, p. 218.

Finnegan, R. (2006). Using Documents. In: Sapsford, Roger and Jupp, Victor. Data Collection and Analysis. London. SAGE Publications, p.146

Finet, S. (1988). Franz Kafka‘s Trial as Symbol in Judicial Opinions. Legal Studies Forum. No. 12.

Freed, M. M. (2011). Robert Musil and the NonModern. A&C Black.

Gaaker, J., Simonsen, K.-M. and Skålevåg, S. A. (2013). Focus: Robert Musil. Pólemos. No. 1.

Giorgi, K. (2014). Culture As Identity. In: Emotions, Language and Identity on the Margins of Europe. London. Palgrave Macmillan, p. 103-116.

Glaser, B. G., Strauss, A. L. (1967). The Discovery of Grounded Theory: Strategies for Qualitative Research. Chicago, IL. Aldine Publishing Company.

Glen, P. J. (2007). The Deconstruction and Reification of Law in Franz Kafka‘s Before the Law and The Trial. South California Interdisciplinary Law Journal. No. 1.

Hanuš, J. (2011). Kdo může za můj hřích? In: Peisertová, l., Petrbok,V., Randák, J.. Zločin a trest v české kultuře 19. století. 1. vyd. Praha. Academia.

Hašek, J., Lada J. (1981). The Red Commissar: Including Further Adventures of the Good Soldier Švejk and Other Stories. New York. The Dial Press.

Hašek, J., Sadloň, Z. K., Joyce, M (2009). The Fateful Adventures of the Good Soldier Švejk During the World War. Samizdat edition. Chicago. 1st Books.

Jan Hus (1954) – Filmový přehled [online]. Directed by Otakar Vávra [vid. 2019-07-20]. Dostupné z: https://www.filmovyprehled.cz/en/film/396186/jan-hus.

Jirásek, A. (1906). Die Laterne (Lucerna). übersetzt von Spiridion Wukadinovi. Prag.

Jonsson, S. (2000). Subject Without Nation: Robert Musil and the History of Modern Identity. Duke University Press.

Jusová, I. (2005). Gabriela Preissová's Women-Centered Texts: Subverting the Myth of the Homogeneous Nation. The Slavic and East European Journal. No .1, pp. 63–78.

Kafka, F. (2016). The Trial. Simon & Brown.

Kafka, F., Josipovici, G (1993). Collected stories. New York. Random House.

Kafka, F., Howe, I. (1992). The Castle. Trans. Willa MUIR a Edwin MUIR. New York. Everyman's Library.

King, K. (2007). Western Drama Through the Ages: Four Great Eras of Western Drama. Greenwood Publishing Group, p. 147.

Klíma, I., Comrada, N. (2002). Karel Čapek : Life and Work. Catbird Press.

Klostermann, K., Dvorak, G. (1998). Der Sohn des Freirichters: Böhmerwald-Geschichten. Andreas-Haller-Verlag.

Klostermann, K., Dvorak, G. (2002). Die Erben des Böhmerwald-Paradieses. Buch-und Kunstverl. Oberpfalz.

Klostermann, K. (1993). Aus der Welt der Waldeinsamkeiten: ein Roman aus dem Böhmerwald; autorisierte Übersetzung. Morsak.

Klusoňová, M. (2013). Why Havel s Plays Should Be Still Played? In: Šavelka, J. et al. Argumentation 2013: International Conference on Alternative Methods of Argumentation in Law. Brno: Masaryk University.

Komporaly, J. (2011). The Gate Theatre: A Translation Powerhouse on the Inter-War British Stage. Journal of Adaptation in Film & Performance, No. 2, pp. 129–143.

Kuna, F. (1974). Franz Kafka: Literature as Corrective Punishment. Indiana University Press.

Kühn, Z. (2011). The Judiciary in Central and Eastern Europe: Mechanical Jurisprudence in Transformation? Brill.

Langer, F. (1928). Peripherie: Schauspiel in drei Akten. 3. Auflage. Berlin. Oesterheld.

Lantern (1925). Filmový přehled [online]. Directed by Karel Lamač [20. 7. 2019]. https://www.filmovyprehled.cz/en/film/395347/lantern

Lelíček in the Services of Sherlock Holmes (1932) – Filmový přehled [online]. Directed by Karel Lamač [vid. 2019-07-24]. Dostupné z: https://www.filmovyprehled.cz/en/film/395571/lelicek-in-the-services-of-sherlock-holmes.

Litowitz, D. E. (2002). Franz Kafka‘s Outsider Jurisprudence. Law & Social Inquiry. No. 1.

Litowitz, D. E. (2011). Max Weber and Franz Kafka: A Shared Vision of Modern Law. Law, Culture and the Humanities, 2011, No. 1.

Locke, B. (2005). Novák‘s Lucerna and the Historiographical Problem of” Czech Modernism”. Intersections: Canadian Journal of Music/ Intersections: revue canadienne de musique. No. 1.

Mańko, R., Škop, M., Štěpáníková, M. (2016). Carving Out Central Europe as a Space of Legal Culture: A Way Out of Peripherality? Wroclaw Review of Law, Administration & Economics. No. 2.

McBride, P. (2006). The Void of Ethics: Robert Musil and the Experience of Modernity. Northwestern University Press.

Minkkinen, P. (1994). The Radiance of Justice: On the Minor Jurisprudence of Franz Kafka. Social & Legal Studies, No. 3.

Mladek, K. (2003). Radical Play: Gesture, Performance and the Theatrical Logic of the Law in Kafka. The Germanic Review: Literature, Culture, Theory. No. 3, pp. 223–249.

Mölk, U. (ed.) (1996). Literatur und Recht: literarische Rechtsfälle von der Antike bis in die Gegenwart. Wallstein Verlag.

Musil, R. (1975). Der Mann ohne Eigenschaften: Roman. Berlin. Volk und Welt.

Musil, R. (1911). Die Verwirrungen des Zöglings Törless. München. Georg Müller.

Musil, R. (1998). Muž bez vlastností. Vyd. 2. Praha. Argo.

Musil, R. (2011). The Man Without Qualities. London. Picador.

Musil, R. (2011a). Zmatky chovance Törlesse. Praha. Argo.

Musilová, D. (2012). Mothers of the Nation: Women's Vote in the Czech Republic. The Struggle for Female Suffrage in Europe. Leiden. Brill.

Novák, A. (1930). Alois Jirásek. The Slavonic and East European Review. No. 25.

Olson, G. (2010). De-Americanizing Law and Literature Narratives: Opening Up the Story. Law & Literature. No.2, pp. 338–364.

Ost, F., Lapidus, R. (2006). The Law as Mirrored in Literature. SubStance. No.1, pp. 3–19.

Parish, F. (1977). Max Reinhardt's American Tour 1927-28: A Legacy Understood or Misunderstood? Modern Austrian Literature, No. 1, pp. 55–67.

Payne, P. et al. (ed.) (2007). A Companion to the Works of Robert Musil. Camden House.

Pallasvuo, K. I. (2014) The Formation of the Female Self in Czech Literature, 1890-1945. PhD Thesis. UCL (University College London).

Papoušek, V. (2010). Dějiny nové moderny: Česká literatura v letech 1905-1923. Praha. Academia.

Papoušek, V. (2014). Dějiny nové moderny 2. Lomy vertikál: Česká literatura v letech 1924−1934. Praha. Academia.

Papoušek, V. (2017). Dějiny "nové" moderny 3. Věk horizontál: Česká literatura v letech 1935-1947. Praha. Academia.

Parrott, Sir C. (1986) The Bad Bohemian: The Life of Jaroslav Hasek Creator of the Good Soldier Svejk. Bodley Head.

Posner, R. A. (2010). Kafka: The Writer as Lawyer. Columbia Law Review. No. 1, pp. 207–215.

Pytlík, R. (1984). Nové rysy literatury na přelomu století (Úvaha o koncepci dějin české literatury 1890—1918). *Česká literatura*, pp. 203–215.

Pytlík, R. (1969). Švejk ve světě. *Česká literatura*, 1969, No. 3, pp. 265–273.

Stern, J. P. (1968). War and the Comic Muse: The Good Soldier Schweik and Catch-22. Comparative Literature. No. 3, pp. 193–216.

Rais, K. V. (2018). Kaliba's Verbrechen: Ein Bild aus dem Nordböhmischen Vorgebirge. Forgotten Books.

Řiháček, T., Čermák, I., Hytych, R. (2013). Kvalitativní analýza textů: čtyři přístupy. Brno. Masarykova univerzita.

Charmaz, K. (2014). Constructing Grounded Theory. London. Sage.

Strauss, A. L., Corbin, J. M. (2014). Basics of Qualitative Research: Techniqeus and Procedures for Developing Grounded Theory. London: Sage Publications.

