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Terezie Smejkalová
Michal Araszkiewicz
Ondřej Glogar
Linda Tvrdíková
Jana Stehlíková
Markéta Štěpáníková
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Contents

Foreword

This volume contains a collection of papers presented at the Argumentation 2021 conference and accepted for publication in its proceedings. The conference follows up on an already established tradition of discussing alternative methods of argumentation in law. As the first ever Argumentation was held in 2011, this year's conference marks its 10-year anniversary, connecting scholars from all over the world.

This year, the main topic for our discussions centred around conceptualization in law.

Recently, the traditional analytic method of conceptual analysis in law has been criticized as not being able to take in wider social context, such as globalization (Twinning 2009). Social sciences have long been developing methods to study conceptualization, yet law seem to be quite wary when it comes to making use of them (Stephanopoulos, Ginsburg 2017, 148). Only carefully, the analysis of legal concepts ventures into borrowing methods from other disciplines (e.g. semantics and pragmatics in Skozen 2015, sociology in McCrudden 2006; or Stephanopoulos, Ginsburg 2017 – even though they claim that their study is not to be considered legal theory). Legal concepts are the object of intensive study in the field of Artificial Intelligence and Law, especially in the context of development of legal ontologies and the use of Semantic Web technology (Sartor, Casanovas, Biasiotti, Fernández-Barrera eds. 2011). In addition, legal scholarship has been moving towards a more empirical direction recently, allowing us to introduce external factors in our understanding of law (e.g. Fowler and Jeon 2007, Derlén and Lindholm 2014, Eisenberg 2011, Heise 2011), which is the space where we would like our year's conference discussions to fit in.

In addition, already established areas of the Argumentation conference concerning the areas of law and logic, cognitive science, law and literature, or law and visualisation were discussed.

This volume contains five papers. Terezie Smejkalová and Markéta Štěpáníková discuss the processes of conceptualization of a chosen vague legal concept in the light of Czech legal style, burdened by the normativist and socialist-formalist heritage. Linda Tvrdíková connects findings of cognitive science and ideas of American legal realists related to intuition. She then discusses the role of intuition in decision-making processes. Ondřej Glogar argues to what extent law may be understood as language, the drawbacks and advantages of such an approach. András Molnár chooses a traditional law and literature approach to discuss The Dynamics of Consent and Antagonism in Ian McDonald's Luna Trilogy. Lukáš Hlouch concludes this volume with a paper discussing vagueness in law.

Let us thank all the authors of these papers as well as all the participants of the International Conference on Alternative Methods of Argumentation in Law (Argumentation 2021), members of the Programme Committee and all our friends and colleagues who share our enthusiasm and help us keep this conference alive.

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Conceptualization of 'Public Order' within Czech Legal Style*

Terezie Smejkalová[**], *Markéta Štěpáníková*[***]

Abstract

In this paper, we report the findings of a part of a wider complex research related to social representations approach in understanding vague legal concepts. In the course of our research, we have explored our participants' understanding of public order in a very similar setting to the one presented in this case. Their understanding seems to suggest that although public order points towards basic values of a given society, some of our participants suggest that it is a concept whose interpretation remains strictly legal, confining the judge to – sometimes incomplete – information provided by formal legal sources or legal doctrine. While such a confinement may result in weak argumentation, we believe it may also be explainable in terms of normativist and formalistic tendencies present in the Czech legal culture.

Keywords

Public Order; Vague Legal Concept; National Identification Number; Czech Legal Style; Normativism; Formalism; Social Representations.

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1 Introduction

In an ongoing project, we explore the use of the social representations approach in studying conceptualization in law. One of the concepts we explore is that of 'veřejný pořádek'. 'Veřejný pořádek' does not seem to have a full equivalent in English: it seems to overlap with public order as well as public policy as well as the French concept of *ordre public*. We have chosen to translate it and talk about it as the less used 'public order', mainly to avoid involuntary conceptual overlaps with public policy. Consequently, the present exploration into 'public order' may not necessarily apply to other legal systems' understanding of public order and/or public policy.

Public order is a vague legal concept and as such it lacks legal definition and needs to be interpreted and re-interpreted in relation to context. While the interpretation of vague legal concepts is essentially in the hands of persons applying the rules containing them, some of them have inescapable links to social realities. It would seem that using public order in legal argumentation requires understanding that is far from strictly formalistically legal. Is that the case for the Czech legal environment? How far should a judge go in order to understand the concept in order to apply it properly?

In a recent case, the Czech Supreme Administrative Court relied on the concept of public order when making a decision on gender indication in a person's national identification number.[1] The court indicated that for the national identification number to bear a different than assigned-at-birth gender identification when the identified person has not yet undergone complete gender-affirming surgery would be (among other reasons) contrary to public order. The argumentation leading to this conclusion seems to show clear argumentative gaps when it comes to the steps taken to determine the content of the concept of public order, as the court practically entirely relied on the personal insight of the judge making that decision.

In this paper, we report the findings of a part of wider complex research related to the social representations approach in understanding vague legal concepts. The present study does not lead to the determination of social representation of public order among legal professionals as such. During

1 Translation note: We use the 'national identification number' as a translation for 'rodné číslo'. Although this Czech expression could be directly translated as 'birth number', we have chosen the alternative translation to indicate it serves wider identification as well as national insurance purposes.

our research, we have conducted an explorative qualitative pilot study to investigate our participants' understanding of public order in a setting very similar to the one presented in this case. Our findings seem to suggest that although the concept of public order points towards basic values of a given society, some of our participants suggest that it is a concept whose interpretation remains strictly legal, confining the judge to – sometimes incomplete – information provided by formal legal sources or legal doctrine. While such confinement may result in weak argumentation, we believe it may also be explainable in terms of normativist and formalistic tendencies present in the Czech legal culture.

As the chosen methodology does not allow us to provide any definitive answers, this explorative paper aims to report on some of the themes arising within the interviews, suggest directions and open a discussion on the processes of conceptualization on the background of the specificities of Czech legal style including adjudication method.

2 Details of the Case

The claimant was a transgender person who asked for their National Identification Number to be changed. The Czech National Identification Number contains a numeric code indicating whether the person is male or female.

It must be noted at this point that talking about this particular topic in the Czech language presents certain difficulties that are capable of influencing any discussion about it. The National Identification Number indicates 'pohlaví', a word that is conceptually closer to 'biological sex' than to 'gender'. However, Slovník spisovného jazyka (Czech dictionary) explains 'pohlaví' as 'a set of defining features that differentiates between male and female' as well as the 'external physical features'. The word 'gender' does not have a close equivalent in Czech, sometimes being translated as 'sociální pohlaví' [social sex], sometimes as 'gender'. Using the English term 'gender' in Czech may be contributing to the perceived 'foreignness' of the term.[2] Furthermore, the concept expressed by the special code in the National Identification Number is being called 'pohlaví' by the law and legislation.

2 Havelková, B. (2020) Feminismus, gender a právo. In: Šimáčková, K., Špondrová, P., Havelková, B. (eds.). *Mužské právo. Jsou právní pravidla neutrální?* Praha: Wolters Kluwer, p. 50ff.

The problem here is that there is no clear difference between gender and biological sex in the Czech language. It is, therefore, not clear what exactly does the number refer to. While it may seem that the Civil Code would refer to biological sex (as it clearly talks about the surgical change), the consequences of this indication are that of a social construct. The current case law on related matters is not much help either. While a recent decision of the Constitutional Court addressed a claimant using her preferred pronouns,[3] the Supreme Administrative Court consciously chose to address the claimant in the discussed case against her expressed preference. Therefore, for the purpose of this paper, let us use the word 'gender', while also paying attention to what the individual parties to the case, the court, or later the participants of our research seem to mean by the words they use.

In the case that is being described here, a transgender person asked to have their National Identification Number indicate neutral gender and should that not be possible, to have their gender indication changed to female. The administrative body refused their request, stating that any change of the National Identification Number of this kind is, by law, possible only when the person underwent gender reassignment surgery, including mandatory sterilization. The claimant sought help in the Supreme Administrative Court, explaining the risks of gender reassignment surgeries and the unconstitutionality of the sterilization requirement.

The Supreme Administrative Court refused the claim,[4] arguing that the legal regulations clearly state that the National Identification Number may only be changed under specific conditions. The Czech law specifies these conditions as an official medical confirmation of the gender reassignment surgery as well as the mandatory sterilization.[5]

Should the Court stop there in its rationale, we might not agree with its unwillingness to open the constitutionality issue regarding the aforementioned legal regulations, but we would not be discussing it in relation to our research today. The Court spent quite a significant amount of space in the judgment's rationale arguing from the point of view of the 'prevalent sentiment of the society's majority' when it comes to a National Identification Number change without the surgery and sterilization, and its readiness

3 Decision of the Constitutional Court of the Czech Republic No. II. ÚS 3003/20.
4 Decision of the Supreme Administrative Court No.2 As 199/2018-37.
5 See § 29 of the law no. 78/2012 Sb., and law no. 133/2000 Sb.

to bear all the consequences of such an act.[6] What strikes us in this particular decision is how the Court reached the conclusion of what the prevalent sentiment of the society is, and that 'the overall majority of Czech citizens' would not feel this was right.[7] And a key – although somewhat hidden – point in the Court's argumentation is the concept of 'public order'. The Court believes that the indication in one's National Identification Number does not relate to 'gender' but to 'biological sex'.[8] And as one does not lie in official documents about one's age, the Court seems to believe it to be wrong to lie about one's biological sex. The Court conceptualizes this wrongness through public order. Consequently, for the Court, changing the National Identification Number without the necessary surgery and sterilization would equal lying in official documents and that would be contrary to public order.

On the one hand, we might say that what we read here is nothing out of the ordinary in terms of legal argumentation.[9] The Court overtly uses references to laws, national as well as international case-law, and discusses the purpose of applicable rules and their interpretation in light of various legal principles. It even claims that it attempts to make a purely minimalist legal argument and that its role is not to push society towards progress.[10] On the other hand, most of the lengthy rationale of the decision focuses on trying to spell out a narrative explaining what society thinks and how 'far' it is when it comes to transgender issues. Given the lack of evidence supporting the claims about the social sentiments, it somewhat feels – as one of the participants put it in the course of our research that we describe below – as if the judge looked out of the window and saw that 'the society is not there yet'.

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6 In paragraph 80 of the Decision No. 2 As 199/2018-37, the Supreme Administrative Court writes: *"Regardless of the complex approaches of intellectual and scientific circles, the general pervasive opinion is that departure from strictly binary social gender dependent on biological sex is undesirable, not in line with the 'common sense' and breaking the cornerstones of the social order."*

7 Paragraph 58 of the above decision.

8 See paragraphs 52–60 of the above decision.

9 It is worth noting that this particular case has not been analysed by scholarly sources. The only honourable mention goes to Kamila Abbasi and Helena Bončková whose text written for Právo 21, a student magazine, is currently the most detailed critique of the Court's argumentation. See Abbasi, K., Bončková, H. Kritická reflexe rozhodnutí, v němž se Nejvyšší správní soud poprvé zabýval právy transgender osob. *Právo 21* [online]. Available at: https://pravo21.cz/pravo/kriticka-reflexe-rozhodnuti-v-nemz-se-nejvyssi-spravni-soud-poprve-zabyval-pravy-transgender-osob

10 See paragraph 91 of the above decision.

3 Normativism, Formalism, and Czech Legal Style

On the one hand, what we have just described may be dismissed as weak argumentation. On the other hand, we believe that it is possible to explain this lacking argumentative approach in terms of some of the elements at play within the Czech Legal environment.

Whether we label it legal environment, legal culture,[11] legal tradition[12] or legal style,[13] it is not only the legal rules themselves that shape the identity of any legal system. The identity of any legal system is being sustained – and the legal rules are in turn shaped – by what is being taught during formal legal training and how the argumentation works in judicial decision-making.[14] Zweigert and Kötz, for example, define a legal style by its historical background, prominent methods of legal thinking, legal institutions, sources of law and the ways they are used, and ideology.[15]

We do not intend to provide a complex analysis of the Czech legal style, nor the Czech legal system's identity, as this has been done elsewhere.[16] We intend to provide an overview of some of the elements shaping the prominent methods of legal thinking with regards to understanding

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11 David, R. (1978) *Major Legal Systems in the World Today. An Introduction to the Comparative Study of Law*. London: Stevens, p. 19ff; or Zweigert, K., Kötz, H. (1998) *An Introduction to Comparative Law.* 3rd edition. Oxford: Clarendon Press, p. 69ff.

12 Glenn, H. P. (2004) Legal Cultures and Legal Traditions. In: Van Hoecke, M. (ed.). *Epistemology and Methodology of Comparative Law*. Oxford – Portland: Hart Publishing, pp. 20–21.

13 Zweigert, Kötz, op. cit. The concept of legal style is also further used and discussed in terms of Central European Legal Culture. In: Manko, 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*. Vol 6:2, pp. 4–28.

14 See Bobek, M., Kühn, Z., Molek, P., Polčák, R., Vyhnánek, L. (2013) *Judikatura a právní argumentace.* 2nd edition. Praha: Auditorium; Recently, the Czech judicial argumentative practice regarding past case law was examined in detail in Harašta, J., Smejkalová, T., Novotná, T. et al. (2021) *Citační analýza judikatury*. Praha: Wolters Kluwer.

15 Zweigert, Kötz, op. cit., p. 69ff.

16 See Kühn, Z. (2011) *The Judiciary in Central and Eastern Europe: Mechanical Jurisprudence in Transformation?* Martinus Nijhoff; or Kühn, Z. (2005) *Aplikace práva soudcem v éře středoevropského komunismu a transformace: Analýza příčin postkomunistické právní krize*. Praha: C. H. Beck.

(and constructing) legal concepts: normativism and socialist normativism, strongly connected with formalism.[17]

Contemporary Czech law is a continental legal system, with Germanic legal tradition roots as well as the forty years of Actually Existing Socialism's imprint on law[18]. This heritage accentuates written laws and a positivist approach to law,[19] which – when used improperly – turns into hyperpositivism[20] or formalism.[21]

The positivistic tendencies within the Czech legal thinking have strong and often emphasised roots: Hans Kelsen's normativism and pure approach to law, and his student František Weyr's ideas about the characteristics of legal science.

One of normativism's basic tenets is that of a strict line between the world of norms and the world of social reality: the world of norms and the world of facts – social realities. The realm of law is something whose existence, or rather normative existence, is not tied to social reality. Law may be defined as a discrete set of abstract norms (belonging strictly to the sphere of 'ought to' only), and its legitimacy may be assessed within the scope of its validity, that is, to justify the existence of law by itself, or by its inner criteria of validity.[22] If law is limited to a set of norms, any legal science is, co sequently, a science of norms.[23] Normativism even stems from an attempt to react to – perceivably – flawed approaches of the turn of the 20th century. As Weyr put it, normative theory attacks the methodologically syncretic

17 Cserne, P. (2020) Discourses on Judicial Formalism in Central and Eastern Europe: Symptom of an Inferiority Complex? *European Review*, 2020, 28(6), pp. 880–891.

18 See Kühn (2011), op. cit., p. 293.

19 As Manko, Škop and Štěpáníková point out, *"if we speak of contemporary Czech legal culture, we need to emphasise that its formative elements include the heritage of the manipulated political processes of the fifties of the 20th century, legal codes from the sixties based on the socialist worldview and socialist normativism which reigned in Czech jurisprudence for four decades."* Manko, Škop, Štěpáníková, op. cit., p. 12.

20 As Manko, Škop, Štěpáníková, op. cit. call it, p. 17.

21 Kühn, Z. (2009) Ideologie aplikace práva v době reálného socialismu. In: Bobek, M., Molek, P. Šimíček, V. (eds.). *Komunistické právo v Československu. Kapitoly z dějin bezpráví*. Brno: Masaryk University, pp. 75–92.

22 See Přibáň, J. (1997) *Suverenita, právo a legitimita v kontextu moderní filosofie a sociologie práva*. Praha: Karolinum, p. 94.