Teubner, G. (2013) The Law Before its Law: Franz Kafka on the (Im) Possibility of Law's Self-Reflection. German Law Journal. No. 2, pp. 405–422.

Thiher, A. (2009). Understanding Robert Musil. University of South Carolina Press.

Tyrrell, J. (2014). Janácek's Operas: A Documentary Account. Princeton University Press. 2014.

Tyrrell, J. (1988). Czech Opera. Cambridge University Press.

Van Houtum, H. (2010). Waiting Before the Law: Kafka on the Border. Social & Legal Studies. No. 3, pp. 285–297.

Vaněk, K. (1927/28) Die Abenteuer des braven Soldaten Schwejk in russischer Gefangenschaft. 2 Bände. Übersetzung Grete Reiner. Illustrationen Josef Lada. Prag. A. Synek.

Ward, S. F. (2009)- The 25 Greatest Legal TV Shows. ABAJ.

Warren, J. (1983). Max Reinhardt and the Viennese Theatre of the Interwar Years. Maske und Kothurn. No.1-4, pp. 123–136.

Webley, L. (2013). Qualitative Approaches to Empirical Legal Research. In: Cane, P. and Kritzer, H. M. The Oxford Handbook of Empirical Legal Research. Oxford. Oxford University Press.

Weisberg, R. H., Kretschman, K. L. (1977). Wigmore's Legal Novels Expanded: A Collaborative Effort Law and Literature II. Maryland Law Forum, pp. 94–103.

Weitzman, E. (2006). Imperium Stupidum: Švejk, Satire, Sabotage. Law & Literature. No. 2, pp. 117–147.

White, J. B. (1987). Law and Literature: No Manifesto. Mercer Law Review.

White, J. B. (1985). The Legal Imagination. University of Chicago Press.

Wigmore, J. H. (1907). List of Legal Novels. Illionis Law Review.

Wintr, J. (2018). Kafka und Schwejk. In: The Idea of Justice in Literature. Wiesbaden. Springer VS, pp. 101–112.

Zeuch, U. (2000). Einleitung. Recht und Literatur um 1800 im Kontext des Law and Literature Movement. Internationales Archiv für Sozialgeschichte der deutschen Literatur. No. 1, pp. 77–84.

Teaching the European Union through Kafka's story The Great Wall of China. Nothing New Under the Sun?

Nellie Munin[1]

Abstract

This article explores the possibility of teaching current EU dilemmas using Franz Kafka's short story *The Great Wall of China* as an allegory. It is an attempt to apply the strong political criticism this story implies to the current regime of the European Union. That story was written more than one hundred years ago, before the establishment of the EU. Nevertheless, this didactic exercise illustrates the similarity of relationship between citizens and governments, as well as political challenges and dilemmas, characterizing mainly, but not only, huge empires and international political alliances throughout human history: geographic distance perceived as political remoteness; the advantages and risks underlining mega-projects, uniting masses of people, under a sense of purposefulness; governmental devices to ensure the political stability in large empires or alliances; and the role walls fill in global and local politics.

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Keywords

Kafka; Short Story; Allegory; Democratic Deficit; European Union.

1 Introduction

1.1 Allegory

This article explores the possibility to teach EU's evolvement and current dilemmas using Franz Kafka's story: *The Great Wall of China*, as an allegory.

> An allegory is a work of art, such as a story… in which the characters, images, and/or events act as symbols… An author may use allegory to illustrate a… political or historical situation.[2]

Allegory is a very old form of illustration, relying on the fact that "[i]t is of the very nature of thought and language to represent what is immaterial in picturable terms." (Lewis 2013, p. 55) It shares some common features with image, metaphor, symbol and myth, all underlined by the combination of imagery, representation of sensation as well as analogy and comparison.

Allegory is described as "unification of disparate ideas".

> The visual image is a sensation or a perception, but it also ‚stands for', refers to, something invisible, something ‚inner'. It can be both presentation and representation at once… the image may exist as ‚description' or… as metaphor.

Ezra Pound defined image as "that which presents an intellectual and emotional complex in an instant of time." (Wellek, Warren 1963, p. 187)

Middleton Murry suggested that an image underlying a metaphor may be visual, but also "wholly psychological." (Murry 1931, pp. 1–16)

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2 See Literary Devices, available at: http://www.literarydevices.com/allegory/; See also Fletcher 1964. While some argue that all literary interpretation is allegorical, e.g. Frye 1967, p. 89, others attempt to narrow allegory's definition, e.g. Quilligan 1979. Aijaz Ahmad recognized the bond between ‚private imaginations' and ‚experiences of the collectivity in literature' in his article "Jameson's Rhetoric of Otherness and the ‚National Allegory'" *(Ahmad 1987*, pp. 15, 17).

1.2 The Merits of Allegory as a Didactic Tool

Allegory is often used in the literature to facilitate readers‘ accessibility to sophisticated ideas. The “concept of national allegory” uses the “narrative as a means by which individual experience and a broader social totality may be somehow represented and reconciled.” (Tally 2017)

Political interpretation of literary texts may thus contribute to the understanding of these texts, and of reality, particularly when current readers try to understand literature that was written in previous ages (Jameson 1981).

Due to its unique qualities, using allegory as a didactic tool ensures that “students remain actively engaged” (Jameson 1981, p. 9) in the learning process:

> …through its coding the allegory forces the reader to pay attention to reality. This is very valuable didactically, because reality isn’t trivial. In addition, the stimulation on the semantic level of self-irony, parody, personification and caricature awakens the reader’s imagination, enabling him to look at things in a new, often truer, light (Jameson 1981, p. 2).

Simultaneously, using an allegory helps detaching the students from ideologies, opinions, emotions and feelings held with regard to an examined political reality, allowing for its fresh and more objective observation, that may lead to fresh insights.[3]

1.3 The Story

The Great Wall of China was written by Franz Kafka in 1917. It was first published only after his death, in 1930.[4] Kafka who was Czech,[5] held a PhD diploma in legal studies from Karl University in Prague, and his world view and fiction writing was inspired by his training and work as a lawyer and as a bureaucrat.[6]

3 This didactic aim may be obtained by other didactic tools, such as role plays, as well. See for example Munin, Efron 2016, pp. 309–331.

4 This story was first published in *Der Morgen*, a German literary magazine. A year later, Max Brod included it in *Beim Bau der Chinesischen Mauer*, the first posthumous collection of short stories by Franz Kafka.

5 Many of Kafka‘s novels refer to remote destinations, which he (and probably many of his readers) never visited. These distant places help him create the sense of utopia characterizing many of his stories: the distance and exoticism of these places detach his readers from biased perceptions connected with reality, allowing for the “quest for the new as the new” (Zilcosky 2003, p. 17).

6 See Glen 2007, pp. 23–66, Banakar 2010, pp. 463–490.

Historically, that Chinese Wall was gradually built from the 7th century BC to the 17th century AC. The narrator's recall of events that took place fifty years before this project begun, may imply that the plot takes place in or around the 7th century BC. However, the author's avoidance to explicitly specify the period when the plot takes place may be deliberate, aimed at creating an eternal allegory.

1.3.1 The Narrator

‚The Great Wall of China' is a monolog told from a ‚bottom up' perspective, by an old man, admitting his restricted perspective, emanating from his remote place of living and limited education.[7] Nevertheless, four elements establish his authority as a witness, authentically describing the spirit of his era: *his old age*[8] – implying long life experience and maybe some acquired wisdom, a broad perspective, enabling comparison between past and present, and willingness to share his thoughts frankly, feeling that at his age, he has nothing to lose; *the fact that he lived all his live in the place described in the story*: a god forsaken province in the south-eastern margins of the great Chinese empire; *his professional education and practice as a mason;* and his *active participation in building the Wall*, ensuring his insights are based on his personal experience. At the same time, the narrator is one of *many* who built the Wall. He admits his perception of things is subjective and imperfect, and the story reflects it is also imperfectly shaped by those who purport to rule an empire. The narrator is thus an ‚everyman' illustrating Kafka's message that in a sense, we all share a subjective and imperfect perception of our reality. Kafka's choice of him to be the narrator further reinforces a major underlying question: to what extent are common citizens capable of understanding the big picture?

1.3.2 The Sub-Themes

The narrator's monolog refers, *inter alia*, to the following sub-themes: why the Wall was built piecemeal (in small sections, in many different places), the relationship of the Chinese people with the past and the present and their emperor's imperceptible presence.

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7 ‚Bottom up' heroes with restricted perspective and limited abilities are common in Kafka's novels (Constantine 2002, p. 21).

8 In many cultures, old age is associated with wisdom, life experience and seniority. In the Chinese culture, these values are associated with Confucian religious and cultural concepts. E.g., Bryant 2017 or Huffington Post (2017).

1.3.3 Political Criticism

Kafka's story includes strong criticism regarding the Chinese regime it describes, that may have been allegorically attributed to regimes that existed during his lifetime, in the beginning of the 20th century. At the same time, it seems relevant to current regimes. The reason may be that Kafka used China as a symbol to all man-kind.[9]

1.4 The Story and the EU

The European Union did not exist during Kafka's lifetime: he passed away in 1924. He could not have consciously intended his story as an allegory to the EU. Nevertheless, it is clear that Kafka referred to the Wall of China as a symbol: "… an object which refers to another object but which demands attention also in its own right, as a presentation." (Wellek, Warren 1963, p. 189)

A symbol is characterized by the "translucence of the eternal through the temporal" (Coleridge 1853, pp. 437–438). It differs from an image, used once, by persistently recurring (Wellek, Warren 1963, p. 189).[10] However, the literature recognizes the ‚image symbol' (Wellek, Warren 1963, p. 197) which combines the effect of the two.

"Kafka thought of his readers as necessary participants in the process of making sense." (Constantine 2002, pp. 14, 23) Perceiving his story as an allegory "breaks down the seamless quality of cultural description by adding a temporal aspect to the process of reading." (Cliford 1984, p. 99)

The Chinese Wall and the EU seem to share Wellek and Warren's understanding of modern myths: utopian programs "meaning that while such an ideal will never become historic fact it must, in order to motivate and dynamize… be present as a future historical event." Modern myths combine together ‚form' and ‚matter', which is "social, anonymous, communal." (Wellek, Warren 1963, pp. 191, 193)

Given that Kafka's story is an allegory about power, politics, and the people's perspective on the governing class, it is interesting to examine the validity of Kafka's insights in light of current reality, attempting to attribute to his modern myth a new, topical dimension. We will try

9 E.g. Rojas 2015.

10 They mention the Greek origin of this verb, "which means to throw together, to compare…" (Wellek, Warren 1963, p. 188)

to do so respecting the rule that "the meaning of a text can be understood variously, but not arbitrarily" (Hábl 2016, p. 6).

If this exercise works, it may reflect the similarity of legal and political challenges, running like a thread throughout human history.

2 Section 1: Vision and Overall Challenges

2.1 Publishing the Vision in Advance

Like each mega-project, the Great Wall of China started with a vision:

> Fifty years before the start of construction it was announced throughout the whole region of China which was to be enclosed within the wall…[11]

Similarly, the vision of creating a European Union developed hundreds of years before its realization (Pasture 2015), maturing into a pragmatic phase following World War II (Stirk 1989).[12] Like the Chinese Wall's vision, the vision of the EU was broadly and publicly announced (e.g. at the Hauge Congress, 1948) long before its realization. Even nowadays, new considered phases of integration among EU member states are publicly announced in advance (E.g. Juncker 2015).[13]

2.1.1 No Public Discourse about Project Planning

Kafka's story does not mention any public discourse, involving the Chinese citizens in a brainstorming process with regard to the Chinese Wall's project. They were informed about the project in advance, to encourage them to get the necessary vocational training (particularly in masonry or architecture) to participate in the building of the wall. Similarly, most EU citizens were scarcely involved in the preliminary phases of establishing this alliance.

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11 All citations of the story used in this article are taken from its English translation from German: Kafka, Franz. *The Great Wall of China.* Translated by Johnston, Ian. Vancouver Island University Nanaimo. 2015.

12 See also Stirk, Smith 1990.

13 See also Juncker 2017b.

While the Chinese people in the story could not have anticipated a democratic discourse, living in a monarchy ruled by an emperor, EU citizens living in democratic countries seem to legitimately expect such discourse.

Due to their strong criticism[14] regarding the EU's ‚democratic deficit', EU authorities gradually initiate more transparent decision-making processes, allegedly calling for an open public discourse regarding the future of the EU and the substance of this alliance. Nevertheless, lack of professional knowledge still undermines effective participation of most EU citizens in such discourse (Habermas 2013). Even where public brainstorming takes place, its effect is doubtful: see, e.g., the unfelt effect of some 2000 public consultation events the EU Commission initiated between March and September 2017, to discuss the 2017 White Paper (Juncker 2017a) that suggested five possible scenarios for the future of EU integration. In his State of the Union Address speech of September 2017 (Juncker 2017), the President of the European Commission repeated Commission's traditional position, supporting maximum enhancement of EU integration, which seems to prevail.

2.1.2 Participation in the Project – A Free Choice

In Kafka's story, when the plans to build the Chinese Wall were published, certain citizens, "worried about the building of the wall, changed their place of residence with incredible speed." Such phenomena take place in the EU as well: EU citizens may practice their freedom to change their place of residence in light of expected effects of EU integration on their daily lives. EU citizens may leave countries joining the EMU, or adapting their laws to strict EU standards, to countries with more flexible regulation. In the broader sense, this freedom also applies to EU membership as a whole, as the Brexit illustrates.

The choice whether – and to what extent – to participate in these respective projects: the Wall of China and the EU, is thus voluntary and should not be perceived as an inevitable decree of faith. This fact softens all potential criticism regarding these projects.

14 E.g. Majone 1998, pp. 5–28, Hix, Føllesdal 2006, pp. 533–562, Moravcsik 2008, pp. 331–340 or Grimm 2015, pp. 460–473.

2.2 The Challenges of Mega Projects

2.2.1 Foundations' Strength

The story draws a link between the Chinese Wall and the Babel Tower,[15] to which the EU project is also often compared.[16] The three stories share similar elements: many people, of many nationalities and cultures, speaking different languages (or dialects), with different interests, trying to combine their efforts to construct an ambitious, immense project that has never been built before. For obvious reasons their differences lead to confusion, risking the projects at stake. According to the story, when the Chinese Wall project took place, a scholar wrote a book[17] arguing, based on his research, that the Babel Tower collapsed not because of the reasons specified in the Bible, but rather due to the weakness of its foundations.

That scholar suggested that the Chinese Wall could form a strong foundation for a new Babel Tower. While mentioning that the scholar drew some "hazy" plans to illustrate his idea, the narrator wonders whether the idea that the Chinese Wall might form a basis to a new Babel Tower "could be meant only in a spiritual sense".

Viewed as an allegory to the EU, this observation may suggest that EU's challenges do not emanate from its over-ambitiousness or from the inability of the different peoples involved to communicate, but rather from the weakness of its foundations.

Indeed, the Babel Tower could serve as allegory to the constant EU attempts to define a common, elaborated legal construction ('pragmatic foundations') underlined by common, shared values and interests ('spiritual foundations'), that could form basis for a common regime, bridging the pluralism of EU's "demoi" (Nicolaides 2013, pp. 351–369).

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15 This is not the only case where Kafka addresses the Babel Tower in his writings: Ziarek 1995, p. 197 or Alter 2010, pp. 91–95. Some draw a line between this comparison and Dostoevsky's criticism of political tyranny in his *Brothers Karamazov* (Part 1, Chapter 5), with which Kafka was thoroughly familiar, also using the image of the Tower of Babel. E.g. LaCocque, p. 43.

16 E.g., The Christian Voice 2016. See also Architecture Here and There 2016 or Tylor 2015.

17 Citing a scholar's book corresponds to Kafka's legal and bureaucratic world, where "inferences are drawn, documents and other proofs cited, arguments and counter-arguments proposed." (Alter 2010, p. 94)

Doubting the scholar's idea, Kafka's narrator wonders: how could the Wall, built only as sort of quarter or half circle, provide the foundation for a tower?

There could be two ways to apply this question to EU reality:

One – assume that this is a temporary situation, since foundations' building is still in the process. This may explain the current EU vulnerability.

Alternatively – assume that this situation reflects an intended, final program. In this sense, the non-circled foundations may represent deliberate partial EU integration.

The strength of EU foundations is challenged, spiritually and pragmatically, with each attempt by its leaders to add another 'floor' of integration to this 'tower'. Nevertheless, unlike the Babel Tower, and despite sceptic forecasts, the EU was able to survive previous and recent severe crises, and thrive.

This fact may imply that EU's spiritual and pragmatic foundations are stronger than some assess, similarly to the Great Chinese Wall which is still standing, despite the narrator's skepticism regarding its soundness.[18]

2.2.2 The Human Desire to Break Free from Any Human-Created Boundaries

Referring to the Babel Tower's story, the narrator provides:

> Human nature, which is fundamentally careless and by nature like the whirling dust, endures no restraint. If it restricts itself, it will soon begin to shake the restraints madly and tear up walls, chains, and even itself in every direction.

This observation may explain the ambivalence of the Chinese people in the story towards the Wall project, and of EU citizens towards the EU project. Nevertheless, unlike the Babel Tower case, in the story (and in reality), Chinese people's ambivalence did not eventually undermine the Chinese Great Wall's project, a fact that may encourage EU supporters.