23 Guastini, op. cit., p. 317.

trends in legal theory, such *as Interessenjurisprudenz, Freirechtslehrschule*, or connecting law with sociology.[24]

For František Weyr, any theory of norms, i.e. legal science, is the epistemology of norms. He aimed to set up a pure theory of law[25] based on Kantian critical idealism.[26] Such a theory would focus purely on the form of legal norms and refrain from all evaluative statements.[27] He strongly refused iusnaturalistic and sociological approaches to law – basically any approaches that would be interested not only in the form of law but also in its content or social realities of its application. That does not necessarily mean that these approaches to law would not have value and merit of their own, but they do not constitute the theory of law. This heritage is still very much alive in how law is taught in the course of Czech legal education as well as a possibly very apologetic approach to legal theory, or legal 'science', endlessly trying to prove the law's – and legal science/theory's – worth as something independent of any other science, social science or humanities.

In one of the widely used legal theory textbooks, Harvánek et al. explain legal science – jurisprudence – predominantly as a normative science.[28] They refer to Weyr's Brno's normative legal school and place emphasis on the noetic study of legal norms. Even though they try to soften these claims by referring to Weinberger's normative institutionalism and the need to view law as a 'space of legal life'[29]. Comparing to how they paint the picture of the basis of legal science this seems like an afterthought.

Viktor Knapp, the author of one of the most influential legal theory textbooks written in Czech after 1989, paints the picture of legal science as a traditional, historically well-rooted science, briefly mentioning its philosophical roots and even including a subchapter about the place of legal science among other sciences and humanities.[30] He does, however, try

24 Weyr, F. (1936) *Teorie práva*, pp. 338–339; Similarly also in Kubeš, V. (1935) Čirá nauka právní a věda soukromého práva. *Časopis pro právní a státní vědu*, 1935, XVII; Kubeš discusses the roots of Weyr's normativism also in Kubeš, V. (1995) *Dějiny myšlení o státu a právu ve 20. století se zřetelem k Moravě a zvláště Brnu. Díl první.* Brno: Masaryk University, pp. 159–169.

25 Weyr, F. (1920) *Základy filosofie právní.* Brno: A. Píša, p. 35.

26 Večeřa, M. (2016) Weyrova formální teorie práva jako skutečná právní věda? *Právní prostor* [online]. Available at: https://www.pravniprostor.cz/clanky/ostatni-pravo/weyrova-formalni-teorie-prava-jako-skutecna-pravni-veda

27 Večeřa, op. cit.

28 Harvánek, J. et al. (2013) *Teorie práva*. Plzeň:. Aleš Čeněk, p. 31.

29 Harvánek, J. et al., op. cit., p. 32.

30 Knapp, V. (1995) *Teorie práva.* Praha: C. H. Beck, pp. 1–9.

to paint a picture of a more sociological view of legal science. Přibáň points out that Knapp tried to reformulate some of the Marxist theses of legal dogmatics when he wrote that law is a cultural phenomenon that *"the people give to themselves and which has gradually developed from a need for rules* […] *and it became separate from other normative systems"*[31]. Přibáň sees in it a hint towards a more sociological view of law. But at the same time, we may pay attention to the fact that law is being singled out as a separate normative system. Moreover, the way Knapp explains basic elements of legal dogmatics is based on normativism.

While being able to pinpoint many of normativism's original tenets within the Czech legal thinking (law is a set of legal norms, judges only 'discover' legal norms, any interpretation of law exists independently of the experience and cognition of judges,[32] or the differentiation between legal norms and the acts of norm issuance[33] to name just a few) it might also seems that what is currently surviving from the original normativist ideas are rather the folk meanings associated with this approach stained by the applicatory tendencies of Actually-Existing Socialism.

The ideology and legal theory in socialist Czechoslovakia were often contradictory: from the purposive nature of law to help attain the idealistic goals of communist society and anti-formalist rhetoric, to the formalistic tendencies of judges who looked up to the Communist Party and its ideals and opinions.[34] Such tendencies seem to have brought about one element: the capacity to saturate the need for instruction. Actually-Existing Socialism brought forward the idea of justice based on the answers that

31 See Přibáň, J. (2002) Sociologie práva: vývoj a trendy po roce 1989. *Sociologický časopis*, XXXVIII, (1-2/2002), pp. 79–87, p. 79; Přibáň quotes Knapp (Knapp 1995, op. cit., p. 28). It is worth noting that Knapp has been an active scholar even before 1989. In his analysis of Stalin's texts, he writes that scholastic, dogmatic and formalistic thinking is not the purpose of (legal) science. Its purpose and place are in the frontlines, where all the lawyers and judges interpret and apply socialist laws. See Knapp, V. (1953) *Význam Stalinových statí "Ekonomické problémy socialismu v SSSR" pro právní vědu*. Orbis: Praha, p. 6. Cited in Kühn (2009), op. cit., p. 66.

32 Guastini, op. cit., pp. 318–319.

33 Guastini, op. cit., p. 318. In Czech legal context 'právní předpis' i.e. the form containing legal norms, is differentiated from 'právní normativní akt' as an act of the issuance of 'právní předpis'.

34 For a complex account of the ideological tendencies in legal theory and practice between 1948–1989 see Kühn, Z. (2009) Ideologie aplikace práva v době reálného socialismu. In: Bobek, M., Molek, P. Šimíček, V. (eds.). *Komunistické právo v Československu. Kapitoly z dějin bezpráví.* Brno: Masaryk University. Kühn discusses the various, often contradictory tendencies present in socialist and communist legal thinking.

only the Party was able to provide and the judge was expected to base their decision-making on. Markovits writes: *"Socialist law believed in substantive justice: it knew the answers (even if those answers changed over time) and therefore had to make sure that each judge would find them. Hence the innumerable instructions, analyses, inspections, and consultations constantly keeping judges abreast of the current political line. The Party, in this scheme of things, was the medical authority on all social ills. The judge was the local practitioner treating the patient."* [35] Although the applicatory practice, as well as the theory of law of communist Czechoslovakia, was far from that simple, Matczak, Bencze, and Kühn write that Actually-Existing Socialist law was reduced to a written system of rules and 'theory of law was close to a conceptually simplified normativism'.[36]

This understanding of the Czech legal style as adopted for the purpose of this paper can be seen as a part of *'the formalism-as-bad-heritage narrative'* as Cserne puts it.[37] He further explains formalism in adjudication as follows: *"Judges see their role as applying rather than creating the law; in their reasoning, they tend to refer to authoritative 'positive' sources rather than a broader range of normative principles, and in interpreting these sources judges tend to focus on the literal or ordinary meaning of legal texts rather than more creative techniques and modes of reasoning."* [38] We may see how this understanding of the judge's role seems to have been played out in the analysed case. Cserne criticizes this narrative as mostly ideological and not based on any strong empirical research.[39] However, as we will show later in this paper, our findings seem to suggest that it may be to a certain extent valid.

The year 1989 brought institutional and ideological change to the Czech legal environment and to the environment in which legal principles, as well as other non-institutionalized arguments, have found their way into

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35 Markovits, I. (1996) Children of a Lesser God: GDR Lawyers in Post-Socialist Germany, *94 MICH. L. REV. 2270*, p. 2293. Even though Markovits writes about the situation in GDR, the same may hold for former Czechoslovakia as well.

36 Matczak, M., Bencze, M., Kühn, Z. (2010) Constitutions, EU Law and Judicial Strategies in the Czech Republic, Hungary and Poland. *Jnl Publ. Pol*., 30, 1, pp. 81–99, p. 81.

37 Cserne, op. cit., p. 884.

38 Cserne, op. cit., p. 881.

39 Cserne, op. cit., p. 882.

courts' argumentation.[40] However, as discussed above, elements of normativism's legal exclusivity are still present in basic legal theory textbooks. Naturally, normativism, as well as socialist formalism, are more complex than this brief overview would suggest. However, for the purposes of our paper, the above-described elements are relevant to the present research.

Seeing the Court's claim in our case in this particular light, a minimalist approach to its argumentation may well be justifiable. But as we have mentioned before, this is not the course of action the Court decided to take. It based its argumentation on the 'prevalent social sentiment and attitudes' while at the same time citing only applicable laws and criticizing case-law of international courts.

In this line of thinking, public order is, on the one hand, a vague concept, on the other, it is a *legal* concept. As such, the simplified normativist and formalist heritage would lead us to believe that we have access to the content, meaning, of such a concept while staying within law. But when the prevalent legal style prefers a somewhat restrictive image of law and legal theory, the judges may miss out on important elements in understanding crucial legal concepts they work with. Moreover, when they do so and when they call upon the prevalent sentiment and attitudes of a society without actually adding any proof of such a claim, they may subsequently endanger the image of the judiciary, or the law and its legitimacy.

On the other hand, one can ask what would be a better solution for a judge dealing with such an issue. Taken ad absurdum, should each judge have training in social sciences as well as in law? Should they cite sociological studies as sources of their decision? Should they make a built-in up-to-date and scientific summary of sociological findings concerning the case? Would something similar to Brandeis Brief[41] made by the judge be sufficient or at least acceptable? We are aware that any cooperation of law and social sciences faces many difficulties discussed by many scholars through years;[42] however, we believe that facing these difficulties while reaching

40 Matczak, Bencze, Kühn, op. cit.; Matczak, Bencze and Kühn categorize references to past case-law as these non-institutionalized, non-formalistic arguments. For a complex discussion on legal principles and their role in legal argumentation see Kühn, Z. (2002) *Aplikace práva ve složitých případech. K úloze právních principů v judikatuře.* Praha: Karolinum.

41 Morag-Levine, N. (2013) Facts, Formalism, and the Brandeis Brief: The Origins of a Myth. *U. Ill. L. Rev.*, 2013, p. 59.

42 Yovel, J., Mertz, E. (2004) The role of social science in legal decisions. *The Blackwell Companion to Law and Society*, p. 410.

for transparency and persuasiveness is a necessity for any judicial decision. Legal sociologists and law and society scholars claim that sociological theory and data may help with fulfilling such an aim.[43]

4 Methodology and Analysis

While exploring the vague legal concept of public order within a wider-oriented research focused on the use of the social representations approach in the legal environment, we have conducted a pilot study to identify basic themes and tendencies in conceptualizing public order among legal professionals. This pilot study will further enable us to draw up a follow-up to explore the social representation of public order among legal professionals.

The social representations approach has been pioneered by Moscovici[44] and others to explore folk meanings in groups of persons. It views concepts as social objects. These social objects are then 'represented' in the community and allow understanding and communicating. Similarly to the conceptual structure proposed by Heck[45] or Hart,[46] social representations, too, might be seen to have a core that most of the community agrees on and that serves the main communicative purpose, whereas the periphery of the social representation contains fringe meanings only some of the persons would feel belong to the given concept.[47] The methods available within this approach are varied and may be of both qualitative and quantitative nature.[48]

As our present research is meant to be designed as a pilot study to identify meanings and directions that would allow possible further exploration of 'public order', we have chosen a qualitative approach that is best suited to identify topics and themes that we have not thought about in advance.[49]

43 See e. g. Cotterrell, R. (2017) *Sociological jurisprudence: juristic thought and social inquiry*. New York: Routledge.

44 Moscovici, S. (2001) *Social representations: explorations in social psychology*. Edited by Gerard, Duveen. New York: New York University Press.

45 Heck, P. (1932) *Begriffsbildung und Interessenjurisprudenz*. Tübinhen: J. C.B. Mohr.

46 Hart, H. L. A. (1994) *The Concept of Law*. 2nd ed. Oxford: Clarendon Press.

47 Abric, J.-C. (1994) Représentations sociales: aspects théoriques. In: Abric, J.-C. (ed.). *Pratiques sociales et representations*. Paris: PUF, pp. 11–36.

48 See e.g. Flick, U., Forster, J., Caillaud, S. (2015) Researching social representations. In: Sammut, G., Andreouli, E., Gaskell, G., Valsiner, J. (eds.). *The Cambridge Handbook of Social Representations.* Cambridge: Cambridge University Press, pp. 64–82.

49 Kvale, S. (1994). *Interviews: An introduction to qualitative research interviewing*. Sage Publications, Inc.

To that end, we conducted semi-structured interviews with 13 legal scholars. They do not represent a group or a community as such, but they are all part of the community of legal professionals. Not only did they undergo legal education, but they are also those who provide legal education and training to others. As such, they represent a part of the group that shapes the concept of public order as a part of the doctrine. As the legal basis of the vague legal concept of public order is multifaceted, we have chosen our participants to cover all the major legal fields traditionally recognized in Czech legal thinking (and usually corresponding to more or less traditional departments in faculties of law): legal theory, constitutional law, civil law, commercial law, labour law, criminal law, international law, European law, financial law, administrative law, environmental law, technology law, and legal history.

Our participants were 3 women and 10 men; aged between 26 and 48 years. Our interviews aimed to explore their representation of public order in depth and were divided into four parts. The first part aimed to discuss the participant's representation of public order; the second part investigated the participant's associations and semantic field of the individual constitutive parts of the term, i.e., public and order; the third part explored various pre-identified links of public order and law and other normative systems, and the fourth and last part introduced several model situations for the participants to assess in terms of public order.

One of the model situations was built upon the case introduced above. We asked the participants the following question:

> *"Do you think it would be contrary to public order for a transgender person who has not yet undergone gender reassignment surgery to have their preferred gender indicated in their identity card?"*

As evident from the question, our model situation was slightly different from the one the Supreme Administrative Court dealt with. We made two changes:

1. We have drafted it not around the national identification number but a general gender/sex identification in one's identity card.
2. We have only asked about the necessity of surgical gender change and did not mention the mandatory sterilization procedure, as we did not want the conversation to be steered towards the constitutionality or morality of such a rule. Even in situations where the participants recognized the source of the model situation, none of them recalled the mandatory sterilization part of the relevant legislation.

It might seem that the participants would tend to answer this particular question based on their value judgment. However, in the framing of this question and the purpose of the whole interview – exploring the vague legal concept of public order – and the fact that our participants are lawyers by education, we were interested in finding out how their understanding of public order and its ties to society, law and the state would colour their responses.

Asking the question of whether this case would be in line with public order or not is two-fold. On the one hand, it allows for subjective answers that would be based on what the participant believes should be the case. On the other hand, we were talking with lawyers. Many of their answers might not be purely subjective because they would be answering within the conceptual framework provided by law. Therefore, their answers may be their reflection of what they perceive the general opinion regarding public order currently is.[50]

Therefore, the main question we are asking in the present study is:

> *"What is the line of argumentation that leads our participants to the answer that it would be contrary to public order or not contrary to public order to allow the change in official gender indication without gender reassignment surgery?"*

Therefore, our primary objective here is not to determine our little group's sentiment towards this particular issue but rather to explore how they tend to think about the concept of public order when confronted with this particular issue. Although we have obtained either a *Yes, it would be contrary to public order*, or *No, it would not be contrary to public order* answers, some of our participants raised the issue of how they believed a judge should proceed when interpreting and applying the concept of public order. To understand the participants' answers to the model situation above, it seems necessary to take these views into account. They are not as much directly related to the participants' subjective views but also to their professional views, as shaped by the legal style they were trained in and formed by. Yet, as we are going to show below, the participants sometimes differentiated between their value-based answers and what they believed a judge should do.

We are using [pseudonyms] to protect our participants' anonymity.

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50 For a complex study on the role of professionalization and training in conceptualization see Chaib, M., Danermark, B., Selander, S. (eds.). (2011) *Education, Professionalization and Social Representations. On the Transformation of Social Knowledge*. New York: Routledge.

4.1 Yes, it is contrary to public order because it is against the law, and We should not lie in official documents

The **'Yes, it is contrary to public order'** answers were overwhelmingly law-based with only one exception.

The only participant who framed her 'Yes, it would be contrary to public order' answer not by legal norms but by values and emotions was [Mamka]. She framed her answer through the emotion of fear and through the image of herself as *'not being a standard-issue modern person'*, as she put it. In her opinion, the model situation would be in breach of public order, mainly because she is afraid such a possibility would open the door for people who would choose a different gender not because they suffer by not being able to do so but because they seek attention. And to her, this poses a great risk to the society that is not outweighed by the alleviation of the pain of persons who might benefit from it: *"I am not ready to admit that these people would not have any other option of meaningful solutions to their lives."*

All our other participants who believed the answer to the question would be Yes, it is contrary to public order, framed their answers firmly by law. It seems that within these responses, there was a tendency not to see the issue in the light of any social or individual values. Even though these participants tended to believe that public order is an institution to protect basic legal values of a given legal order, here they recalled the rule mandating the gender-reassignment surgery and judged an act of any state body contrary to this rule as being contrary to public order. These answers, therefore, may seem as if it was rather the act of gender indication change by the administrative body that would be the breach of public order, not necessarily the fact that a person would have a gender changed legally without the surgery.