This description may further reflect the constant human urge to achieve perfection and the constant frustration from failing to achieve it, underlying and motivating the ongoing process of building our world (including projects like the Chinese Wall and the EU), trying constantly to improve what we've already gained.

18 The story does not refer to the current state of the Chinese Wall, so one may argue that it should not be considered part of the allegory. Under such interpretation, the story implies that the Wall – unlike the EU – is a wasteful distraction, an imperial project. However, being within Kafka's knowledge when the story was written, I assume he believed his readers to be aware of it as well.

3 Section 2: The Building Process

3.1 Piecemeal Building

3.1.1 Merging East and West

According to the story:

> The Great Wall of China was finished at its most northerly location. The construction work moved up from the south-east and south-west and joined at this point.

Similarly, the EU which started as an alliance of western European countries, turned, after the Iron Curtain's fall in the 1990's into a mutual project of Eastern, Central and Western European countries.[19]

3.1.2 Gaps in the Wall

The story describes the piecemeal system of building:

> It was carried out in the following manner: groups of about twenty workers were formed, each of which had to take on a section of the wall, about five hundred metres long. A neighbouring group then built a wall of similar length to meet them. But then afterwards, when the sections were fully joined, construction was not continued on any further at the end of this thousand-metre section. Instead the groups of workers were shipped off again to build the wall in completely different regions. Naturally, with this method many large gaps arose, which were filled in only gradually and slowly, many of them not until after it had already been reported that the building of the wall was complete. In fact, there are said to be gaps which have never been built in at all…

3.2 Territorial gaps

EU vision aims at the creating a broad, strong economic and political alliance, strengthening its participants' position in their relations with third countries, by creating a synergic effect.[20] One of the strategic assets of this alliance

19 E.g. Sjursen 2003, pp. 491–513.

20 See European Commission. *The History of the European Union*. 2018.

is a broad territory, implying internal benefits, e.g. in terms of transport,[21] enhancement of economic and social cohesion[22] and external benefits, e.g. facilitating global competitiveness[23] and security. Nevertheless, the process of enlarging of EU's territory is gradual, somewhat resembling the piecemeal method of building the Wall as depicted in the story.

Consequently, like in the Chinese Wall described in the story, EU's territorial sequence still suffer gaps, that the EU may want to close in the future, e.g. by accepting the current candidate countries, and wishfully Switzerland,[24] as member states.

3.3 Conceptual (legal and political) gaps

The creation of a customs union implying a uniform external trade policy, shared by all member states, effectively created a legal 'wall' around EU borders. This was later enhanced by further regulation, distinguishing the EU from third countries in all aspects subject to market integration. However, different national interests and occasional constraints, such as the current ongoing financial, economic and political crises, sometimes dictate the development of fragmented regulation, undermining that solid and systematic vision, to meet emergency needs or contemporary political constraints. In some cases, legal gaps by such legislation are filled later. Thus, for example, deficiencies[25] in the financial stabilization mechanism, established in the height of the financial crisis, are gradually addressed by complementary regulation.[26] Direct taxation is only scarcely regulated at EU level, due to strong resistance of EU member states to opt for a higher level of integration in this field. The taxation 'gaps' implied partly undermine the full exhaustion of single market's benefits by the business community (Munin 2011, pp. 121–133).

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21 See Committee of the Regions. *Central European Transport Corridor EGTC Ltd*. 2018.

22 See European Commission. *Territorial Cohesion*. 2018.

23 See European Union. *Territorial Agenda for the European Union, 2020*. Agreed at the Informal Ministerial Meeting of Ministers responsible for Spatial Planning and Territorial Development on 19th May 2011 Gödöllő, Hungary.

24 Switzerland forms a ‚hole' in EU's territorial sequence. Nevertheless, since 1992 the Swiss people reject by referenda attempts to turn Switzerland into an EU member, settling for a series of bilateral, specific agreements that frame their relations. See Swissinfo 2005 and also Goulard 2016.

25 E.g. Maduro, De Witte, Kumm 2012, Baratta 2012, Munin 2016a, pp. 7–31.

26 E.g. Munin 2016, pp. 7–28.

Some of the regulation gaps reflect conceptual gaps: different positions by different EU member states with regard to the desired level of market integration. These differences, combined with the differences in the economic and political profiles of the member states, underline the "multi speed Europe": gaps in integration levels illustrated, for example, by the fact that by now, only 19 out of 28 EU member states have joined the monetary union. This kind of difficulty is almost unmentioned in the Chinese Wall's story where, as a general rule,[27] the Chinese people is depicted uniformly, without reference to different interests that may have distinguished certain regions, ethnic groups, provinces or villages from others, although these may have existed in reality.

3.3.1 Citizens' Difficulty to Notice the Gaps in the Wall

Regarding the Chinese Wall, the narrator confesses:

> In fact, there are said to be gaps which have never been built in at all, although that's merely an assertion which probably belongs among the many legends which have arisen about the structure and which, for individual people at least, are impossible to prove with their own eyes and according to their own standards, because the structure is so immense.

Like the Chinese Wall, the EU is such an immense structure that its individual citizens find it difficult, if not impossible, to assess whether there are still dangerous 'gaps in the wall' necessitating immediate treatment, as EU leaders suggest, e.g. in the 2015 Five Presidents Report (Juncker 2015) and in the 2017 White Paper (Juncker 2017a), and if so – what might be the best manner to fill them satisfactorily.

3.4 Identification with the Project and the Motivation Gap

The narrator indicates three categories of participants in the Chinese Wall's building: the architects and higher and middle supervisors; the masons and subordinate supervisors; and the daily laborers. Each

27 The story mentions one attempt to rebel in one province, which neither succeeded nor spread to others. It is mentioned in a specific context, to be addressed below.

of these groups experienced the project differently, due to different motivation: the *first group* enjoyed the highest motivation:

> The higher supervisors and, indeed, even the middle supervisors, see enough from their various perspectives of the growth of the wall to keep their spirits energized.

The daily laborers, at the other end of the scale, were totally reluctant to the vision, being "driven only by their pay".

The masons and subordinate supervisors had the hardest time: they were men who, right from the first stone which they let sink into the ground, had a sense of themselves as part of the wall… driven not only by the desire to carry out the work as thoroughly as possible but also by impatience to see the structure finally standing there in its complete final perfection.

However, after long years of building the Wall, they experienced distress leading to non-productivity, due to the remoteness of their working sites from their homes, their being "mentally far above their outwardly trivial tasks", and their gradual realization that they might not live to see the end of this project.

The EU seems to suffer similar motivation gaps: EU leaders, driven by the overall vision, seem to enjoy the highest motivation, although to a certain extent, even they have not completely escaped motivational fluctuations during the long life-time of the EU project (Esteve-González, Theilen 2014). The fragmentation of EU regulation and functioning may partly reflect these fluctuations.

Inferior EU's civil servants may be compared to the daily laborers in the story, interested only in their salary and transferred from one site to another according to the needs of the project.

EU citizens, who constantly cater the EU by their labor and tax-paying, reluctant to fully grasp the benefits of EU citizenship, and national leaders caught ‚between the rock (EU leadership[28] and pressures) and the hard place (frustrated citizens)' seem to suffer the greatest motivation crisis.

28 E.g. Grimm 1995, pp. 282–302, Scharpf 2010, Fabbrini 2015, pp. 289–306.

3.5 The Reasons for Piecemeal Building

The narrator specifies three reasons to explain the piecemeal building practice:

1. *Rareness of great professional expertise*

   > [T]he wall was to become a protection for centuries; thus, the essential prerequisites for the work were the most careful construction, the use of the architectural wisdom of all known ages and peoples, and an enduring sense of personal responsibility in the builders… the supervision… required a knowledgeable man, an educated expert in construction, someone who was capable of feeling sympathy deep in his heart for what was at stake here. And the higher the challenge, the greater the demands.

   Similarly, EU's slow development may be partially attributed to the project's sophistication necessitating architects who must be great experts in their respective fields, motivated by a strong feeling of identification with the European Union's vision. Both in the Chinese and European cases, the long establishment processes seem to be advantageous, allowing for the exhaustion of "the architectural wisdom of all known ages and peoples".

2. *The differential treatment of the masons and subordinate supervisors' motivation crisis*

   Decision makers realized that this group has to be "catered to in other ways": unlike the other groups involved in the Wall project, they were allowed to take a break once every five years. They traveled to their distant villages, saw on their way the progress of other parts of the project, were praised and given gifts of honor by higher administrators, met their families and friends, who paid them great respect and public recognition. Thus, they regained their powers. Motivated by this public appreciation and by the sense of public mission: contribution to the empire's defense as well as to the defense of their families and friends, they got back to work, in different building sites of the Wall.

   In recent years, the rhetoric of EU leaders is trying to address EU citizens' feeling that their investment in this project in terms of labor, tax payments etc. does not bear the expected fruits, that they may not live to see, their lack of purposefulness and shared mission sense, and the lack of public recognition and appreciation for their daily efforts.

Despite having common sovereignty symbols: a flag, an anthem, an annual Europe Day celebration, the EU seems to fail in creating in its citizens' minds and hearts a sense of identification with the mission and pride that would motivate them to continue their contribution to that project,[29] as the Chinese people succeeded to do in the story, maybe because such attempts are perceived as mere impersonal rhetoric 'lip service', unfollowed by deeds.[30] Adopting the pragmatic Chinese approach, of identifying different groups with distinctive motivations among EU citizens, and substantially address their needs, may improve this situation.

3. *The Conspiracy Explanation: Intended Impractical Manner of Construction?*

   The narrator speculates that this impractical manner of construction was deliberate, aiming to obtain the following purposes:[31]

   - Nurture the people's national pride, keeping them busy with a unifying national project which is wearing their bodies and minds, to a state where they would lack the energies to criticize the regime's failures in other respects, or to act to replace it.
   - Simultaneously, frighten them with unknown, maybe non-existing, enemies.

   This combination of shared purposefulness, preoccupation and fear seems to effectively ensure political stability (Higgs 2005),[32] particularly in great empires, where the citizens never get to meet the emperor. The narrator says: "I imagine the leadership has existed since time immemorial, along with the decision to construct the wall as well", possibly implying that this is not a new tactic by the current regime, but rather a device existing since "time immemorial". Furthermore, he reveals that the builders of the Wall are well aware of it, but nevertheless "are silent".

   The Current Donald Trump's initiative to build a wall between the US and Mexico seems to be underlined by similar political motivations. In the EU, the rhetoric of the 2015 Five Presidents Report

29 E.g. Habermas 2013, pp. 4–13.

30 E.g. Munin, Matthee 2018, pp. 5–23.

31 This ambivalence seems to reflect Kafka's appreciation for national (or international) projects that he considered valuable, real and relying on strong foundations, like the Zionist plan, on the one hand, and on the other hand, his suspicion towards totalitarian utopias.

32 See also Buzan 2007.

(Juncker 2015), the 2017 White Paper (Juncker 2017a) and the 2017 State of the Union Address of the EU Commission's President (Juncker 2017) invokes mutual citizens' pride by recalling the achievements of the EU, suggesting a future mega-project: turning the EU into an alliance close to a federation, while mentioning economic and security risks originating in third countries, that might adversely affect the EU if not duly attended (Munin, Matthee 2018). One may assume that EU citizens are aware of these devices, but like the Chinese people in the story, choose not to challenge them.

Even Kafka seems to accept this political tactic. Through his narrator he admits that it corresponds to an eternal decree, emanating from the understanding, reflected in many of his writings, that the human nature urges for concrete tasks in a secured order of things.

3.6 The Disadvantages of Piecemeal Building

In the story – like in reality – piecemeal building implies great risks: according to the story, during the long building process, the fragments built were ineffective in protecting the Chinese population against potential invaders and enemies. Moreover

> In fact, not only can such a wall not protect, but the structure itself is in constant danger. Those parts of the wall left standing abandoned in deserted regions could always be destroyed easily by the nomads…

At least in the eyes of EU leaders, the history of the European Union leads to a similar conclusion: its gradual evolvement enhances its vulnerability to external shocks. The ongoing financial crisis is an example. The Five Presidents Report (Juncker 2015), explicitly recognizes as the major reason for EU/EMU's financial vulnerability its insufficient level of financial market's integration. The 2017 White Paper (Juncker 2017a) depicts a broader picture of vulnerability, encompassing security, economic, social and other dimensions. Read with the September 2017 State of the Union Address of the EU Commission's President (Juncker 2017), these documents reiterate the necessity for tightening EU's integration, to ‚fill in the gaps' in all aspects.

The incomplete structure of the EU alliance is perceived as enhancing the refugees' crisis the EU is suffering since 2015: the combination of long borders which cannot be hermetically closed or fully watched at all times, with open borders and free circulation among EU member states, once

the EU territory has been penetrated; the vulnerability of certain member states, such as Greece and Italy, which were abused by refugees as comfortable gateways to the EU; the lack of a uniform approach towards the refugees among EU member states; and the lack of sufficient regulation to meet the challenges imposed, in the beginning of this crisis.[33] This is another case were the 'gaps in the wall' are gradually filled, by new EU regulation, administrative practices and CJEU decisions.[34]

In the story, the ineffectiveness of the Wall may serve as an expression of, or an allegory to, the sovereign's weakness of functioning, at least in the eyes of the Chinese people, represented by the narrator. This idea, "whereby the assertion of sovereignty's power is simultaneously its weakening" is repeated in many of Kafka's writings (Vardoulakis 2016, p. 129). The EU regime seems to experience a similar paradox (Frigot, Bonadonna 2016).

4 Section 3: Past and Present

The narrator in Kafka's story makes many comparisons between the past and the present. He refers to some periods: the old period, when the Babel Tower was built, the Chinese Wall's building era, and the ‚present' time, in which he tells the story.

4.1 The Babel Tower Period

Referring to the scholar's argument regarding the weakness of the Babel Tower's foundations, the narrator indicates the professional superiority of his generation's masons over those of the Babel era, with regard to laying foundations. One interpretation to the meaning of the Babel Tower in the story suggests it is an allegory to totalitarian regimes which Kafka detested. [35] According to this interpretation, he compared such regimes to towers of words and ideologies with shaky foundations. Furthermore, the described popularity of the scholar's book, with its "hazy" plans to build a new tower, and the feeling that now everybody can lay stable foundations, marked the sweeping risk of this popular and appealing state

33 E.g. Bačić Selanec 2015, pp. 73–114.
34 E.g. CJEU. Cases C-643/15 and C-647/15 Slovakia and Hungary v Council.
35 E.g. Hawkins 2003, p. 246.

of mind. In this sense, the EU seems to represent a completely different case: while its final goal may be controversial, there is no debate that this regime is substantive, not consisting only of words that would carry the masses nowhere. Moreover: its system is already functioning for decades, yielding benefits to its member states and citizens, first and foremost (as the State of Union address 2017 stresses) by creating political stability and peace lasting over 60 years.

4.2 The Wall Building Era

Referring to his profession: a mason, the narrator appreciates his luck to live in the Wall building era, offering many jobs which were unavailable to masons before that time, who suffered unemployment.

Similarly, the EU era has contributed to the economic prosperity of its member states and citizens, e.g. by offering funds to economically weaker members and investment opportunities to economically stronger members, by improving the allocation of production factors, by negotiating better terms of trade with third countries. In the medium and long run, all these steps are expected to enhance jobs creation and the reduction of overall potential unemployment in the EU, while stabilizing EU members' economies.[36]

Referring to people's state of mind during the Wall's building period, the narrator admits: "There was a great deal of mental confusion at the time…perhaps for the simple reason that so many people were trying as hard as they could to join together for a single purpose", which, according to him is against the human nature in the long run.

In a sense, such confusion or ambivalence towards the EU project is currently experienced, enhanced by recent crises. Maybe it could be partly explained by the same reason.

4.3 Past and Present as Part of an Ongoing Process of Change

The time-perspective depicted by the narrator, and his reference to past and present dynasties, reflect Kafka's perception, expressed in many of his novels, that: "to construct sovereignty as an instrumental realization and as an economic function, sovereignty must be unstable and

36 See European Commission. *Employment, Social Affairs and Inclusion*. 2018.

in the process of dissolution." (Vardoulakis 2016, p. 130) The constant search for a way forward, characterizing the evolvement of EU regime, seems to be compatible with this observation.

4.4 The Limitations of Time Perspective

From his time-perspective, the narrator cannot be sure whether the Chinese Wall project was ever accomplished. In historic perspective we, the readers, know it has been successfully completed, and despite doubts regarding its effective contribution to China's security, it is considered as one of the greatest human projects globally. Allegorically, the story thus illustrates the limitations of evaluating the future prospects of historic processes like the Wall and the EU project from a present time-perspective.

5 Section 4: The ‚Democratic Deficit'

The old Chinese regime never pretended to be a democracy:[37] it was an empire. Nevertheless, the narrator assumed that even the political stability of such regime relied on its citizens, reiterating: " in them the empire has its final support". A major part of the story is dedicated to describing the detachment between the decision-makers[38] and the Chinese citizens.