One of the participants [Divadelník] automatically recalled the relevant legal regulation. In his understanding, change of gender in one's official documents is governed by laws and this particular situation has legally specified conditions that have to be met. Should an administrative body change a person's gender information without the person fulfilling all the legal conditions for such a change, the administrative body would act ultra vires and such an act would be contrary to public order. In his understanding, the answer is purely based on applicable legal rules.

Similarly, two other participants were trying to recall the legal basis for this issue. [Šimon] automatically thought about looking for a legal definition of 'pohlaví'.[51] He was not sure but thought that there must be legal regulations to define gender and rules that must be followed in order to change the information about gender in one's official documents. Since it would all be laid down somewhere in legal regulation, he did not believe the whole issue to be extra-legal or ethical. He also considered possible consequences that such a change would have, legally speaking: *"... there would be hundreds or thousands of legal norms bound to gender, so I would say that the rules that specify how to determine one's gender are connected with public order."* This led him to the conclusion that such a change would be contrary to public order.

Another participant, [Skywalker], hesitantly answered that the model situation would probably be contrary to public order, but when he attempted to figure out why that would be the case, his answer steered towards legal rules. He believed that such a situation would infringe the public order *"in the sense of personal data that should correspond with the reality, and this is one of the crucial principles of functioning of the system."*

The theme of correspondence between facts and legally important information such as gender indication in one's identity card appeared to be voiced by more of our participants, regardless of their final assessment of the situation. It usually arose when they were trying to pinpoint the purpose of a rule binding the gender indication to surgery requirement.

Participant [Dana] recalled her conceptualization of public order as a set of local and temporal traditions and for that, the model situation would constitute too much of an excess.[52] As she talked about the reasons why that would be the case, it seemed that she pictured this situation where someone who looks like a man would be identified as a woman in their identity card. In her reasoning, that would constitute too much of a discrepancy with how the world has traditionally been seen.

This, let us call it the 'correspondence to reality argument', has also appeared in the Court's argumentation of the case above: the information available in official legal documents should correspond to what is, so to say, the truth.

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51 In this paper translated as gender, see above.

52 The issue of excess or intensity of a transgression was a running theme across all the interviews. For the purpose of this paper, we are setting it aside, as it does not relate to present research and we will report on it in the future.

But what is 'the truth' here is naturally a much more complex issue as biological sex is one thing, but preference for a specific social construct we call gender[53] is another. And the fact that for the Czech law, the jury is still out on what exactly is the law talking about when it uses the word 'pohlaví', does not simplify this issue. But it seems from our interviews that while some of the participants seemed to conceptualize it as what genitalia does a person have and gender indication as corresponding to that information, or overall looks of the person and the correspondence with the gender indication, the participants' conceptualizations seem to be too diverse to draw any conclusion from that. Moreover, it was not the purpose of our research to dig deeper into this topic.

What is, however, more interesting here, is that the use of this 'correspondence to reality argument' was capable of yielding opposite answers, as it also appeared in the answers of those who believed the answer to the model situation was 'No'. The arguments of this group of participants seemed to circle the opinion that *'there is no right to know what one has in their pants'*, as one of the participants put it. And that it should not be relevant for law.

4.2 No, it is not contrary to public order because it is not a matter of public order

In general, the **'No, it is not contrary to public order'** answers seemed to be built around the extent of our participants' representations of public order. If we imagined the concept of public order as a bubble, for them, this bubble does not reach as far as the discussed issue. Answers given by our participants may be simplified into the following sentence: *"This is not a matter of public order, therefore it cannot be contrary to public order"*. The routes to arrive at this conclusion, however, seemed to be related partially to their value judgment, partially to their own personal representation of public order.

[Pozitivista] reacted to the model situation by saying: *"I don't see it as a problem. Maybe it is an infringement of a legal norm – I am not sure now, maybe it has legal consequences that I do not recall now, but I do not believe this would be contrary to public order."* This restricted

53 See Ásta (Ásta Sveinsdóttir) (2018) *Categories we live by: The Construction of Sex, Gender, Race, and Other Social Categories. Oxford*: Oxford University Press, pp. 54–69; or Butler, J.(2004) *Undoing gender*. New York: Routledge, 2004.

view of public order – at least regarding the transgender person's identification – seems to be common also for other participants who think the model situation would not be contrary to public order.

This is the case for [Desperado]. He does not believe the model situation to be an issue in any way connected to public order. He does, however, point towards some sort of idea of social consensus about what a crucial identification element in a person is. This idea of contrasting their judgement of the model case to 'what the society thinks' also appeared in [Pozitivista]'s account. He even said that should we conceptualize public order as values of the majority of the society, most Czechs would not be willing to accept his opinion.

Another participant [Cpt. Picard] also reflected on the differences between his assessment and what he perceives as a sentiment of the society:

> *"... subjectively, I do not see a problem there. But it is clear to me, that objectively, the society is not there yet* […] *There is no social consensus yet* […] *and if we defined the public order at the beginning [of the interview] as a social consensus means that the minority part of the society that is in dissonance with the majority is for some time in a bad position. And maybe it will flip and it will become a part of public order, or not. We are not there yet."*

[Klára] expresses an understanding for those who do not share her approach. While she believes that the answer to the model situation is that it is not contrary to public order, she sees that subjectively, it might be different for other people who may feel that such a change in the law (i.e. change of legal indication of gender without sex-reassignment surgery) might infringe upon *'how we live here together'*. [Klára] also opens the topic of 'otherness' and 'foreignness' of such a trend. In law (especially in public international law) the concept of public order serves as a kind of stop sign a state (or society) may use to protect certain legal and cultural specifics. And since the trend of changes and increased acceptance of transgender identities in law may – in her opinion – seem too foreign for the Czech society to warrant the public sentiment of *'Hey, no, we are not ready, keep that in the Netherlands, America or far away'*, as she puts it.

It seems that sometimes those participants whose answer to the model situation was 'No' do not necessarily conceptualize public order as something that would be so wide as to cover the model issue. Their answers, therefore, do not seem to be about how wide do they imagine the concept of public

order to be. However, as is evident from the participants' accounts, value judgments seem to peek through their answers as they often express doubt as to whether or not their assessment is shared by the rest of the society, often guessing, as the Court in our case did, that 'we are not there yet'. It is clear that our participants did not have any other option than to guess the sentiments of the society should they choose to contrast their value judgments and those of the society. However, is it acceptable in a legal setting for a judge to do the same?

Some of our interviews naturally developed towards a point when the participants talked about how a judge should go about interpreting the vague legal concept of public order. Not everyone from our pool of participants talked about this particular issue, however. Sometimes they raised it themselves, sometimes the interview naturally led to it, so we asked them about it.

The most prevalent notion present in the participants' accounts seems to be that any search for the meaning of public order must start within law. The first step concerns the legal rules, the normative context of the use of the term 'public order'. The next steps are still related to law. In [Dana]'s, [Martin]'s and [Šimon]'s opinion, the judge should next consult the travaux preparatoires, hoping that when the legislator decided to include such a concept into a law, they must have a reason to do so, an intent, a purpose, and this original intent should guide us.

[Martin] believes that we need to consider not only these documents of the history of the law itself but also to the general history of the term, especially if it is a legal transplant or a borrowing. This is closely connected to yet other steps available: commentaries (which in the Czech setting usually contain an account of relevant case-law as well as scholarly considerations and are a widely used source) and doctrine.

Case-law might be an equally important source to turn to. [Šimon] practically did not admit there would be any other way to reach the meaning of public order than doctrine and case-law. [Dana] sees commentaries and case-law as a means to mainly check what other judges think so that her interpretation would not dilute legal certainty.

[Artur] also describes the process of interpreting the concept of public order as starting with written laws (legal regulations) and additionally use political documents and memoranda. *"It still is* [...] *law, I am still interpreting law, I still need to use it as law. But I cannot overlook the matter*

of values that [...] *have been evolving over time and I need to somehow observe it or deduce it from something else, society. It is still public order and because law does not provide its definition, we need to find its meaning elsewhere."* But what is this elsewhere? Where should a judge turn to when these legal sources do not provide an answer? Is it morality? Other normative systems? [Divadelník] has a strict answer to these questions. In his opinion, the judge cannot consider issues of morality, mainly because they are bound by laws only.[54] They can only presume that the relevant moral norms have been moulded into legal norms. *"Because how would they objectively judge a case based on morality? Whose morality? One of the parties to the case? Their own? The society's?"*, he wonders.

Our participants also generally agreed that it is mostly the courts and, consequently, judges who eventually determine the meaning of vague legal concepts such as public order. [Cpt. Picard] concluded that ultimately, such an interpretation in any legal environment is the court's. The judge would need to determine the content of the concept in an individual case. *"But it is not a sociological study,"* he says, *"They will draw from their adjudication practice, from legal regulations that will clearly state when something is or is not OK."* [Artur], too, says that ultimately, public order is what the judges conclude in their decisions it is. But he is thinking about the 'elsewhere' they need to draw upon when legal sources such as rules, case-law, commentaries, and doctrine are not sufficient. That means that the judge who is to say what public order is *"must choose a system of values apart from legality and draw the line a little bit further."* But where is that 'further' the judge may go?

[Klára] rather cynically says that the content of vague legal concepts is dependent on the arbitrariness of the judges. She criticizes the approach of the judge in the original case the model situation was based on, calling it *'looking over to the streets and seeing what the people think'*. Looking into the law is surely the first step. But because the judge would not find an answer in law (may it be the lack of legal definition or lack of doctrinal or adjudicatory sources) they need to *"step out of the normative system of law and step into the normative system of morality of the majority of the society – and that is the better option. The worse option would*

54 Article 95/1 of the Czech Constitution specifies: *"In making their decisions, judges are bound by statutes and treaties which form a part of the legal order; they are authorized to judge whether enactments other than statutes are in conformity with statutes or with such treaties."*

be the normative system of the individual morality of the judge, who would apply their own worldview by means of using the vague legal concept," which is something [Divadelník] was worried about. In [Klára]'s opinion, the preferable way would be to truly determine what the social sentiment is by looking into the protocols on voting in the Parliament, the normative context of the laws, or into public sentiment polls. Because as [Artur], too, observed, *"the judge should not evaluate the mood in a society without any scientific data"*. Ultimately, as [Martin] points out, the content (representation) of legal order is constituted through the *"behaviour of each and every one of us and at the same time together. And that leads to the common idea about what public order means, and in turn what it is."*

5 Discussion

We have seen that while most of our participants described what is practically the same path they would take to interpret the vague legal concept of public order, they reached different conclusions when it comes to assessing the model situation.

They clearly differentiate between law and the rest, the non-law, such as morality, values, social norms, or religious norms. While some of the legal norms may be built upon these 'extra-legal' norms, they as 'the rest' seem to reside beyond law. This seems to point to a rather positivistic view of law.

We believe that what our participants say may be interpreted as being very much reflective of the – in this instance Czech – legal system's conceptualization of law. As explained above, the Czech legal system – or Czech legal style – carries along signs of its specific past: a combination of pre-war normativism and elements of Actually Existing Socialism's hyperpositivism.[55]

It is clear from our participants' answers that despite their differences in how they seem to think about public order, and despite differences in their answers to the model situation, the way they would (and, in their opinions, the court should) interpret the vague concept of public order seems to reflect the restrictive view of law as understood by normativism as well as a certain degree of formalism.

55 Manko, Škop, Štěpáníková, op. cit., p. 17.

While practically all of the participants talked about public order being the concept that overlaps with various non-legal normative systems, such as morality or religion, they also stressed that since it is a legal concept – a concept used in legal regulation – it must be first and foremost thought about in relation to law. And when it comes to determining the content of the concept in an applicatory context, they seem to have a clear idea as to how a judge should proceed when doing it: The law they are talking about consists of individual laws (legal regulations), *travaux preparatoires* (to determine the original legislative intent behind the law), commentaries, case-law, and doctrine. While all these sources may be viewed as 'legal' to a certain extent, we can see that the described process does not fit well into Weyr's ideas of law. The problem starts already in step two because for Weyr, legal theory should not be bound by what the legislator had in mind.[56] Weyr strictly differentiated between legal theory and legal practice, as the latter brings about unacceptable subjectivity.[57] Legal theory and legal practice are described as mutually independent.[58] Legal theory's task is purely to get to know the law and, to that end, use terms and concepts that are independent of the concepts used in legal practice.[59] Again in step four in the above process – seeking advice in case-law – judicial decision-making would be classified as legal practice, hence be excluded from legal theory. On the other hand, he does believe that judicial decision-making should be in line with legal theory,[60] indicating that some connections between legal practice and legal theory must exist.

Some of our participants talked about how the meaning of public order should be determined, and they connected pieces of theory as well as practice, recognizing that one influences the other, and the other way round. The discrete nature of law our participants seem to talk about is not strictly normativistic in Weyr's sense. Stressing the *travaux preparatoires* and case-law indicates not only wanting to provide legal certainty for subjects of law (as [Dana] put it), but also searching for instruction. While looking to case-law to provide answers is very well explainable within the terms

56 Weyr, F. (1936) *Teorie práva*, Praha: Orbis, 1936, p. 82.

57 Weyr (1936), op. cit, p 80.

58 Ibid., p. 82.

59 Škop, M. (2009) Normativní škola a tvorba práva [online]. In: *Dny práva – 2009 – Days of Law: the Conference Proceedings,* 1. edition. Brno: Masaryk University. Available at: https://www.law.muni.cz/sborniky/dny_prava_2009/files/prispevky/misto_brna/Skop_Martin__1301_.pdf

60 Weyr, F. (1930) Teorie a praxe. *Časopis pro právní a státní vědu,* 13, pp. 253–265.

of legal certainty, foreseeability of judicial decision-making, and general conservative approach in law,[61] seeking answers in *travaux preparatoires* signals a search for the original legislative intent. As we have mentioned earlier, the activities of a legislator belong in Weyr's terms to the realm of legal practice; searching for legislative intent would, therefore, mean searching for the meanings of legal terms outside of boundaries of legal theory. As such, it rather refers to socialist-formalist tendencies in legal methodology. Rodin[62] explains that legal systems of post-communist countries suffer from the formalist, or rather authoritarian, discourse. This authoritarian discourse sees law as a universal and final truth. It is, furthermore, communicated exclusively from the top.

As we have mentioned above, Cserne criticizes the narrative of judges in post-communist countries seeing their role in applying the law rather than creating the law and relying their reasoning on authoritative sources, focusing on the literal meaning of legal texts as ideological and not strongly grounded empirically.[63] However, our research seems to suggest that at least in dealing with vague legal concepts this narrative fits rather well. This might be the result of the double nature of the normativist heritage: Kelsenian and Socialist. Cserne also notes that these narratives are usually visible in connection to methods of court adjudication. In that aspect, we have to agree because while the Czech legal style is not the main focus of our research project, our findings connected to methods of adjudication and their possible explanations point us in that direction very strongly.

Moreover, our participants' accounts also speak of a certain method, one that is passed down in the process of professionalization. Determining the meaning of public order would, therefore, take place throughout these steps and with reference to these sources. Some of our participants exhibit quite a trust in the law when they say that the meanings of vague legal concepts are to be determined in a strictly legal context. Only when all these 'legal' sources fail to provide an answer, some of the participants suggest other sources they must use. As [Cpt. Picard] cited above said that while we are

61 Here we are touching on a very complex theme that would be far outside the scope of this paper to discuss any further. Let us refer to some of the relevant sources.
As regards the Czech legal environment, the practice of referring to past judicial decisions has been recently analysed and discussed in depth in Harašta, J., Smejkalová, T., Novotná, T. a kol. *Citační analýza judikatury*. Praha: Wolters Kluwer, 2021.

62 See Rodin, S. (2006) Diskurz a autorita v evropské a postkomunistické právní kultuře. *Právník*, No. 8, pp. 873–875.

63 Cserne, op. cit., p 882.

still interpreting law, if law does not provide a definition, we should look 'elsewhere'. Yet only two participants somehow recognize[64] that finding the meaning of public order elsewhere does not mean 'simply looking out of the window', and that the judge should not evaluate the mood in the society without any scientific data.

One might argue that this claim is not accurate since most participants mention 'doctrine' or 'legal science' as sources to look for when determining the content of vague legal concepts. But what exactly is that 'doctrine' or 'legal science' they talk about? It might seem that this part of the methodological path might include knowledge coming from social sciences and humanities, However, given the textbook understanding of this concept, it comprises legal textbooks and other legal scholarly writing. And in the Czech legal environment, most textbooks reinforce the restrictive, positivist view of law and it is still very unusual for legal scholarly writing to engage in any kind of non-traditional research. Writing about vague legal concepts usually entails examining past legal scholarly writing and analysing case-law; borrowing methodology from social sciences or engaging with scientific data is less common.

Should the court rule something that goes against accepted scientific knowledge, it would be disproved and criticized. But it seems that it is much easier to ignore social sciences and humanities and what they can bring towards the understanding of complex social phenomena. However, we might argue, a judge is not a sociologist. As [Cpt. Picard] said, what the court does when drawing up their conceptualization of public order is not a sociological study. Indeed, it would be inappropriate to ask a judge to conduct a sociological study. Yet what might this public order the judge talks about be, if not the 'prevalent sentiment of the society'?

Asking our research participants whether the model situation would be contrary to public order or not, is two-fold. On the one hand, it allows for subjective answers based on what the participant believes should be the case. On the other hand, our participants were lawyers. Many of their answers were not – and could not be[65] – purely subjective because they answered within the conceptual framework provided by law, and by their professional

64 It must be noted that they did recognize the original case from the model situation and their critique was directed at the argumentation of the case.

65 Ratinaud, P., Lac, M. Understanding Professionalization as a Representational Process. In: Chaib, M., Danermark, B., Selander, S. (eds.). *Education, Professionalization and Social Representation*s. New York: Routledge, 2011, pp. 55ff.

training and practice. Their understanding of public order is to a certain extent a professional representation, i.e. *"[n]either a scientific knowledge nor a common sense, they are elaborated and put into context in professional action and interaction, by protagonists whose professional identities they form. These identities correspond to groups in a specific professional field, in connection with salient objects of this field"*.[66] We might say that the public order about which we talked with our participants is an item of their unconscious practical knowledge and as such shared by the individuals working and professionally interacting with one another.[67] Therefore, their answers, may it have been 'yes, it is contrary to public order' or 'no, it is not contrary to public order', may not reflect their value judgment, but rather their understanding of either what the law thinks or what they perceive the general opinion regarding public order currently is. What they might be doing is the same, (un)educated guess as the Supreme Administrative Court did in the judgment.

It might even follow from our interviews that the concept of public order seems to invite making these guesses about the society as a whole and its value sentiment. However, since thinking in a more social science-oriented way, i.e. proving the society's sentiment by examining if there are any data to support a claim, does not appear in how our participants think about determining the content of public order, it seems that it is rather the simplified, legally restricted thinking about the concept of public order that nudges its users into making assumptions about what the society thinks.

The vague legal concept of public order is connected to the basic values of the society, embedded in the legal system. Authors trying to determine its meaning often make these links to social realities that, necessarily, invite guessing what the current sentiment of a society is. Eliáš refers to *"equal and free people who are aware of their responsibilities towards others and the whole society"*,[68] for Hendrych and Fiala it is a set of rules or principles of public behaviour.[69] In general, it seems that it works

66 Bataille, M., Blin, J. F., Mias, C, Piaser, A. (1997) Représentation sociales, representations professionnelles, systéme des activités professionnelles. In: *L'année de la recherche en sciences de l'education*. Partis: presses Universitaires de France, pp. 57–89, p. 63; English translation by Ratinaud, Lac, op. cit., p. 57.

67 Comapare Ratinaud, Lac, op. cit., p. 57.

68 Eliáš, K. (2015) K pojetí dispozitivního práva v občanském zákoníku. *Bulletin advokacie, odborný právnický portal,* No. 9, p. 12–34.

69 Hendrych, D., Fiala, J. (2009) *Právnický slovník*. 3. edition. Praha: C. H. Beck.

as a measure of acceptability of various phenomena,[70] something tolerable within a given society. And that needs a judgment as to what is tolerable within a given society, a judgment about what is still in line with the society's *'acceptable mess'*, as [Artur] put it. Such a conceptualization tends towards a representation of stability and the status quo. At the same time, this essentially conservative tendency of relating to 'our own acceptable mess' or 'that's how we do it here' may conflict with 'what is in accordance with the Constitution'. Moreover, public order is capable of being used as an argumentative veil to cover judges' personal opinions and present them as the 'prevalent sentiment of a society'.

6 Conclusion

We are observing a paradox: the concept of public order has strong roots in the society and its values but because it is a legal concept, lawyers may seem to rarely think about it outside the boundaries of law. Given the normativistic and socialist-formalistic elements surviving in the methods of current legal thinking, the image of law seems to be very restricted. Not only does it see law as something discrete, different from morals or religion, but it also sees social sciences, or even legal sociology, as something distinctive from legal theory.

When applying rules containing vague legal concepts, the 'minimalist' legal argument may lack important information as to the meaning of the concepts. While such an approach is acceptable within certain continental legal systems[71], a plain reference to the laws without a proper justification would not be acceptable within the Czech legal system.[72] But it is exactly these controversies and sensitive subjects that call for a change in the way judges argue their decisions. We believe the case described above shows

70 Tichý, L. (2015) Veřejný pořádek jako tzv. Obecná klauzule v soukromém právu z hlediska evropského kontextu. *Acta Universitatis CarolinaeIuridica*, 61, No. 3, pp. 77–108, p. 82.

71 See for example the French Cour de cassation minimalist decisions. On the legitimacy of the minimalist argumentation in judicial decision-making see Lasser, M. de S. O.-l'E. (1994–1995) Judicial (Self-) Portraits: Judicial Discourse in the French Legal System. *Yale L. J.*, No. 104, pp. 1325–1410.

72 There is quite a vast case-law regarding what constitutes 'proper' justification of a judicial decision. Among others, see the decision of Czech Constitutional Court No. IV. ÚS 2957/20, where the court stresses that a proper justification must be transparent enough to prove that the decision was not arbitrary.

the weaknesses of the argumentation whereby a judge while trying to draw upon legal sources only creates an illusion that they know the social sentiment well. When these types of argumentative claims lack references to proper sources, we believe that not only does the whole argumentation suffer, it is also capable of endangering the legitimacy of the law and the judiciary.[73]

Weyr's ideas about normative theory, or rather its surviving folk understanding in the current Czech legal environment, nicely explains and categorizes law as norms only. As such, it may provide useful information and tools to study said norms. We believe, however, that the remnants of this restrictive view that seems to survive in Czech legal style deprive the legal practice (adjudication as well as legal scholarship) as well as legal theory of valuable data – and in some cases – of being able to truly effectively contribute to the understanding of law.

We also believe we may observe a hint of a collective testimony from a generation of legal scholars, who were 'raised' within the Czech predominantly positivist legal tradition, believing in law being something discrete, something separable from the society, but at the same time tinted by social formalism and need for instructions.

Our present research shows that what has been so far only a pilot study brought a deeper understanding of what may be hidden behind the steps we lawyers seem to take automatically when it comes to interpreting and applying vague legal concepts. We believe – and intend to explore it further, that one of the means available is the social representations approach as a specific approach in examining and exploring what are essentially folk meanings of concepts. It provides a useful tool allowing us to dig deeper into the processes of conceptualization of lawyers themselves.

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73 See Smejkalová, T. *Soudní rozhodnutí jako autoportrét českého soudnictví* (forthcoming); Smejkalová builds on Loth, M.A. (2007) *Courts in Quest for Legitimacy: A Comparative Approach* [online]. P. 2. Available at: https://repub.eur.nl/pub/11005/; and Belling, V. (2009) *Legitimita moci* v *postmoderní době. Proč potřebuje Evropská unie* členské *státy?* Brno, Mezinárodní politologický ústav.

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Do Not Ignore the Elephant. Exploring the Role of Intuition and Experience in Judicial Decision-Making*

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Abstract

If we look at the literature about judicial decision-making and interpretation of law, we can find many texts which are dedicated to legal arguments, logic and legal reasoning – in those texts the rationality, analytical and logical thinking is glorified and an interpretation seems 'just' as a logical operation where judges subsume certain facts under general legal norm or norms, those norms are formulated linguistically, so it seems that the whole job of judges is to analyze texts. What we can see more rarely are discussions and texts exploring the role of intuitions, feelings and emotions and their role in judicial decision-making – at least in the Czech Republic. Those of our faculties are seen as the source of bias and distortion. Even if we look to the past, those themes are not so common among legal theorists and philosophers – especially in our tradition where we are still influenced by Hans Kelsen and František Weyr and their normative theory – but we can find exceptions and those are the American legal realists. In this paper, we will show that their observations and insights seem to be right. How can we know it? Because in last decades cognitive scientists have made big progress in the area of decision-making and it seems that we are

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not so rational as we thought us to be. They have explored that our thinking does not take place only through the deliberative system but, surprisingly, there is also another one system which influences our decisions. This system is automatic, fast, and intuitive – some call this system S1, Seymour Epstein an experiential system. This automatic system is more influential than our deliberative system because it is always heard – we can use Jonathan Haidt's metaphor of an elephant and a rider. S1, the intuitive, experiential system, is an elephant and S2, the deliberative, analytical system is the rider – in legal theory, we have talked about the rider a lot but we do not explore the elephant sufficiently. This paper will try to uncover the nature of the elephant.

Keywords

Hunch; Intuition; Experience; Cognitive Science.

1 Introduction

If we look at the literature dealing with legal interpretation and judicial decision-making, we will undoubtedly come across texts that deal with the problems of legal argumentation, discuss individual arguments, or deal with logic[1]. Interpretation and application of law are very often portrayed as a logical operation, where we merely subsume some facts under a general legal norm, analysing it through its linguistic expression, when it may seem from these texts that the judges' work consists only in a thorough analysis of legal texts. As Bartosz Brožek states, after reading methodological textbooks, we may get the impression that the world of law is purely linguistic and that lawyers are excellent text analyzers:

> *"... the methodological textbooks clearly suggest that the legal mind is mainly preoccupied with reasoning: the establishment of the valid law, the interpretation of legal provisions, their application to concrete cases, or proving facts. They are mental operations that require language. When one needs to know what the valid law is, it must be checked* […] *which statutory provisions have been properly*

1 It might seem that it is these abilities of ours, such as logical thinking, that might distinguish us from animals. But if we look into the animal kingdom, we find similar abilities in higher primates (at least in them). Tomasello speaks of protology.
Tomasello, M. (2014) *A Natural History of Human Thinking*. Harvard: Harvard University Press, p. 19.

> *enacted* […]. *When one interprets the law, one is concerned with linguistic expressions, considering their literal or functional meaning. The application of law is often depicted as a logical procedure, consisting in 'subsuming' the given facts under a general legal norm.* […] *It seems that the legal world is linguistic and that lawyers are excellent text analyzers."*[2]

What we encounter less often in legal theory and legal philosophy is that someone is more closely concerned with intuitions, feelings, or emotions. These human 'faculties' are often seen just as an entirely subjective source of bias – to demonstrate this thesis, we can look at some American judges' opinions:

> *"State v. Martini, 651 A.2d 949, 997-1000 (N. J. 1994) (Handler, J., dissenting) (linking, at several points, intuition to mere subjectivity in criticizing death penalty proportionality review and referring also to the judiciary's 'unexplained intuitive moral responses' to particular crimes).*
>
> […]
>
> *Shaffer v. Farm Fresh, Inc., 966 F.2d 142, 145-46 (4th Cir. 1992) (holding that 'some stronger objective indicator* […] *than simple judicial intuition is needed to warrant the drastic step of disqualification of counsel'), Squires v. Squires, 854 S. W.2d 765, 775 (Ky. 1993) (Leibson, J., dissenting) (arguing that 'the Majority Opinion* […] *is more intuitive than objective'."*[3]

If we turn to history, we rarely encounter these themes – the exception being the legal realists, whose work has not received much attention in our tradition and legal theory, whether it be American legal realism or Scandinavian legal realism. It is the question of intuitions that has received attention from the American legal realists, and since we will be dealing with this issue in this text, we will introduce their ideas in the first part.

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2 Brožek, B. (2020) *The Legal Mind: A New Introduction to Legal Epistemology*. Cambridge: Cambridge University Press, pp. 1–2.

3 Wright, G. R. (2006) The Role of Intuition in Judicial Decision Making. *Houston Law Review*, 42 (5). Available at: https://houstonlawreview.org/article/4799-the-role-of-intuition-in-judicial-decisionmaking [cit. 8. 6. 2021].

In the American legal realists' account, intuition may seem to be a kind of mystical faculty, a kind of judicial sixth sense, as Joseph C. Hutchenson called this 'feeling':

> *"I recognized, of course, that in the preparation of the facts of a case there was room for intuition, for feeling, that there was a sixth sense which must be employed in searching for the evidence …".* [4]
>
> *"… would hunch out just verdict after verdict by the use of that sixth sense, that feeling, which flooding the mind with light, gives the intuitional flash necessary for the just decision."* [5]

We will show in this text that intuition can be explained with the help of cognitive science, and if we look at it through the cognitive science's lens, it will not seem at all mysterious. In recent years, many cognitive scientists have been examining intuitions, feelings and emotions, and it is beginning to emerge that our thinking may be very different than we thought, that it is much more rooted in feelings and emotions, and that intuitions are an inevitable part of our thinking – as Haidt says, our automatic system is an elephant and our deliberative system is 'just' a rider – what does it mean? According to Haidt, our conscious is *"like a rider on the back of an elephant, the conscious, reasoning part of the mind has only limited control of what the elephant does."* [6] In this text, a model will be presented which argues that intuitions are based on our experiences[7].

First of all, we will present American legal realists' insights, observations and ideas briefly, especially those of Joseph C. Hutchenson, who wrote an article about intuitions in judicial decision-making, and Oliver Wendell Holmes, who emphasized the importance of experience. Then we will move to the 'modern' world and explore intuitions with the help of cognitive science and its findings – we will see that intuitions are intimately connected to our

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4 Hutchenson, J. C., Jr. (1929) The Judgment Intuitive: The Role of the 'Hunch' in Judicial Decision. *Cornell Law Review*, 14 (3), p. 275. Available at: https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1282&context=clr [cit. 8. 6. 2021].

5 Ibid., p. 277.

6 Haidt, J. (2006) *The Happiness Hypothesis: Finding Modern Truth in Ancient Wisdom*. New York: Basic Books. A Member of the Perseus Books Group, p. 3.

7 Epstein, S. (2014) Intuition from the Perspective of Cognitive-Experiential Self-Theory. In: Plessner, H., Betsch, C., Betsch, T. (eds.). *Intuition in Judgment and Decision Making.* London: Routledge: Taylor and Francis Group, pp. 23–38; or Betsch, T. (2014) The Nature of Intuition and Its Neglect in Research on Judgment and Decision Making. In: Plessner, H., Betsch, C., Betsch, T. (eds.). *Intuition in Judgment and Decision Making.* London: Routledge: Taylor and Francis Group, pp. 3–22.

experiences and that they are resistant to changes, so when gaining relevant experiences it seems that the environment and feedback are really important. After this, we will be armed with the needed information and we will be able to connect the old and the new – ideas of American legal realists and findings of cognitive science. We will see the connections and the fact that American legal realists – although they did not have the information that we have thanks to science nowadays – described quite aptly how this automatic system works, and they realised its importance while making decisions.