5.1 Decision-Making Center is Remote

The narrator elaborates on the remoteness of the Capital: Peking, the situs of the court and the emperor. He admits:

> It's true that on the way out of our village there stands on a little pillar the sacred dragon, which, for as long as men can remember, has paid tribute by blowing its fiery breath straight in the direction of Peking. But for the people in the village Peking itself is much stranger than living in the next world…

37 Other Kafka's stories did not describe democratic regimes either. The reason may be that "the institution of modern literature is linked to the emergence of the bourgeoisie and capitalism, thereby being antidemocratic." (Vardoulakis 2016, p. 140)

38 An alternative interpretation to that suggested above is a religious one, referring to the emperor as an allegory to God. Both interpretations correspond to Kafka's constant preoccupation with the ‚symbolic order', the ‚paternal metaphor' that could take the form of a biological father, an emperor, a God, but also of the Law or economic power. See Fuchs 2002, p. 35.

> Rather than imagining such a city, it's easier for us to believe that Peking and its emperor are one, something like a cloud, peacefully moving along under the sun as the ages pass.

Due to the great distance, "any report which might come, even if it reached us, would get there much too late and would be long out of date."

Often, EU citizens experience a similar sense of remoteness from Brussels, perceived as the EU center of decision-making. While modern electronic means rule out excuses that distance and time-gap prevent access to updated information, as those mentioned in the story, shifting responsibility to become well-informed to EU citizens, it seems not to suffice to bridge their mental distance from the EU project.

5.2 The Emperor's Imperceptible Presence

The Chinese citizens in the story know nothing on the current emperor and never saw him:

> We would have concerned ourselves with the present one [emperor – N.M.] if we had recognized who he was or had known anything definite about him. We were naturally always trying—and it's the single curiosity which consumed us—to find out something or other about him, but, no matter how strange this sounds, it was hardly possible to learn anything, either from pilgrims… or from the close or remote villages, or from boatmen… Of course, we heard a great deal, but could gather nothing from the many details.

The Chinese citizens grasp that the emperor is a human being, just like them. Nevertheless, they have no clue about his deeds or feelings. They know he is surrounded by a Royal Court, but have no clue about the political intrigues taking place in it, eventually leading to the decisions affecting their lives. "They don't know which emperor is on the throne, and there are even doubts about the name of the dynasty."

Nowadays, the media enables every EU citizen to identify the looks of EU leaders. However, the indication with regard to their feelings, thoughts and the effect of political lobbyists and interest groups on their decisions is still quite vague. Moreover, in modern times the media is sometimes abused to manipulate the public opinion through misinformation or disinformation,[39] options which were much less feasible for rulers at the story's era.

[39] E.g. Cooper 2016.

5.3 Confusion Leads to Trust Only in Local, Known Leaders

In the story, consequently, if, once in their life-time, the remote Chinese empire's citizens live to witness a visit by the emperor's agent in their village, they are almost sure that he is representing a dead emperor of a dynasty that already ceased. They hide their suspicions from the visitor in order not to hurt his feelings, but in essence,

> behind the official's sedan chair as it hurries away there arises from the already decomposed urn someone high up who is arbitrarily endorsed as ruler of the village.

Similarly, it seems the EU citizens tend to trust their local or national leadership more than EU leadership. Despite its potential or effective shortcomings, many citizens view this leadership, speaking their own language, as more accessible and attentive (ERCAS 2015).

5.4 Remote Decision-Making Process

The detachment between the Chinese people and the decision makers implies their exclusion from legislative and decision-making processes. They are only introduced with the final products thereof, to which they are expected to obey:

> We—and here I'm really speaking on behalf of many—actually first found out about it [the Wall project – N.M.] by spelling out the orders from the highest levels of management and learned for ourselves that without the leadership neither our school learning nor our human understanding would have been adequate for the small position we had within the enormous totality.

The Chinese people in the story have an ambivalent approach towards their high leadership. On the one hand, they want to believe that these leaders encompass the totality of human experience and dreams, which they can translate into a glittering reality:

> In the office of the leadership—where it was and who sat there no one I asked knows or knew—in this office I imagine that all human thoughts and wishes revolve in a circle, and all human aims and fulfillments in a circle going in the opposite direction. But through the window the reflection of the divine worlds fell onto the hands of the leadership as they drew up the plans.

However, on the other hand, the great distance makes the Chinese people suspicious regarding their high leaders' very existence and motivation.

While currently, the media provides constant proofs to the very existence of EU leaders, remoteness still serves as fruitful soil for the development of speculations, suspicions and mistrust among EU citizens, with regard to these leaders and their decisions.[40]

5.5 Remoteness Implies Freedom?

In the Chinese empire, which did not enjoy the means of modern communication and remote-control, remoteness had its own merits:

> Now, the consequence of such opinions is a life which is to some extent free and uncontrolled… a way of life that stands under no present law and only pays attention to the wisdom and advice which reach across to us from ancient times.

This paragraph seems to reflect Kafka's ambivalence towards a system of law dictated by governments, probably based on his legal experience, and his search for a peaceful and harmonious community to which the modern individual would like to belong and with which he or she longs to identify (Banakar 2010).

Kafka's writings broadly address the relationships between disciplined society and society of control (Vardoulakis 2016): a disciplined society, as described above, is a society that in fact does not need external control, being purely motivated by its morals and shared values. To a certain extent, such society is always utopian.

Due to the great variability of its components, the EU society is still far from this utopian ideal.

In contrast to the Chinese people in the story, EU citizens seem to drift away from this utopian freedom: modern means of communication and remote-control ensure that the member states adapt their rules to EU regulation as interpreted by the CJEU. They further ensure citizens' compliance with these rules. If the integration process deepens, EU interference in national affairs – and its effect on individuals' lives – is expected to grow (Juncker 2017a).

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40 To address this challenge, in 2017, the president of the EU Commission nominated a special adviser on outreach for citizens, who published a report including recommendations how to meet this challenge (Van den Brande 2017).

5.6 Citizen's Passivity

While the story addresses the remote Chinese citizens as *a group*, in *The Zürau Aphorisms* Kafka (2006, p. 104) discusses a complementary dimension of freedom: the free will of *individuals.* In this sense, freedom, or the free will, holds religious and political meanings. Kafka identifies three sorts of free individual will: the will to live; to choose one's pace and course in life; and to proceed in one's chosen life course. However, the exercise of individual free will (or freedom to choose) may have an extrinsic cumulative effect. In the case of EU citizens, for example, choosing to participate in the elections of EU Parliament members or to vote in referenda such as the Brexit referendum may affect EU's future.

The Chinese citizens in the story believed that in order to avoid trouble, or further distress that would overwhelm them like a river overflooding the fields, they should better try to limit their understanding of the leadership's orders to a confined extent (probably – to their pragmatic implications on daily life).

Both the story and EU reality seem to reflect that although the citizens seem to have their reservations about the project, they continue to participate in it, either actively or passively.

Kafka does not criticize this passivity, but rather advocates for it: he believed that trying to transcend one's limits may end up with this person's losing direction. In EU context, this view may correspond to EU leaders' view that beyond a certain extent, EU citizens should trust them, recognizing their own limits in understanding the full picture, or otherwise may risk losing direction.

5.7 Lack of Solidarity

The story mentions a bagger who succeeded to escape a revolution that took place in a Chinese remote province. He showed the citizens of a neighboring province a pamphlet proving that revolution, but they ignored it altogether, laughing. While not ruling out the possibility that they misinterpreted the pamphlet, due to dialect differences, the narrator nevertheless suggests that they refused to "obliterate the present".

That lack of solidarity among provinces in the story may serve as an allegory to the insufficient solidarity among EU member states. It was recently

reflected in the context of refugees' treatment, as certain EU members refused to participate in the general effort, preventing refugees' access to their territories altogether. The CJEU ruled that some of them infringed EU law.[41] Interpretation of these members' motivation may endorse either of the two suggested by the story: mentality differences, or refusal to "obliterate the presence". In the story, this lack of solidarity was mentioned as an anecdote. In EU reality, such lack of solidarity (witnessed in other fields as well) weakens this alliance, undermining its progress.

5.8 Shared Responsibility of Government and Citizens

The narrator sums up the story by putting the blame for the detachment between government and citizens in the Chinese empire on both sides:

> It's true that in the main things the blame rests with the government, which… right up to the present day has not been able or has… neglected to cultivate the institution of empire sufficiently clearly so that it is immediately and ceaselessly effective right up to the most remote frontiers of the empire. On the other hand, however, there is in this also a weakness in the people's power of imagining or believing, which has not succeeded in pulling the empire out of its deep contemplative state in Peking and making it something fully vital and present in the hearts of subjects, who nonetheless want nothing better than to feel its touch once and then die from the experience.

These observations, that seem to describe the current EU reality as well, may be added to Kafka's description, in his stories, of the political regimes' paradox: the human constant desire to break free of frameworks it created, dictating the constant change and evolution of sovereignty.

Together, they may suggest some deep reasons for the current crossroad the EU is facing.

5.9 The Wall as a Symbol

Why did Kafka choose the Wall allegory?

The Chinese Wall is an eternal global symbol of human achievements and the human spirit, but so are the Egyptian Pyramids, Machu Pichu etc. Unlike

41 E.g. CJEU. Cases C-643/15 and C-647/15 Slovakia and Hungary v Council.

them, however, walls hold a simultaneous uniting and separating potential: their builders are usually united by goals defined by politicians and leaders initiating them, e.g. the need to protect the nation or city from potential threats and invaders. However, as Kafka's story implies, sometimes these alleged goals only cover other, hidden political aims, such as directing the people's enthusiasm and devotion to a mutual project, to distract their attention from other leadership failures, or impressing other nations with monumental structures, implying strength. Once built, walls may separate nations (e.g. the Berlin Wall, identified with the Iron Curtain era, the current controversial Trump's attempt to build a wall between the US and Mexico, to stop immigration) or isolate those within them from the rest of the world. Did Kafka think that the regimes he meant to criticize by this analogy shared these dangers? Does the EU share them? These are open questions that may trigger class discussion.

5.10 The Didactic Challenge

Obscurity of Chinese institutions, including the empire itself, seems to enhance citizens' detachment. The narrator contends that "in Peking, right in the court, there is some clarity about it, although even this is more apparent than real".

Many EU citizens feel the same regarding EU law and institutions.

In the story, this obscurity is reflected by the educational process, where teachers pretend to know what they teach, while actually

> a superficial education surges up as high as a mountain around a few precepts drilled into them for centuries, sayings which, in fact, have lost nothing of their eternal truth, but which remain also eternally unrecognized in this mist and fog.

It is a well-known fact that EU law, structure and functioning is difficult to grasp in its totality. It involves a huge body of *acquis* which is constantly evolving, including many vague expressions, attributed an agreed meaning only in retrospect, by CJEU's interpretation. Moreover, a constant controversy over competences between EU courts and national constitutional courts affects EU law's interpretation.[42] All these facts make EU law's teaching and understanding, as a whole, a task no less challenging[43]

42 E.g. Paris 2017, pp. 792–821.

43 E.g. Gravey 2015.

than the teaching and understanding of the Chinese law and institutional framework, described in the story.

6 Conclusion

The Great Wall of China seems to be one of Kafka's more optimist stories. It raises important political questions about the relationship between the people and their rulers: do rulers exert power over a large, dispersed population, distracting them by having them focus on large projects? Is the public truely capable of participating in decision making, as ‚democracy' implies? Isn't everybody's perspective (including that of political leaders) historically limited? To what extent observations depend on the identity of their narrator?

The futurist nature of Kafka's stories has been long recognized. Milan Kundera (1988, p. 116) wrote that "experiments that History has performed on man in its immense test tubes, Kafka performed (some years earlier) in his novels."

"An allegory is a very specific type of story, as it must stay true to the message for the entirety of the story." (Literary Devices) To succeed, it has to "create a consistent network of relationships between the external text and the internal (allegorical) meaning." (Hábl 2016, p. 7) Moreover, any cultural description seen through the prism of an allegory "is a (morally charged) story…" (Clifford 1984, p. 100).

Surprisingly, although written more than one hundred years ago and long before the establishment of the EU, this story seems to suggest quite an accurate allegory to the functioning and failures and challenges of this current regime, illustrating both the eternal character of this story and the deficiencies, criticized aspects and political and moral dilemmas that the EU seems to share with the Chinese regime in the story.

As illustrated, the use of this story as a didactic tool may change "one's perception of the real world", in light of insights gained through experiencing the fictional world the story portrays (Clifford 1984, p. 100).

The mission of teaching EU's evolvement and functioning becomes more and more challenging in the current classroom reality, dictating a constant search for new, intriguing teaching methods. Franz Kafka left us a powerful allegory, that can meet this didactic challenge.

References

Ahmad, A. (*1987*). Jameson‘s Rhetoric of Otherness and the ‚National Allegory’. Social Text. No. 17 pp. 3–25.

Alter, R. (2010). Franz Kafka: Wrenching Scripture. In: Harold Bloom (ed.). Franz Kafka. New York. Infobase Publishing.

Bačić Selanec, N. (2015). A Critique of EU Refugee Crisis Management: On Law, Policy and Decentralisation. Croatian Yearbook of European law & Policy, pp. 73–114. Available at: https://hrcak.srce.hr/index.php?show=clanak&id_clanak_jezik=222770

Banakar, R. (2010). In Search of Heimat: A Note of Franz Kafka‘s Concept of Law. Law & Literature. No. 3, pp. 463–490.

Baratta, R. (2012). Legal Issues of the ‚Fiscal Compact‘ – Searching for a Mature Democratic Governance of the Euro. Available at: http://ssrn.com/abstract = 2196998

Buzan, B. (2007). People, States and Fear. Colchester. ECPR Press.

Bryant, S. (2017). Understanding Cultural Differences. Country Navigator. Available at: https://countrynavigator.com/blog/global-etiquette/age-seniority/

Clifford, J. (1984). On Ethnographic Allegory. In: Clifford, James and Marcus, George (eds.). Writing Culture: The Poetics and Politics of Ethnography. Berkeley. University of California Press, pp. 98–121.

Coleridge, S. T. (1853). The Stateman‘s Manual: Complete Works. Vol. 1. New York. 1853.

Committee of the Regions (2018). Central European Transport Corridor EGTC Ltd. 2018. https://portal.cor.europa.eu/egtc/CoRActivities/Pages/Central-European-Transport-Corridor-Limited-Liability-European-Grouping-of-Territorial-Cooperation.aspx

Constantine, D. (2002). Kafka‘s Writing and Our Reading. In: Julian Preece (ed.). The Cambridge Companion to Kafka. Cambridge. Cambridge University Press, pp. 9–24.

Cooper, Ch. (2016). EU Referendum: Immigration and Brexit – What Lies Have Been Spread? Independent. Available at: https://www.independent.co.uk/news/uk/politics/eu-referendum-immigration-and-brexit-what-lies-have-been-spread-a7092521.html

ERCAS (2015). Public Integrity and Trust in Europe. Available at: https://dsc.kprm.gov.pl/sites/default/files/pliki/public_integrity_and_trust_in_europe.pdf

Esteve-González, P. and Theilen, B. (2014). European Integration: Partisan Motives or Economic Benefits? LEQS Paper. No. 71.

Architecture Here and There (2016). EU's New Tower of Babel. Available at: https://architecturehereandthere.com/2016/12/28/eu-new-brussels-hq/

European Commission (2018). The History of the European Union. 2018. Available at: https://europa.eu/european-union/about-eu/history_en

European Commission (2018a). Employment, Social Affairs and Inclusion. Available at: http://ec.europa.eu/social/main.jsp?catId=101&langId=en

European Commission (2018b). Territorial Cohesion. Available at: http://ec.europa.eu/regional_policy/en/policy/what/glossary/t/territorial-cohesion

European Union. Territorial Agenda for the European Union 2020. Available at: http://ec.europa.eu/regional_policy/sources/policy/what/territorial-cohesion/territorial_agenda_2020.pdf

Fabbrini, F. (2015). From Executive Federalism to Executive Government: Current Problems and Future Prospects in the Governance of the EMU. In: Fabbrini, Federico, Ballin, Ernst Hirsch and Somsen, Han (eds.). What form of Government for the European government and the Eurozone? Bloomsbury. Hart, pp. 289–306.

Fletcher, A. (1964). Allegory: The Theory of Symbolic Mode. Ithaca. Cornell University Press.

Frye, N. (1967). Anatomy of Criticism: Four Essays. New York. Atheneum. 1967.

Frigot, F. and Bonadonna, E. (2016). Europe and Sovereignty: Reality, Limits and Outlook – Conference of 29 September – Report. Robert Schuman Foundation, European Issues, No. 410. Available at: https://www.robert-schuman.eu/en/doc/questions-d-europe/qe-410-en.pdf

Fuchs, A. (2002). A Psychoanalytic Reading of ‚The Man Who Disappeared'. In: Julian Preece (ed.). The Cambridge Companion to Kafka. Cambridge. Cambridge University Press, pp. 25–41.

Glen, P. J. (2007). The Deconstruction and Reification of Law in Franz Kafka‘s ‚Before the Law‘ and ‚The Trial‘. Southern California Interdisciplinary Law Journal, No. 1, pp. 23–66.

Goulard, H. (2016). Switzerland Withdraws Application to Join the EU. Politico. Available at: https://www.politico.eu/article/switzerland-withdraws-application-to-join-the-eu/

Gravey, V. (2015). Theoretical Theatre: An Innovative Teaching Method for EU Studies. Available at: https://environmentaleurope.ideasoneurope.eu/2015/04/08/teachingeu/

Grimm, D. (1995). Does Europe Need a Constitution? European Law Journal, No. 3, pp. 282–302.