2 Intuition and American Legal Realism

The thinking of American legal realists has not received much attention in our legal environment. If anything, a rather simplistic, sometimes even caricatured, picture is presented. It should be noted that one of their members, Jerome Frank, contributed to this, which is rather paradoxical because Frank himself did not think of himself as one of the realists. When he spoke about the realists, he referred to them as a group of which he was not a part, as pointed out by Neil Duxbury in his article *Jerome Frank and the Legacy of Legal Realism*:

> *"Frank regarded himself to be somehow outside the 'mainstream' of realism, and in resorting to fact-scepticism appears to have been attempting an assault not only to Langdell and the Realist but on realism itself. And while he was prepared on occasions to defend that group of non-Euclidean legal thinkers unfortunately labelled 'legal realists' – especially against the Langdellian tradition – he wrote about those thinkers very much as an observer of rather than as a participant in their intellectual milieu. For Frank, it was 'the realists' rather than 'we realists'."* [8]

Brian Leiter speaks in this context of a 'Frankification' of the ideas of the American legal realists. Even though the ideas of other members were different, many authors consider and criticize especially the ideas of Jerome Frank while discussing American legal realism. As Leiter puts it:

> *"For everyone commonly thought to be a Realist* […] *endorses the following descriptive claim about adjudication: in deciding cases, judges respond primarily to the stimulus of the facts. The Received*

[8] Duxbury, N. (1991) Jerome Frank and the Legacy of Legal Realism. *Journal of Law and Society,* 18 (2), pp. 175–205. Available at: https://www.jstor.org/stable/1410136?seq=1#metadata_info_tab_contents [cit. 8. 6. 2021].

> *View can then be seen as simply one interpretation of certain aspects of what I shall call this "Core Claim" of Realism* […]. *That the misleading presentation of the Received View as the essence of Realism really represents what we may call the "Frankification" of Realism, i.e., the new dominant tendency to treat Jerome Frank's particular interpretation of the Core Claim as identical to Realism.* […] *But Frank is not Llewellyn or Moore or Oliphant, and while Frank shares in the Core Claim, none of these other writers share the Frankified Received View."* [9]

Leiter summarizes Frank's ideas as follows: *"How do judges decide cases? According to Frank, they first choose the solutions they want, the ones they like, and then they look for premises to support them."* [10] Judges are thus focused on some conclusion they like and only then do they look for some facts and some rules to justify their conclusion. In doing this justification, they manipulate these facts and rules entirely as they want and are not constrained by anything – they have unfettered discretion. He came to this conclusion by his deduction and interpretation of Joseph C. Hutchenson, who mentioned in his article that a judge who is on a quest for a just solution will follow his hunch wherever it leads him.[11] Frank inferred that whatever creates this judge's hunch also creates the law. Law is thus not at all certain but is at the mercy of the judge's unfettered discretion.[12]

The difference between Frank's thought and that of other legal realists is also discussed by Duxbury in his article on Frank and his legacy. Indeed, Frank was a sceptic *par excellence*; he was not only sceptical about rules but also about facts. This is an important difference between him and other realists because this is related to where they saw the sources of the indeterminacy of law. Leiter, in his *A Note on Legal Indeterminacy*, states that if we want to say that law is indeterminate, it can be for four main reasons. The first is to say that the sources of law are indeterminate, the second is to say that legitimate methods of interpreting law are indeterminate, the third is to say that legitimate ways of characterizing facts in terms of their legal relevance (importance) are indeterminate, and the fourth may be the indeterminacy of legitimate ways of justifying legal rules and legally

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9 Leiter, B. (2007) *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy.* Oxford: Oxford University Press, pp. 16–17.

10 Leiter, B. (2007), op. cit., marg. 12.

11 Hutchenson (1929), op. cit., p. 278.

12 Duxbury (1991), op. cit., p. 184.

qualified facts. Frank differed from the other legal realists in that he emphasized indeterminacy arising mainly from the third source of indeterminacy, i.e., facts, while the other legal realists emphasized indeterminacy mainly in relation to the second possibility, i.e., legitimate methods of interpreting law[13], where, as we know, there are various theories; among the most influential we can mention intentionalism, originalism and purposivism.

We will not deal further with this frankified version of American legal realism, although most of the criticism is directed against this version[14]. We will now focus our attention, given our central theme, on Joseph C. Hutchenson, Jr. Hutchenson wrote a short article in 1929, *The Judgment Intuitive: The Role of the 'Hunch' in Judicial Decision*.[15] As we will see, even though Hutchenson himself did not rely on today's scientific theories (which he objectively could not), what he describes in his short article fits the picture of thinking and decision-making as it is accepted by the scientific community today and, based on various experiments, appears to be a true description of how we think and how we make decisions.

At this point, then, we will introduce Hutchenson's article. He begins by describing how, as a young graduate student, he left school with clear ideas about how law works. He states that he was trained at the university to follow the law, where the law was discussed as a system of rules and precedents, categories and concepts. The image of the judge he took away from the university was that of a clerk who was austere and cold, a logic machine who used his logical reasoning to determine the relationship between the facts of each case and previous precedents. He was

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13 Leiter (2007), op. cit., p. 9.

14 And this is whether we look at Ronald Dworkin's 'characterization' of American legal realism, which argues that, according to realists, judges decide cases on the basis of their own political or moral views, and only after the fact select some legal rule to serve as a rationale for their decision.
Dworkin, R. (1977) *Taking Rights Seriously*. Cambridge: Harvard University Press, p. 3.
Or, for example, when Frederick Schauer describes realists as those who argue that judges are largely unfettered and uninfluenced by influences and forces external to their views.
Schauer, F. (1991) *Playing by the Rules*. Oxford: Oxford University Press, p. 191.

15 Hutchenson uses the words hunch and intuition as synonyms, though in today's terms there should be a distinction between the two, since intuitions are not mere guesses, but are a form of thinking, unconscious thinking. As scientists from the University of Leeds put it, *"intuition is more than just a hunch"*.
University of Leeds (2008) Go With Your Gut – Intuition Is More Than Just A Hunch, Says New Research. *Science Daily*, 6 March 2008. Available at: https://www.sciencedaily.com/releases/2008/03/080305144210.htm [cit. 20. 9. 2021]

astonished then, when, in deciding a very difficult case, the judge told him that he would wait for his 'hunch', and he considered it only a joke, and a very bad one, since he respected the law for the logical rigidity and precision which he presupposed.[16]

Yet for example Oliver Wendell Holmes wrote already in 1881 in his book *The Common Law* that the life of law is not logic, but experience, feeling – the judge and his decisions are influenced by what he feels, he is also influenced by prevailing moral and political theories, intuitions, whether consciously or unconsciously. Holmes argues that, in addition to this influence of theories and intuitions, judges even share prejudices with their fellow citizens. And all this, he says, has more to do with determining what rules one should follow than any syllogism, as Holmes puts it:

> *"The life of law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed."* [17]

Hutchenson himself admits that he only began to recognize the wisdom of these men who spoke of feelings and intuitions as he gained more experience over time.[18]

When he started out, he saw law as something that was already fully formed, fully 'grown up' and that all processes were already fully established, and he completely rejected the notion that law should still have a 'life of its own', that it should evolve and grow. He states that he was of course aware that in the past the law was made by judges, he was also aware that judges had to decide all cases, but he thought that all creative activity of judges and the evolution of law was already over and that in modern law only deduction had its place and judges had to decide only on the basis of how their predecessors had decided, in Hutchenson's words:

> *"I knew that in times past the law had grown through judicial action, that rights and processes had been invented by the judges, and that under their creative hand new remedies and new rights had flowered.*

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16 Hutchenson (1929), op. cit., p. 274.

17 Holmes, O. W., Jr. (1881) *The Common Law 1*, quoted by Wright (2006), op. cit., pp. 1382–1383.

18 Hutchenson (1929), op. cit., p. 278 ff; or Brožek (2020), op. cit., p. 12.

> *I knew that judges 'are the depositories of the laws like the oracles, who must decide in all cases of doubt and are bound by an oath to decide according to the law of the land,' but I believed that creation and evolution were at an end, that in modern law only deduction had place, and that the judges must decide 'through being long personally accustomed to and acquired with the judicial decisions of their predecessors'. "*[19]

But as he got more into practice, his opinion began to change and he began to realize that it was different than he thought as a young graduate. In fact, he began to meet great lawyers who were successful precisely because of the intuitive skills they had acquired through their practice, training and cultivation of their imagination. He began to discover that the law does change and modification is the 'life' of the law, and through his experience, he no longer doubted that a really good judge 'feels' how to decide a case[20]. As Oliver Wendell Holmes said, *"general propositions do not decide particular cases. The decision depends on judgment, or intuition, which is far more subtle than any general premise."* Of course, not only good judges are endowed with this ability, but also for example lawyers. But they differ from judges in that they have a clear goal, namely to win a lawsuit for their client, so they will not follow the intuitions that lead them in the opposite direction. Judges, on the other hand, do not have such a set direction; judges are supposed to decide fairly in accordance with the law, so they can follow their intuitions wherever they lead them.[21]

Intuition, then, is the light that guides the judge along the way *"when the case is difficult or involved, and turns upon a hairsbreadth of law or of fact, that is to say, 'when there are many bags on the one side and on the other' "*[22] In that case, then, Hutchenson describes that *"... after I had examined all the available materials and given them due consideration and thought, I left room for my imagination* […] *and waited for that feeling, that hunch – that intuitive flash of understanding that connects the question to the decision, and in the place that is darkest to the judge's feet, sheds light on his path."*[23] Hutchenson is certain that intuitions are our top skill, possessed not only by the best judges and lawyers, but also by the best gamblers, detectives,

19 Hutchenson (1929), op. cit., p. 275.
20 Ibid., p. 277.
21 Ibid., p. 278.
22 Ibid., p. 278.
23 Ibid., p. 278.

or even scientists and mathematicians. These, he believes, open doors that were previously closed and expand our horizons thanks to our intuitions. As Hutchenson saw it, intuition:

> *"... is that tiptoe faculty of the mind which can feel and follow a hunch which makes not only the best gamblers, the best detectives, the best lawyers, the best judges, the materials of whose trades are the most chance because most human, and the results of whose activities are for the same cause the most subject to uncertainty and the best attained by approximation, but it is that same faculty which has guided and will continue to guide the great scientists of the world, and even those august dealers in certitude, the mathematicians themselves, to their most difficult solutions, which have opened and will continue to open hidden doors; which have widened and will ever widen man's horizon."* [24]

From a man who thought that feelings and intuitions had no place in law, that law was certain and predetermined, he became a man who came to see that intuitions were very useful and present in judicial decision-making.

3 Intuition Through Scientific Eyes

In this section, we come to intuitions themselves and how they work according to contemporary science. As noted Hutchenson refers to intuitions and this 'feeling' as a kind of sixth sense, a mystical faculty. I suspect that even today many people who are not interested in the question of intuitions have a similar idea. Tilman Betsch provides a definition of intuition from the Encyclopaedia Britannica, where intuition is defined as *"the power of obtaining knowledge that cannot be acquired either by inference or observation, or by reason or experience."* [25] If we look at these definitions, we also get the impression that it is a mystical faculty. Betsch explains that this 'traditional' view has religious roots, where intuitions are something that connects us to 'the one above' and is some sort of supernatural ability.[26] In my opinion, this view of intuitions is also the source of the fact that we don't usually take them too seriously or concern ourselves with them much within legal theory and philosophy.

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24 Ibid., p. 279.
25 Betsch (2014), op. cit., p. 3.
26 Ibid., p. 3.

Within the cognitive sciences, the opposite is true. In the last few decades, many scientists have been looking at this very issue, and the view of how human thought works is beginning to change. It is becoming clear that intuition, but also feelings or emotions, play a very important role. Much more important than we have been able to admit, and many even today are able to admit. Although it seems that thinking is much more emotionally rooted, it does not mean that we are irrational as Daniel Kahneman wrote:

> *"The definition of rationality as coherence is impossibly restrictive, it demands adherence to rules of logic that a finite mind is not able to implement. Reasonable people cannot be rational by that definition, but they should not be branded as irrational for that reason. Irrational is a strong word, which connotes impulsivity, emotionality, and a stubborn resistance to reasonable argument. I often cringe when my work with Amos is credited with demonstrating that human choices are irrational, when in fact our research only showed that Humans are not well-described by the rational-agent model."*[27]

In the following lines, we will present some findings made in this field and we will see that intuitions are not a mystical faculty, that they do not really connect us with something or someone supernatural, but that they have developed quite naturally and are closely linked to our experience.

Tilmann Betsch summarizes the basic features of intuition by saying that *"intuition is a thinking process. The input to this process is acquired through knowledge that is stored in long-term memory and that has been previously acquired through associative learning. It is an automatic process that takes place at an unconscious level. The output of this process is then a feeling that can serve as a basis for our judgement and our decisions."*[28] Scientists agree that we must distinguish between two different modes of our thinking, namely intuitive and deliberative, which are then usually referred to as 'System 1' (intuitive) and 'System 2' (deliberative)[29], which Seymour Epstein refers to as the 'experiential system' and the 'rational

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27 Kahneman, D. (2011) *Thinking Fast and Slow*. New York: Farrar, Straus and Giroux, p. 594.
At this point, it is also worth noting that the experiments conducted by Kahneman were specially prepared. In these special cases, our intuitions may fail, but we cannot conclude from this that they are unreliable in general.

28 Betsch (2014), op. cit., p. 5.

29 Betsch (2014), op. cit., p. 4; or Kahneman (2011), op. cit., p. 24.

system'[30]. The deliberative system is relatively slow, verbal, abstract, analytical, energy and time consuming, and is a conscious activity.[31]

In contrast, there is the intuitive, experiential system (hereafter referred to as 'intuitive'), which is very fast, automatic, non-verbal, energy-light, holistic, and takes place unconsciously.[32] Daniel Kahneman states that it is beginning to appear that this automatic process, i.e. intuition, has more influence on our decision-making than we might think or believe. He identifies intuitions as the secret author of many of our choices, judgments, and decisions.[33] As Seymour Epstein writes, *"an experiential system can influence a rational system without the rational system being aware of it."* [34] This need not be seen as some human failing, however, since Herbert Alexander Simon, for example, did not rule out that intuitions can be our strengths and that *"the unconscious may be a better decision maker than the conscious mind."*[35] If we look at the deliberative system, it is not only slower but is also limited by our inability to pay attention and focus on everything that is happening around us or on all the information that is consciously available to us. So this 'higher-order thinking' is limited by the capacity of our attention as well as our memory. We are not able to consciously focus on all relevant information at one single moment, but in the deliberative process we have to go through it one by one, so it is processed sequentially.[36] Sometimes the problem being addressed *"may be so complex or structured that it is impossible to objectively analyze all of its components that holistic, intuitive judgments may be the only possible approach."* [37]

In contrast, the intuitive system works differently; here, information is not processed sequentially, but in parallel. As a result, this system is able to process vast amounts of information. This information is acquired through experience, which then creates a very rich database. This information is stored in long-term memory. If the previous experiences are sufficiently representative, i.e. similar to the problem being solved, then the intuitions

30 Epstein (2014), op. cit., p. 24.
31 Ibid., p. 25.
32 Ibid., p. 24.
33 Kahneman (2011), op. cit., p. 24.
34 Epstein (2014), op. cit., p. 27.
35 Simon, H. A. (1950) *A Behavioral Model of Rationality Choice*, quoted by Betsch (2014), op. cit., p. 18.
36 Betsch (2014), op. cit., p. 6.
37 Epstein (2014), op. cit., p. 33.

are very accurate.[38] From this, it is clear that intuitions are not innate to us, but instead, they must be learned; they are formed only on the basis of our experience. Their quality then *"depends on how well we have reasoned in the past;* […] *and also on how well we have reflected on the successes and failures of our past intuitions. Intuition is simply rapid cognition with the required knowledge partially swept under the carpet, all courtesy of emotion and much past practice."* [39]

Good intuitions are the result of training and practice. In this case, it also depends on whether this training and practice are done well; the feedback we receive and the environment in which we gain our experience play an important role.[40] If we want to shape our intuitions, then it is important to consciously expose ourselves to an environment where we get the necessary experience, information and feedback. Having enough relevant experience and choosing an appropriate environment seems all the more important when we consider that the intuitive system is quite resistant to change -it will only change if we have repeated experiences that override the original ones, or if we have some very intense experience.[41]

If the practice is long enough and we get enough experience, we can become experts in that particular field, where thanks to this experience we can see things very quickly that novices don't see[42], or we can make decisions that a novice would not be able to make, or at least not so quickly, since novices use more of a deliberative system and need to compare different options.[43] In this context we can cite the often-cited example of chess grandmasters. Herbert Simon conducted research with them and showed that after thousands of hours of playing (i.e. practice), they see the chess pieces on the board differently than the rest of the players. Simon then describes this expert intuition by saying that *"the situation provided a cue, the cue gave the expert access to information stored in his memory, and this information provided the answer. Intuition is nothing more and nothing less than*

38 Betsch (2014), op. cit., p. 6.
39 Damasio, A. (2006) *Descartes' Error: Emotion, Reason and the Human Brain*. London: Vintage, pp. XVIII–XIX.
40 Hogarth, R. M. (2014) On the Learning of Intuition. In: Plessner, Betsch, Betsch (eds.)., op. cit., p. 102.
41 Epstein (2014), op. cit., p. 26.
42 Klein, G. (2017) *Sources of Power: How People Make Decisions.* Cambridge: The MIT Press, p. 238.
43 Ibid., p. 52.

recognition."[44] What we need to notice, however, is that it usually takes a long period of practice and experience for someone to reach the level of 'expert'. Daniel Kahneman explains this by saying that becoming an expert in a field is not about acquiring and mastering any one skill, but rather about acquiring a great many mini-skills.[45]

Our intuitive system then provides us with answers to the problems we are solving, automatically and unconsciously. But it is not that the deliberative system has no place in our thinking, for it controls the quality of these solutions – it can approve, modify, or reject[46] them. Steven Sloman points out, however, that because the intuitive system is so fast and automatic, its *"opinion is always heard* […] *and, because of its speed, it often precedes and neutralizes the response"* of the deliberative system.[47]

4 Implications for Law

In this section, we consider what the findings of cognitive science mean for us as lawyers. If we draw on their findings, it may become clear that intuitions are much more common and present in decision-making, even judicial decision-making, than we thought. As has been written, intuitions use prior experience as a database for decision-making, and it is a fast, automatic process. If we look at it through this lens, then it is possible to talk about intuitions not only in the context of higher and supreme court decision-making, where American legal realists have described this decision-making, since it was mainly the judges of those courts, but also in lower court cases, where the environment is even more conducive to the formation of intuitions since they are mostly deciding cases that are quite similar, and so it is easier to recognize the similarity of cases.

As mentioned, intuitions are not innate, but we have to train them to become experts in the field, it takes quite a long period of practice. Just as one does not become a chess master by learning the rules of chess, one does

44 Kahneman (2011), op. cit., p. 336.

45 Ibid., p. 336.

46 Kahneman, D., Shane, F. (2002) Representativeness Revisited: Attribute Substitution in Intuitive Judgment. In: Gilovich, T., Griffin D. W., Kahneman, D. (eds.). *Heuristics and Biases: The Psychology of Intuitive Judgment*, Cambridge: Cambridge University Press, p. 51.

47 Sloman, S. (2002) Two Systems of Reasoning. In: Gilovich, Griffin, Kahneman (eds.)., op. cit., p. 391.

not become an excellent judge or lawyer by knowing or looking up the rules of law. After all, if we look at how people who play chess at a higher level learn and prepare for their game, it is also through going through the games of chess of grandmasters and looking at how they played and how they reacted to particular situations. In law, we might consider the case law of the Supreme Courts and the Constitutional Court to be such grandmasters' games. Of course, there is always room for improvement, but they can serve to refine our reasoning and to practice identifying what is legally relevant in particular cases.

The legislature seems to be aware of this, since if we look at the requirements for someone to become a judge, then practice is required. Judicial candidates have a preparatory service whose *"purpose* […] *is to prepare judicial candidates professionally to serve as judges"* [48] and this *"preparatory service lasts 36 months."*[49] For the transfer to a regional, superior, or supreme court, then, even longer experience is required[50], which makes sense since, as noted above, more complex cases may come to these higher courts, and it is more difficult to look for similarities with previous cases.

The environment in which the experience is gained and the quality of feedback is also important. If we think about it, within our court system, we could talk about the feedback that lower courts' judges can get through the decisions of the higher courts, which in turn can get feedback through the supreme courts, and all of these in turn through the findings of the Constitutional Court. However, this feedback is rather limited and can often occur after several years. At this point, I see it as very important that we have jurisprudence and academics who follow the development of case law and not only that, they even comment on it and reflect critically on it. In my view, this is a very important role for jurisprudence, and academics and judges should follow these debates – at least those that are in some way related to their decision-making. The problem, however, may be that these expert debates and expert criticism of decisions concern precisely the decisions of higher-level courts and the Constitutional Court, so judges of lower courts have to wait for feedback from the possible overturning of their decisions. However, what is important is not the overturning of the decision itself how it is justified that they have made a wrong decision.

48 § 109 (1) Act No. 6/2002 Sb., Czech Republic, in Czech.
49 § 110 Act No. 6/2002 Sb., Czech Republic, in Czech.
50 § 71 (2 and 3) Act No. 6/2002 Sb., Czech Republic, in Czech.

Another way in which feedback can be obtained is in an informal way where judges can ask their colleagues how they would have handled the case and why, so they can learn from each other[51].

However, there is a risk with gaining sufficient experience and expertise, namely that the more experience we have, the larger the database is and the easier it is to find similarities but, on the other hand, there is a risk that we may miss some clues that could navigate us to a different direction. As Tilmann Betsch points out, *"the larger the sample of our previous experience, the more people tend to be conservative in their judgments and decisions and then underestimate the new evidence."*[52] The fact that we are becoming more conservative in our decisions and judgments can be seen as relatively good news for judicial decision-making since judicial decisions should be predictable, but each case should be considered separately to avoid applying a standard that does not apply to the case at hand. If we are not careful, this very conservatism may lead us in the wrong direction. Each case must therefore be given due consideration.

5 Concluding Remarks

Having introduced intuitions as perceived by today's science, we can compare the ideas and claims of American legal realists with the findings of scientists. The reader could certainly spot the connections, but for the sake of clarity, we will briefly list them here so that we have them in one place. As noted, American legal realists emphasized the importance of experience, whether we take Oliver Wendell Holmes's statement that the life of the law is not logic but experience, or when Chancellor Kent declared that he must first become a master of facts in order to see where justice is found afterwards – it is clear, then, that experience is very important to him. As noted in the section dealing with intuitions from the perspective of contemporary science, then, scientists agree that experience forms the basis of intuitions; indeed, for example, Seymour Epstein calls the intuitive system experiential.

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51 Richards, D. (2016) When Judges Have a Hunch: Intuition (and Some Other Emotion) in Judicial Decision Making. *ARSP: Archives for Philosophy of Law and Social Philosophy*, 102 (2), p. 12. Available at: https://houstonlawreview.org/article/4799-the-role-of-intuition-in-judicial-decisionmaking [cit. 8. 6. 2021].

52 Betsch (2014), op. cit., p. 16.

This system differs from the deliberative system in that its operations occur unconsciously and automatically, and the result of this process is a feeling that something is so and so. This feeling is then discussed, for example, by Joseph C. Hutchenson, when he writes that *"... after canvassing all the available material at my command, and duly cogitating upon it, give my imagination play, and brooding over the cause, wait for the feeling, the hunch-that intuitive flash of understanding which makes the jump-spark connection between question and decision, and at the point where the path is darkest for the judicial feet, sheds its light along the way."* [53] In this Hutchenson's statement, we find another thing that cognitive scientists have confirmed, namely, that when a case is very complex and it is not within our ability to objectively analyze all of its components intuition is all we are left with.

Thus, it seems that the American legal realists who wanted to describe how judicial decision-making works and thus were concerned with descriptive theory, were quite successful, given the results and theories of today's science. Of course, this knowledge was not available to them, so they could not use it. But they are available to us today, and therefore we can explain some phenomena and better understand how some processes work. What is more, intuitions are not only a source of bias, but also our very strong point and they are much more common than we think. In the author's view, then, it is not appropriate to dismiss them by stating that they have no place in legal thinking. They are part of all thinking, including legal thinking, and should therefore be given attention.

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53 Hutchenson (1929), op. cit., p. 278.

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The Concept of Legal Language: Law is Language*

*Ondřej Glogar***

Abstract

This paper deals with the metaphor 'law is language' coined by James Boyd White and how it can be useful to understand the concept of legal language, connections between law and language and how the term language is used in the legal realm. In the beginning, the article aims to give an overview of possible approaches to legal language and continues with further analysis of one of them (the above-mentioned White's proposition). By applying a semiotic approach to this concept, namely Saussure's theory of distinguishing between langue (language) and parole (speaking), the paper helps to understand that language (and even legal language) can be understood in two different forms. It can be either considered an abstract system of signs, or it can be comprehended as individual speech acts – langue and parole, respectively. White's metaphor is usually used in the meaning of texts, way of reading, writing and speaking. However, such conception corresponds to language in the sense of parole. These considerations lead at the end of the article towards the communicative theory of law and its merits to jurisprudence. According to a given doctrine, in some instances it can be more accurate to consider law as communication rather than language (and vice versa). Nevertheless, in either case, it is essential to bear in mind the distinction between both of the concepts.

* This paper is partly based on and built on the previous works of the author, especially on the diploma thesis dealing with connections between law and communication. See Glogar, O. (2020) *Právo jako komunikace.* Master's thesis. Brno: Masaryk University, Faculty of Law. Available at: https://is.muni.cz/th/wxiq5/ [cit. 18. 7. 2021].

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Keywords

Legal Language; James Boyd White; Law is Language; Communication; Semiotics.

1 Introduction

Legal language is a crucial element to understand law. Without legal language (or legal communication) we would not be able to recognize which norm can be considered a valid legal rule and what its content is.[1] It serves as a tool through which law is created as well. Despite that, approaches to the description of 'legal language' vary. There is no simple and generally accepted definition of this term.[2]

This article aims to contribute to the discussion about the concept of legal language itself. At the beginning, it shortly introduces possible streams of viewpoint at this phenomenon. Afterwards, I will select one of these approaches for deeper analysis, namely the canonical metaphor of James Boyd White 'law is language' and its subsequent reflections in the works of other scholars. Although this concept is probably widespread and well-known among legal scholars (especially those dealing with law and humanities), I assume that by applying a novel point of view it is possible to uncover so far unnoticed features of the concept and possibly even point out some blind spots. This view is based on the notes of semiotics (as they are tightly connected to legal language), mainly on Ferdinand de Saussure and his differentiation between 'langue' (language) and 'parole' (speaking). In the final part of this paper, the semiotic approach applied to White's work should result in clarification of White's metaphor and, in general, emphasize the difference between the communicative aspect of law on one side, and legal language as a system on the other.

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1 See e.g., Weinberger, O. (1995) *Norma a instituce: (úvod do teorie práva)*. Brno: Masaryk University, p. 35.

2 See Myška, M., Smejkalová, T., Šavelka, J., Škop, M. (2012) Creative Commons and Grand Challenge to Make Legal Language Simple. In: Palmirani, M., Pagallo, U., Casanovas, P., Sartor G. (eds.) *AI Approaches to the Complexity of Legal Systems. Models and Ethical Challenges for Legal Systems, Legal Language and Legal Ontologies, Argumentation and Software Agents* [online]. Berlin: Heidelberg, New York: Springer, p. 273. Available at: https://link.springer.com/content/pdf/10.1007%2F978-3-642-35731-2.pdf [cit. 18. 7. 2021].

2 Possible Approaches to Legal Language

The study of legal language is not an unexplored area of jurisprudence (or science in general). Based on my analysis, I have so far arrived at the following possible approaches to legal language:

- general legal-theoretical approach – branch of jurisprudence, which deals in more detail with legal language; it is rather a 'residual' category, doctrinal approaches to legal language (especially B. Wróblewski, D. Mellinkoff,[3] we can also mention the German theorist Hatz[4]);
- general linguistic approach – description of legal language as one stylistic layer of language;[5]
- applied approach – an approach using various computer quantitative tools, especially language corpora, the applied approach is also connected with legal informatics (L. Solan, T. Gales or S. Mouritsen);[6]
- semiotic approach – thinking about law and language as sign systems, the semiotic approach is mainly connected with issues of conceptualization, meaning, etc. (for example J. Broekman has been recently very productivein this area);[7]
- pragmatic approach – stream that examines the use of natural language, external linguistic features of speech (with typical representatives: A. Marmor, F. Poggi or I. Skoczeń);[8]

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3 Mellinkoff, D. (1963) *The Language of the Law*. Oregon: Resource Publications.

4 Cf. Hatz, H. (1963) *Rechtssprache und juristischer Begriff*. Stuttgart: W. Kohlhammer Verlag.

5 These notes are usually part of general textbooks of stylistics. See in the Czech domain e.g. Bečka, J. V. (1992) *Česká stylistika*. Praha: Academia, p. 34; Homoláč, J., Mrázková, K. (2016) Sféra institucionální komunikace. In: Hoffmannová, J. et al. *Stylistika mluvené a psané češtiny*. Praha: Academia, p. 144ff.

6 Solan, L., Gales, T. (2017) Corpus Linguistics as a Tool in Legal Interpretation. *Brigham Young University Law Review* [online]. 6, pp. 1311–1358. Available at: https://www.researchgate.net/publication/329019956_Corpus_Linguistics_as_a_Tool_in_Legal_Interpretation [cit. 5. 5. 2021]; Mouritsen, S. C. (2010) The Dictionary Is Not a Fortress: Definitional Fallacies and a Corpus-Based Approach to Plain Meaning. *Brigham Young University Law Review* [online]. 5, pp. 1915–1980.Available at: https://digitalcommons.law.byu.edu/lawreview/vol2010/iss5/10 [cit. 5. 5. 2021].

7 See e.g., Broekman, J. M., Backer, L. T. (2013) *Lawyers making meaning: The semiotics of law in legal education II*. Dordrecht: Springer; Broekman, J. M. (2019) *Rethinking law and language: The flagship 'speech'*. Cheltenham: Edward Elgar Publishing.

8 Marmor, A. (2008) The Pragmatics of Legal Language. *Ratio Juris*, 21, pp. 423–452; Poggi, F. (2016) Grice, the Law and the Linguistic Special Case Thesis. In: Capone, A., Poggi, F. (eds.) *Pragmatics and law: philosophical perspectives*. Cham: Springer, pp. 231–248; Skoczeń, I. (2019) *Implicatures within Legal Language*. Cham: Springer.

- rhetorical approach – (mainly) prescriptive handbooks on legal writing and legal rhetoric (including translation manuals, dictionaries, popular articles etc.), notably books by B. A. Garner.[9]

Many works on language and law (mainly in Central and Eastern European circles) follow in a certain way the distinction between *'jezyk prawny'* (legal language) and *'jezyk prawniczy'* (the language of lawyers), as B. Wróblewski first entitled this opposition.[10] Legal language in this traditional categorization represents the language of sources of law or other manifestations of public authorities. In contrast to these texts, there is the language of lawyers, which encompasses expressions of representatives of legal professions or communication of law students, etc. Nevertheless, even following this division, we face some troubles when we try to comprehend what we mean by legal language. On one hand, it could only consist of the language of normative texts, i.e., texts that are considered a formal source of law and that reflect a legal rule (mainly, statutes or court decisions). On the other hand, legal language (stricto sensu, i.e., excluding the language of lawyers) could also comprise the language used by academics within legal literature.[11]

Bernard Jackson (building on Walter J. Ong) uses a different classification of legal language. The key criterion for Jackson is not officialness and literacy, but whether the communication is written or oral.[12] Although to some point the division might seem close to Wróblowski's, the sets do not overlap entirely. As an example, let us imagine an official discussion or judge's monologue in court which, as an oral communication, corresponds to Wróblowski's legal language. Or vice versa, a chat of two attorneys or law students on social media that is, without doubt, a typical example of the language of lawyers, even though it is written. What both

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9 Garner, B. A., Ginsburg, R. B. (2009) *Garner On Language and Writing: Selected Essays and Speeches of Bryan A. Garner*. Chicago: ABA Defending Liberty Pursuing Justice; In the Czech domain see for example Vučka, J. (2019) *Právní psaní*. Praha: C. H. Beck.

10 Mainly in the book *Jezyk prawny i prawniczy* (Kraków, 1948). Cited according to Tomášek, O. (2003) *Překlad v právní praxi*. Praha: Linde.