Grimm, D. (2015). The Democratic Costs of Constitutionalization: The European Case. European Law Journal. No. 4 (2015), pp. 460–473.

Habermas, J. (2013). Democracy, Solidarity and the European Crisis. In: Anne-Marie Grozelier et al. (eds.). Roadmap to a Social Europe, pp. 4–13. Available at: https:/www.socialeurope.eu/wp-content/uploads/2013/10/eBook.pdf

Hábl, J. (2016). ‘Partly Allegorical, Partly Disclosed‘, The Problem of Using Allegorical Method as a Didactic Tool in Comenius‘ Labyrinth. Available at: www.academia.edu

Hawkins, B. (2003). Reluctant Theologians: Franz Kafka, Paul Celan, Edmond Jabes. New York. Fordham University Press.

Higgs, R. (2005). Fear: The Foundation of Every Government‘s Power. Independent Institute. Available at: http://www.independent.org/publications/article.asp?id=1510

Hix, S. and Føllesdal, A. (2006). Why There is a Democratic Deficit in the EU: A Response to Majone and Moracsik. Journal of Common Market Studies. No. 3, pp. 533–562.

Huffington Post (2017).7 Cultures that Celebrate Aging and Respect Their Elders. Available at: https://www.huffingtonpost.com/2014/02/25/what-other-cultures-can-teach_n_4834228.html

Jameson, F. (1981). The Political Unconsciousness: *Narrative as a Socially Symbolic Act*. Ithaca. Cornell University Press.

Judgment of the Court of Justice of the European Union of 6 September 2017. Slovak Republic (C-643/15) and Hungary (C-647/15) v Council of the European Union. Available at: http://curia.europa.eu/juris/documents.jsf?num=C-643/15

Juncker, J.-C. (2015). Completing Europe's Economic and Monetary Union. 2015. Available at: http://ec.europa.eu/priorities/economic-monetary-union/docs/5-presidents-report_en.pdf

Juncker, J.-C. (2017). State of the Union Address. Available at: https://ec.europa.eu/commission/state-union-2017_en

Juncker, J.-C. (2017a). The White Paper on the Future of Europe: Reflections and Scenarios for the EU27 by 2025. Available at: https://ec.europa.eu/commission/sites/beta-political/files/white_paper_on_the_future_of_europe_en.pdf

Kafka, F. (2015). The Great Wall of China. Translated by Johnston, Ian. Vancouver Island University Nanaimo. Available at: http://johnstonia-texts.x10host.com/kafka/greatwallofchinahtml.html

Kafka, F. (2006). The Zürau Aphorisms. Berlin. Suhrkamp Verlag. 2006.

Kundera, M. (1988). The Art of the Novel. Translated by Asher, Linda. London, Boston. Faber and Faber.

LaCocque, A. The Captivity of Innocence – Babel and the Yahvist. Eugene. Cascade.

Lewis, C. S. (2013) The Allegory of Love, Cambridge. Cambridge University Press.

Literary Devices. Allegory. Available at: http://www.literarydevices.com/allegory/

Maduro, M. P., De Witte, B. and Kumm, M. (2012). The Democratic Governance of the Euro. Florence. Robert Schuman Centre for Advanced Studies (RSCAS). Available at: http://cadmus.eui.eu/bitstream/handle/1814/23981/

Majone, G. (1998). Europe's 'Democratic Deficit': The Question of Standards. European Law Journal. No. 1, pp. 5–28.

Moravcsik, A. (2008). The Myth of Europe's Democratic Deficit. Intereconomics: Journal of European Public Policy, November-December, pp. 331–340.

Munin, N. (2016). Democracy and Financial Crisis Between the Five Presidents Report and the Brexit: In Search for a New Way? International and Comparative Law Review No. 2, pp. 7–28.

Munin, N. (2016a). European Monetary Union‘s Single Banking Supervision Mechanism: Another Brick in the Wall? The IUP Journal of International Relations. No. 4, pp. 7–31.

Munin, N. (2011). Tax in Troubled Time: is it the Time for A Common Corporate Tax Base in the EU? EC Tax Review. No. 3, pp. 121–133.

Munin, N. and Efron, Y. (2016). Role Plays Bring Theory to Life in a Multicultural Learning Environment. The Journal of Legal Education: special issue on international legal education, pp. 309–331.

Munin N. and Matthee, M. (2018). The Future of the EU: Rhetoric in Service of Commission‘s Agenda? Journal of Jurisprudence and Legal Practice. No. 1, pp. 5–23.

Murry, J. M. (1931). ‚Metaphor‘, In: Murry, J. M. Countries of the Mind: Essays in literary criticism, London. Oxford University Press, pp. 1–16.

Nicolaides, K. (2013). European Democracy and its Crisis. Journal of Common Market Studies. No. 2, pp. 351–369.

Paris, D. (2017). Constitutional Courts as European Union Courts: The Current and Potential Use of EU Law as a Yardstick for Constitutional Review. Maastricht Journal of European and Comparative Law. No. 6, pp. 792–821.

Pasture, P. (2015). Imagining European Unity Since 1000 AD. New York. Palgrave Macmillan.

Quilligan, M. (1979). The Language of Allegory: Defining the Genre. Ithaca. Cornell University Press.

Rojas, C. (2015). Writing on the Wall: Benjamin, Kafka, Borges and the Chinese Imaginary. Duke University. Available at: https://www.452f.com/pdf/numero13/13_452f_Rojas_orgnl.pdf

Scharpf, F. W. (2010). Community and Autonomy. Frankfurt. Max Planck Institute.

Sjursen, H. (2003). Why Expand? The Question of Legitimacy and Justification in the EU’s Enlargement Policy. Journal of Common Market Studies, No. 3, pp. 491–513.

Stirk, P. M. R. (ed.) (1989). European Unity in Context: The Interwar Period. London: Pinter Publishers.

Stirk, P. M.R. and Smith, M. L. (eds.) (1990). Making the New Europe: European Unity and the Second World War. London. Pinter Publishers.

Swissinfo (2005). EU Membership Application not to be Withdrawn. Available at: http://www.swissinfo.ch/eng/eu-membership-application-not-to-be-withdrawn/4811170.

Tally, R. (2017). Fredrick Jameson and the Controversy over ‚Third World Literature in the Era of Multinational Capitalism'. Global South Studies: *A Collective Publication with The Global South.* University of Virginia. Available at: https://globalsouthstudies.as.virginia.edu/key-thinkers/fredric-jameson-and-controversy-over-%E2 %80 %9Cthird-world-literature-era-multinational.

The Christian Voice (2016). The European Union's Tower of Babel. Available at: https://www.youtube.com/watch?v=2l1RhAI-rRQ

Tylor, P. (2015). EU's Tower of Babel May Fall While Leaders Distracted. Reuters. Available at: https://uk.reuters.com/article/us-europe-migrants-babel-analysis/eus-tower-of-babel-may-fall-while-leaders-distracted-idUKKCN0W10AQ

Van den Brande, L. (2017). Reaching Out to EU Citizens: A New Opportunity ‚about us, with us, for us'. Available at: https://ec.europa.eu/commission/sites/beta-political/files/reaching-out-to-citizens-report_en.pdf.

Vardoulakis, D. (2016). Freedom from the Free Will: On Kafka's Laughter. Albany. State University of New York Press.

Wellek, R. and Warren, A. (1963). Theory of Literature. London. Penguin Group.

Ziarek, E. (1995). The Beauty of Failure. In: Alexander Gelley (ed.). Unruly Examples on the Rhethoic of Exemplarity. Stanford. Stanford University Press.

Zilcosky, J. (2003). Kafka's Travels: Exoticism, Colonialism and the Traffic of Writing. New York. Palgrave Macmillan.

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This volume represents a collection of papers accepted to and presented at the 6th International Conference in Alternative Methods of Argumentation in Law (ARGUMENTATION 2019) on October 18, 2019 in Brno, Czech Republic. The conference follows up on the tradition set on October 7, 2011 where the first conference (ARGUMENTATION 2011) took place at the Faculty of Law of Masaryk University. This year follows the line of bi-annual proceedings.

Even though the timeline is changing the main ideas that stood behind the foundations of the conference remain the same. Its main goal is still to bring together researchers representing different scientific perspectives and to create a space in which they could exchange their views concerning the phenomenon of argumentation in the domain of law. Although it aims high, it has been fairly successful in achieving these objectives as previous volumes of this conference proceedings demonstrate.

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ARGUMENTATION 2019 brings together legal scientists to participate on ensuring the line of these conferences will persist and the International Conference on Alternative Methods of Argumentation in Law will remain recognized scientific event. Let us thus thank to all of the authors whose papers were published in this volume, all members of the Programme Committee and all other people who share our enthusiasm and help us continue the tradition.

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