11 Cf. Knapp, V. (1978) Právní pojmy a právní terminologie (Právní pojmosloví a názvosloví). *Státní správa: Bulletin Ústavu státní správy v Praze*, 4(5), p. 11. Available at: https://is.muni.cz/el/1422/jaro2008/CM218Zk/um/3533856/3533878/?lang=en [cit. 15. 2. 2021].

12 Jackson, B. (1995) *Making Sense in Law: linguistic, psychological and semiotic perspectives*. Liverpool: Deborah Charles Publications, p. 111.

of the standpoints have in common is the realization that legal language cannot be narrowed to written official text in statutes or precedents.[13]

Even other scholars emphasize this aspect.[14] For instance, Peter M. Tiersma points out the existence of various 'genres' of legal language.[15] Deborah Cao describes *"legal language as a type of register, that is, a variety of language appropriate to the legal situations of use."*[16] Therefore there might be written legal language as well as oral one, official and unofficial one, or even lawyers' jargon, and each of these genres come with distinct characteristics.[17] An extensive concept of legal language is promoted by Izabela Skoczeń as well. She divides legal language (more precisely 'legal discourse') into the following categories (although she also notes that this is certainly not a definitive and exhaustive list):[18]

"1. An exchange within a legislative body.
2. An exchange between a legislature and courts.
3. An exchange between a court and parties.
4. An exchange between parties.
5. Contracts and other legal declarations of intent."

It is perhaps worth noting that the maximum complexity of a given term is not always the endeavoured aim. As I tried to outline above, the extension of this term varies. Legal language is thus an example of a term with blurred edges[19] and together, the definitions can form a continuum of possible meanings with extreme approaches at the opposite poles. E.g., Annabelle Mooney's view on legal language comprises almost the whole interpersonal communication as it accompanies us in our day-to-day activities, and yet

13 Ibid., p. 89.
14 Cf. Škop, M. et al. (2019) *Tvorba práva – empirické studie*. Brno: Masaryk University, p. 97.
15 Tiersma, P. M. (2000) *Legal Language*. Chicago: The University of Chicago Press, p. 51; Similarly see Mellinkoff (1963), op. cit., p. 18.
16 Cao, D. (2007) *Translating Law*. Clevedon:Multilingual Matters, p. 9.
17 Ibid., pp. 133–143.
18 Skoczeń (2019), op. cit., p. 2; Even other pragmatically oriented articles give similar comprehensive conceptions to legal language. See Poggi, F. (2011) Law and Conversational Implicatures. *International Journal for the Semiotics of Law – Revue internationale de Sémiotique juridique* [online]. 24, p. 37 [cit. 23. 2. 2020]. Available at: https://link.springer.com/content/pdf/10.1007/s11196-010-9201-x.pdf
19 In the sense of Wittgenstein, L., Anscombe, G. E. M. (1967). *Philosophical investigations*. 3. edition. Oxford: Blackwell, pp. 34–36. Available at: https://static1.squarespace.com/static/54889e73e4b0a2c1f9891289/t/564b61a4e4b04eca59c4d232/1447780772744/Ludwig.Wittgenstein.-.Philosophical.Investigations.pdf [cit. 14. 7. 2021].

we do not usually perceive its legal nature. Mooney presents an example of a passenger who, by entering the bus and buying a ticket, concludes a contract of carriage including extensive terms and conditions of which the average person is usually unaware: *"Until something goes wrong, such legal language remains hidden."*[20] Although Mooney aptly states that legal regulation is part of our predominant daily activities, I am convinced that it is not convenient to prescribe legal nature to all cases of implied-in-fact contract (e.g., purchase of several items in a supermarket without a single word expressed). On the other hand, sometimes the term 'legal language' is used mainly in the sense of language that mediates the content of law: *"legal language may be described as a type of code intended and used as a means of capturing the complex of law, which has evolved hand in hand with it."*[21]

Based on outcast analysis it is also worth pointing out the possible distinction between legal language and legal discourse, or even legal communication – a term used e.g. by Olga Kosonogova (including into the scope of this term among other things also spoken discourse, such as communication in court proceedings or jargon used by individual members of the legal professions).[22] Likely, legal language, discourse and communication do not have the same meaning and we shall not use them as synonyms, even though many publications do so. I will get to this point more in detail later in this paper.

We can also conclude that since there is no agreement on the definition of legal language, there is a risk of non-complexity of jurisprudence in relation to the study of legal language. From the point of view of the current state of the art, I also perceive it as problematic that jurisprudence generally neglects the study of some types of communication and together, the studies do not form a comprehensive picture of legal language. Nevertheless, the aim of this paper is not to give a definite description of legal language and fill all the gaps appearing within the study of this phenomenon. However, bearing in mind the discovered discrepancies, I will look more in detail into

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20 Mooney, A. (2014) *Language and law*. London: Palgrave Macmillan, p. 6.

21 Myška, Smejkalová, Šavelka, Škop (2012), op. cit., p. 273. Although the cited paper uses the term as described, the authors are clearly aware of other possible meanings of the respective term.

22 Viz Kosonogova, O. (2016) Legal Communication: Verbal and Nonverbal Communication in the Practice of Law. *US-China Law Review* [online]. 13, p. 705. Available at: https://heinonline.org/HOL/P?h=hein.journals/uschinalrw13&i=701 [cit. 20. 2. 2020]; In a similar sense Bhatia uses the term 'language of law', see Bhatia, V. (1987). Language of the law. *Language Teaching* [online]. 20(4), pp. 227–234. Available at: https://www.cambridge.org/core/journals/language-teaching/article/abs/language-of-the-law/1E5F4AA7C1DEE0DA1D55EFAAC6A85A65 [cit. 15. 7. 2021].

another approach to law and language which I have not described so far. In particular, I will depict the view of James B. White on law and language and relate it to semiotics, whereas it is in my opinion tightly connected to White and legal linguistics in general.

3 Law Is Language: a Semiotic Approach

'Law is language' is a concept promoted by James Boyd White primarily in his article Law as Language: Reading Law and Reading Literature: *"Law is in a full sense a language, for it is a way of reading and writing and speaking and, in doing these things, it is a way of maintaining a culture, largely a culture of argument, which has a character of its own."*[23] Despite this introduction, White deals in his paper with literary texts and their similarities with legal texts rather than with language itself. Specifically, he emphasizes the possibility of reading both types of texts in a way that insofar we can agree on the text's meaning, in some regards the interpretation always remains unclear. In other words, ambiguity is an essential element of both law and literature.[24]

In his other works, White notices that to lay people, legal language might seem as a foreign language in some way, *"it is an unpredictable, exasperating, and shifting mixture of the foreign and the familiar."*[25] According to White, there is no doubt that legal language is based on ordinary language since it largely uses its vocabulary and mostly even follows general grammar rules. However, at some point, legal language starts to differ from the language we use in daily conversations. Lawyers speak *"an inherited and traditional language with marked peculiarities of vocabulary and construction."*[26] Although legal speech might not even contain any technical vocabulary, the peculiarities may cause incomprehension in a lay mind. Legal discourse thus creates, as White calls it, a special 'cultural syntax', i.e., conventions on the grounds of which words are used in a different way that entails

23 White, J. B. (1982) Law as Language: Reading Law and Reading Literature. *Texas Law Review* [online]. 60, p. 415. Available at: https://heinonline.org/HOL/P?h=hein.journals/tlr60&i=437 [cit. 16. 2. 2020].

24 See Ibid., p. 419.

25 White, J. B. (1983) The Invisible Discourse of the Law: Reflections on Legal Literacy and General Education. *University of Colorado Law Review* [online]. 54, p. 145. Available at: https://repository.law.umich.edu/articles/2113/ [cit. 15. 7. 2021].

26 White, J. B. (1973) *The Legal Imagination: Studies in the Nature of Legal Thought and Expression*. Boston: Little, Brown and Company, p. 7.

the foreignness of legal speech.[27] The cultural syntax is responsible for the fact that *"whenever one creates a rule of the legal kind, for the operation of the rule in a procedural system itself necessarily involves an artificial way of giving meaning both to words and to events."*[28] Even a simple word used in an expression of a legal rule does not just imply substantive topics, but also procedures of argument, questions about the definition or competent authority to resolve such debates. To put it differently, the legal language creates implications that are usually apparent only to a legally trained person.

Let us compare White's theses with the semiotic approach to language, particularly with the work of Ferdinand de Saussure, one of the godfathers of semiotics (especially from the linguistic branch of semiotics).[29] Apart from his theory of signs, he also enriched the linguistics of distinguishing its subject matter into two forms – so-called 'langue' and 'parole', i.e. distinguishing language (as such) from speech and speaking.[30] According to Saussure, language is not identical with speech ('langage'), but is only its *"definite part, though certainly an essential one. It is both a social product of the faculty of speech and a collection of necessary conventions that have been adopted by a social body to permit individuals to exercise that faculty."*[31] Language tout court in Saussure's conception does not correspond to individual samples of its usage (or a mere set of these samples), but to a generalized entity (a system) that serves as a precondition for such usage. The term 'langue' is used for this aspect of language, understood as a system of signs which are associations bearing the stamp of collective approval.[32]

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27 White (1983), op. cit., p. 155.

28 Ibid., pp. 154–155.

29 See Broekman, Backer (2013), op. cit., p. 53.

30 These theses permeate his entire Course in General Linguistics (Cours de linguistique générale), a work that was published posthumously in 1916, mainly on the basis of students' notes from de Saussure's lectures. See Čermák, F. (2007) Ferdinand de Saussure a jeho Kurs. In: Saussure, F. *Kurs obecné lingvistiky*. Praha: Academia, p. 15.

31 Saussure, F. (1959) *Course in General Linguistics* [online]. New York: Philosophical Library, p. 9. Available at: https://archive.org/details/courseingenerall00saus/page/n11/mode/2up [cit. 15. 7. 2021].

32 See Ibid., p. 15; In this part, Saussure emphasizes that linguistic signs are not abstractions. This point could raise a doubt about the meaning of the word 'abstraction' in a given context and whether by abstraction Saussure means an object that has no physical denotation. Indeed, from the fact that he calls them *"realities that have their seat in the brain"*, it is necessary to deduce that langue is, in contrast to parole, an abstract system and it has no empirically perceptible counterpart in reality. Cf. as well Čermák's note sub70 in: Saussure (2007), op. cit., pp. 368–369.

In contrast to langue, speaking (parole) is the way language is executed in a certain verbal act, *"a concrete realization of language by its user in a dialogue that takes place in a specific space-time."* [33] Langue and parole shall be always considered in relation to the third term – langage (speech).[34] Speech in Saussure's viewpoint is a general ability of language, or rather the ability of a person to create and use language in individual speaking acts.[35] Thus, the fundamental features of language (in the sense of langue) can be summarized as follows: language is a social institution, a complex and abstract system of signs and rules of their use, and at the same time it is a source and prerequisite for the realization of an act of speaking. The parole is then formed by individual speech acts (whether speaking or texts), which the speaker (transmitter) executes on the basis of selection and combination of language units from the system (i.e., from the langue).[36]

From Saussure's distinction between langue and parole arises a dual view on language which, in my opinion, must be taken into account when using this term.[37] Although J. B. White proclaims that law is language, he mostly draws attention to the similarities between the interpretation of legal and literary texts. Even though that this might be probably the greatest value of White's work (the way he shows connections in specific cases), he remains at the level of texts and individual speeches. That means he almost exclusively links legal texts (not law as such) to language. Does that mean White's metaphor is to be understood as 'law is language in the sense of parole'? Should we rephrase it as 'law is speaking' (or communication)? The answer to this question does not only lie within the conception of language, it is linked to how we understand law as such.

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33 Nekula, M. (2012–2018) Langue a parole. In: Pleskalová, J., Karlík, P., Nekula, M. (eds.). *CzechEncy – Nový encyklopedický slovník češtiny* [online]. Brno: Masaryk University. Available at: https://www.czechency.org/slovnik/LANGUE%20A%20PAROLE [cit. 8. 2. 2020].

34 See Čermák, F. (2011) *Jazyk a jazykověda: přehled a slovníky*. Praha: Karolinum, p. 86; Or Saussure (1959), op. cit., pp. 9 and p. 77. Saussure does not explicitly define the concept of langage, but it is clear from the described relationship between langage and langue (more precisely from notes from the third course, cf. Saussure (1959), p. 77).

35 See Nekula (2012–2018), op. cit.

36 See Saussure (1959), op. cit., pp. 14–15; or Čermák (2011), op. cit., pp. 86–87.

37 I am well aware that Saussure's theory does not belong to the newest ones. In spite of that fact, Saussure and his heritage persist in linguistics and takes a position of a fundamental dogma (however, I do not deny that some of the recent theories could help come to a better understanding of the discussed topics).

The concept of law took various forms during the history of legal theory.[38] In White's understanding, law is not only a system consisting of rules, but he sees it as *"the culture of argument and interpretation through the operations of which the rules acquire their life and ultimate meaning."*[39] White thus probably understands law as language in the sense of parole, or, in other words, communication.

Martin Škop, who largely introduced White's studies to Czech jurisprudence, is aware of Saussure's work when, for example, he cites his definition of language (in the sense of langue).[40] Most of his book also focuses on language at the level of individual speeches (especially literary texts).[41] Unlike White, however, he emphasizes (though non-explicitly) the similarity of law to the langue level and even comes up with arguments as to why law is essentially a system composed of signs governed by rules: *"The law undoubtedly expresses ideas, and there can also be no doubt that it consists of signs between which certain rules apply. Although it is a system of rules (and individual rules can be understood as independent signs), there are certain regularities between these rules."*[42] Škop bases his conclusions as well on Robert M. Cover's paper Nomos and Narrative[43] and his conception of norms as *"signs by which each of us communicates with others."*[44] By given communication Cover means communicating one's attitudes to a norm according to the way we deal with such a norm.

The theses described here create quite a different picture of law. Whereas White points out that law is a way of communicating, Cover (followed by Škop) emphasizes that law is a system of norms, and by these norms, we communicate with each other. Communication plays a crucial role in both cases; however, in the latter, communication is not the content of law, but the form through which we can recognize law and perhaps even create it. In this regard, I tend to side with Cover's concept. I do not deny that communication (in White's words 'speaking, reading and writing') is of the essence in legal

38 See e.g., Hoecke, M. (2002) *Law as communication*. Oxford: Hart, pp. 1–4.
39 White (1982), op. cit., p. 436.
40 See Škop, M. (2013) *…právo, jazyk a příběh*. Praha: Auditorium, p. 7.
41 Especially when he deals with the issue of legal and literary interpretation, cf. Škop (2013), passim, e.g., pp. 15 or 59.
42 Ibid., p. 7.
43 Ibid., p. 81.
44 Cover, R. M. (1983) Foreword. Nomos and narrative. *Harvard Law Review* [online]. 97, p. 8. Available at: https://heinonline.org/HOL/P?h=hein.journals/hlr97&i=21[cit. 16. 2. 2020].

realm (quite the opposite); however, in my opinion, the core element of law shall be considered a norm or a legal rule.[45] Following this view, a system formed by norms (which can be considered signs) closely reminds of language in the sense of 'langue' rather than 'parole'. Parole (communication) can be particularly helpful for approaching the system, discovering it and understanding it. And this applies both to law and the langue.

The described concept is closely related to the semiotic approach to law which, among other things, advocates a view of law as a sign system. Roberta Kevelson, possibly a founder of legal semiotics, suggests that *"law is a system of signs in terms of legal semiotics, so that law can be broadly (and not solely technically) understood as a process of communication or message exchange by means of signs and sign systems."*[46] Similar to White, Kevelson considers that law is envisaged as a language. On the one hand, it is a realm of arguments and unique rhetoric, on the other, it is a profession of words as signs that manage meaning.[47] In both conceptions, the subject matter is merely the same, though each of them emphasizes a different form or a different level of communication. Meaning and communication, as key issues for understanding not just legal discourse but even human life, are common elements for both White's and semiotic approaches. Nevertheless, semiotics notices that language can be recognized in two forms and introduces the differentiation as described in relation to Saussure: *"This fact underlines the system-character of language (as made visible in traffic signs) and the communicative features of law (there is no society without 'signs of law')."*[48]

I believe that legal semiotics (as depicted in Kevelson's notes) support my thesis described above. Law (in the dogmatic concept) can be considered as a language in the sense of a sign system. In order to recognize and grasp such a system, an act of speaking must be executed on the basis of selection and combination of units from the system. Hence, it would be probably better not to consider law as parole (communication) because it is merely the way we recognize or create law, though it is not law itself. However, as I tried to depict above, the way White describes his concept 'law is language' rather corresponds to language in the sense of parole.

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45 Following for example Hart's concept of law as the unity of primary and secondary rules. Cf. Hart, H. L. A. (2012) *The Concept of Law*. 3. edition. Oxford: Oxford University Press.

46 Broekman, Backer (2013), op. cit., p. 26.

47 Ibid., p. 14.

48 Ibid., p. 16.

To sum up, considerations about the concept 'law is language' from a semiotic point of view as given above helped us discovered some inaccuracies. In my opinion, they are not just petty terminological differences but they raise the question of whether White's metaphor should not be rephrased as 'law is speaking' (parole) or more comprehensibly 'law is communication'. On these grounds, I will focus on the communicational approach to law, since the comparison of this approach with White's and semiotic theses might provide clarification for these discrepancies (or, on the contrary, it can reveal some others).

4 Law Is Communication

The communicative approach to law is usually associated with Mark van Hoecke in Western European legal theory, although the concept of law as communication is also developed in Russian legal theory (especially by A. Polyakov).[49] Based on Habermas's concept of rational communication, Mark van Hoecke concludes that law inherently is communication: *"If law is rational and if rationality is to be understood as communicative rationality, then law is communication, and not only about differing forms of interhuman communications."*[50] He emphasizes that law is not primarily focused on the behaviour of the individual, but on human interaction and behaviour in interpersonal relationships.[51] Law as a system cannot then be formed by individuals, but by particular communicative acts that give the law its proper meaning.[52]

However, according to Mark Greenberg, a critic of the communication theory of law, this theory is based on the assumption that *"legal texts are linguistic texts, so the meaning or content of a legal text is an instance of linguistic meaning generally."*[53] Greenberg proclaims that proponents

49 Cf. Antonov, M. (2015) Thinking Law as Communication. *Review of Central and East European Law* [online]. 40, pp. 189–202. Available at: http://heinonline.org/HOL/Page?handle=hein.journals/rsl40&div=15 [cit. 21. 4. 2020]. In this paper, I will stick to the Western European concept.

50 Hoecke (2002), op. cit., p. 10.

51 See Ibid., p. 19.

52 See Ibid., p. 41.

53 Greenberg, M. (2011) Legislation As Communication? Legal Interpretation and the Study of Linguistic Communication. In: Marmor, A., Soames, S. (eds.). *Philosophical foundations of language in the law* [online]. Oxford: Oxford University Press, pp. 217–218. Available at: https://ssrn.com/abstract=1726567 [cit. 21. 4. 2020].

of the communicative theory suggest that in order to understand this meaning, we should also draw on linguistic theories, especially on the concept of communicative content, which is based primarily on the communication intention of the speaker.[54] Greenberg criticizes this approach and argues that the intention of the legislator is not to be regarded solely as determining for content of law.[55] I am convinced that this opinion is too narrow, though. Lately, there has been much debate in regard to communicative content and the usage of pragmatics concepts in the legal realm (namely Grice's cooperative principle).[56] However, even these approaches are sceptical of the legislator's intention and its crucial importance in legal interpretation.[57] Not even Hoecke, a representative of communicative theory of law, promotes the thesis of creating the content of law by the intentions of legislators. According to him, the normative character of a rule results from the interaction of both the creator of the rule and its addressee.[58]

As this paper does not aim to describe these theories comprehensively, I will leave these disputes aside and focus on the key point of the communicative theory of law. Namely, that from a certain perspective, we can consider law as communication, the common space within which we enter the processes of transmission of information and producing, mediating and revealing of meaning.[59] This thesis seems very similar to the viewpoint that White emphasized, law as a way of reading and writing and speaking, as the culture of argument and interpretation. Even though he frames these statements under the term 'language', he still points out mainly the connections with literature and literary theory (like the whole stream Law and Literature to which White gave rise).[60] In comparison, the communication

54 Greenberg mentions, for example, Neal, Alexander, Campos and Soames as proponents of this theory. See Ibid., p. 219.

55 See Ibid., passim, e.g., p. 223.

56 See Marmor, A. (2008), op. cit.; or Poggi, F. (2016), op. cit.

57 Skoczeń proposes for example a modified concept of Grice's cooperative principle which she calls a strategic principle. Her theory combines Grice's cooperative principle and, in the second phase, a strategic approach. Thus, according to Skoczeń, the participants in legal communication, as a kind of preliminary step, first apply the cooperative principle, on the basis of which they deduce all possible meanings of the speech, and then, in accordance with the strategic principle, select the most appropriate ones for them. See Skoczeń (2019), op. cit., p. 40.

58 Cf. Hoecke (2002), op. cit., p. 20.

59 Thus, both in the procedural and semiotic view of communication as described by Fiske, J. (2011) *Introduction to communication studies*. 3. edition. London: Routledge, p. 2.

60 See Škop (2013), op. cit., p. 20.

theory refers to language and linguistics. Nevertheless, communication connects both views.

The need to recognize the law also through individual manifestations of law or individual speeches (as is especially the case in White's concept of law) was accentuated by all the above-mentioned approaches that perceived law either as a language or as communication. However, communicative approaches to law mostly rely exclusively on parole. Therefore, it raises the question of whether they do not neglect that law can also work at the langue level. Both the approaches correspond to a view that law can be seen as a system composed of certain units (in a structuralist sense). These units can then be either the norms themselves (as abstract rules) or the way we talk about them (specific communication acts). According to the prevailing concept of law, we can assign the right metaphor to law – in some cases we mean law as langue, in others law as parole. To sum up, it is possible to liken the law to the form of the langue as the abstract sign system. At the same time, however, we can observe connections with language in the form of parole – especially when we examine individual manifestations of law. They do not necessarily have to be only formal sources of law, normative or individual legal acts or exclusively legal texts. Law (in White's sense, as parole) can be any communication (verbal and nonverbal, written or unwritten) in which law manifests itself as an abstract sign system.

5 Conclusion

This paper dealt with J. B. White's metaphor 'law is language' in connection with the stream of legal semiotics, particularly with Ferdinand de Saussure's work. Saussure's observations (and semiotic approach in general), namely distinguishing between langue (language) and parole (speaking), helped us understand that language (and even legal language) can be understood in two different forms. It can be either considered as an abstract system of signs, or it can be comprehended as individual speech acts.

While White's metaphor uses the term 'language', communicative approaches to law, on the contrary, liken the law to communication. As White's conception of law represents a special kind of rhetoric, a unique way of reading, writing and speaking, it rather corresponds to language in the sense of parole. Thus, it could be more accurate to link law to communication. On the other hand, for some theories the description 'law

is language' is preferable. In other words, regardless of the chosen approach, it is essential to bear in mind the distinction between both of the concepts. When using the described metaphors, we still, in my opinion, neglect the dual nature of language (langue and parole) and do not sufficiently distinguish them. Based on these considerations, this paper shall enrich the concept of 'legal language'; in particular, aid to realize both the sign character of language and its communicative aspects.

It should be also pointed out that these concepts of law should not be considered a comprehensive description and exclusive models. They should be rather understood as metaphors that can serve as complementary approaches for better comprehension of the essence of law or some of its features.

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The Dynamics of Consent and Antagonism in Ian McDonald's *Luna* Trilogy

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Abstract

This paper is an attempt at a 'law and literature' analysis of Ian McDonald's *Luna* trilogy. It claims that operating with a science fiction setting, the trilogy invites the reader to reflect on how and in what form a legal system may contribute to the proper functioning of a human community. The law of the moon rests on consent and antagonism at the same time. The 'consent' principle reflects law and economics' conception that a person should be left to freely negotiate for their interests and rights, and that unless the transaction costs transcend the benefits, such free negotiation is the most effective way to regulate social relationships and increase common wealth. The Moon's legal system, in this respect, is taken to the extreme, because even though courts do exist, there is no state apparatus to enforce judicial decisions. The system operates on fully individualistic and voluntary compliance to judicial decisions, which means that abiding by a pact is salvaged only by the individual interests of the participants. This reliance on individual interests – a pivotal point of law and economics – seemingly warrants cooperation, but also carries in itself the germ of antagonism.

Antagonism, in my opinion, can be traced on two levels of the workings of the Moon's so-called legal system. First, it places significant emphasis on fight: substantial truth matters little, if at all, in the moon's legal system;

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what matters is pure bargaining power, tactical sense, and sometimes even bluffing, and this feature is even ideologised. One's rights are constituted as a result of struggle. Second, however, the novel also deconstructs this notion of the law by centring on a more general level of antagonism, the armed conflicts of the various families to ground their own interests. Such conflicts demonstrate the inherent instability of the system that is not backed by a normative structure above pure partial interests.

Keywords

Ian McDonald; Law and Literature; Law in Literature; Luna; Science Fiction; Speculative Fiction.

1 Introduction

Perhaps it is not an exaggeration to say that science fiction is inherently political. This genre reflects on contemporary social problems and the challenges of the near or far future by placing its plot in imagined, futuristic societies. Beyond the sheer entertainment value of the extraordinary settings, the contrast between the imagined world and real life can function as an effective tool to highlight social problems that may not be perceptible for some of the readers. One of the most characteristic features of science fiction as a genre is world building. This feature demands a credible representation of the environment of the plot, and this includes at least a partial depiction of the imagined society's institutions and its value system.

This potential of science fiction makes the genre a good subject for law and literature research. In modern times, law plays a crucial role in governing social life. The increased pace of change and technological advancement offers a broad range of possibilities for imaginative fiction to speculate on what the future holds, and this includes speculations on what functions the law and the state may fulfil in radically different circumstances.

A constantly expanding body of research is aimed at the analysis of popular culture, and science fiction is no exception. In this article, I wish to make a small contribution to this research by examining the representation of law in Ian McDonald's *Luna* trilogy, a science fiction trilogy whose plot takes place in the quasi anarcho-capitalistic society of the colonies on the moon about a century later. To do this, I first sketch a brief overview of the possibilities of the law and literature approach in the realm of popular culture and

specifically science fiction. Then I turn to *Luna*, and by a close reading of the novels, I explore the characters' utterances that are related to law, and I argue that these utterances embody narratives that legitimise the moon's legal conditions. I also point out that these narratives value individual freedom and consensual interactions highly. Then I move on to examine the elements of antagonism in the moon's contract-based legal culture. By these elements, I mean the factors that inevitably lead to fights between the moon's inhabitants, or make the moon's legal system incapable of preventing them.

2 Preliminary Remarks on the Focus beyond 'High Culture'

In his pioneering article that called for the inclusion of popular culture in jurisprudence, Friedman argues that popular culture reflects the ways laypeople think about the law, its nature and purpose, as well as it is created by these beliefs,[1] and for these reasons, popular culture may be interpreted as a mirror of the public imagination about the law. This public imagination concerns the popular representation of the legal profession and popular ideas about the substance and procedure of the law. Friedman's argument is a fairly early and highly influential attempt at the inclusion of popular culture into the then-budding law and literature movement.

The article was one out of several attempts in the 1980s to broaden the scope of law and literature research. Macaulay offered a detailed evaluation of American education, popular culture and spectator sports, and the popular impressions they convey about the law. His premise was that more people *"learn about their legal system from television and film than from first-hand experience."*[2] The overall conclusion he drew is that while popular culture rarely offers an accurate picture about the law, it does reflect some of the fundamental attitudes toward the legal system, and these attitudes can often be contradictory: some of them say that one should respect authority, others say that sometimes it is necessary to circumvent the rules of the law.[3] The use of such research is that they help us gain a picture

1 Friedman, L. M. (1989) Law, Lawyers, and Popular Culture. *Yale Law Journal*, 98 (8), pp. 1592–1593.

2 Macaulay, S. (1987) Images of Law in Everyday Life: The Lessons of School, Entertainment, and Spectator Sports. *Law & Society Review*, 21 (2), p. 197.

3 Ibid. pp. 207–208.

of *"the symbols related to law found in American culture,"*[4] and their impact. Chase mapped the representation of American lawyers according to their relationship to virtue, money or power, and order,[5] while in another article, he scolded the jurisprudential community for ignoring the impact of popular culture on the population's image of the legal profession and its participants.[6] These and other investigations indicate that legal scholars in the last decades of the 20th century started to recognize that popular culture may carry information about the law and legal attitudes that is worthy of examination.

The development of this kind of research has two directions. One direction was related to the genres of speculative fiction and the distinction between 'high' literature and 'low' or 'popular' literature, a deeply embedded common impression that attributes an intrinsically higher aesthetical or moral value to 'classic' or 'canonical' literature. Popular culture is often considered to be an inferior and superficial branch of culture for various reasons. One of the most common reasons for this disdain is that popular culture is associated with mass production and mass consumption: such works, literary or otherwise, are purposely produced for a broad audience to make a profit, and this intended profitability is in contradiction with the idea of art as an activity pursued for its own sake. Popular culture is also commonly associated with a form of culture whose primary purpose is entertainment, a feature that too readily implies superficiality and the reliance on cheap, hackneyed tropes instead of artistic creativity.

The second direction, while not directly pertaining to this analysis, deserves mentioning: it concerns the extension of research to cultural media other than literature. Early law and literature studies focused on the lingual and written aspects of the law, which naturally entailed an emphasis on written narratives. As new questions and topics arose, scholars began noticing the possible value of law-related cultural products that might reveal information concerning the lay population's imagination about the role and activity of the legal profession, the function of law in a community, and the outlines of a just society. Legal scholarship in the late 20th century recognized the need to keep up with the proliferation of various forms of entertainment,

4 Ibid, p. 214.

5 Chase, A. (1986) Lawyers and Popular Culture: A Review of Mass Media Portrayals of American Attorneys. *American Bar Foundation Research Journal*, 11 (2), p. 281.

6 Chase, A. (1986) Toward a Legal Theory of Popular Culture. *Wisconsin Law Review*, 1986 (3).

and to look beyond literature – that is, narratives in the form of written texts – to map the popular perception of the law. This extension of focus gained momentum in the 1980s.

Speculative fiction, a subcategory of literary fiction that is characterized by a focus on imaginary environments that markedly diverge from our everyday reality, and is commonly considered to include the genres of fantasy, horror, and science fiction, has for a long time been subject to an even stronger marginalization. This prejudice stemmed primarily from attributions of escapism and useless fantasizing to this subcategory. Speculative fiction is often perceived as but a form of relaxation for the mind by travelling to far-far realms, away from the burdens of everyday toils. Science fiction is not exempt from this, and both the old and recent history of the genre and its criticism reflect an experience of marginalization on the part of the genre's writers and consumers, as well as an ongoing discourse about its literary and aesthetical values.

In a 2004 article, Barr argues passionately for the abolition of what she calls 'textism', that is, the neglect of science fiction texts by literary criticism in favour of high literature. In her view, *"critical theory, science fiction, and contemporary reality are each a version of the others, that science fiction is integral to imaginative literature and literary theory – and* […] *to life. For example, when making the point that President Bush's announced initiative to send astronauts to Mars could be financially affordable if the astronauts undertake a one-way trip, Paul Davies, professor of natural philosophy* […] *comments that an 'initial colony of four astronauts* […] *could make their own oxygen, grow some food and even initiate building projects using local raw materials* […]*' Only one minor detail differentiates Davies's reality-based text from the premise of Mars Society President Robert Zubrin's science fiction novel First Landing (2001): Zubrin imagines that an initial colony of five astronauts will sustain itself on Mars."*[7]

Barr's argumentation is worth citing in length, not only because it is one among many voices that argue for the critical acknowledgement of speculative fiction and the deconstruction of literary boundaries, but also because it presents an issue that is becoming more and more relevant with respect to the genre of science fiction. This issue is the rapid technological development and the state of constant change humanity goes through

7 Barr, M. S. (2004) Introduction: Textism – An Emancipation Proclamation. *PMLA*, 119 (3), p. 439.

at the beginning of the 21st century, a condition that makes science fiction a lived experience. What seems to be a work of imagination one day, may become reality on the next one. Macleod, elaborating the idea that *"the political philosophy of [science fiction] is essentially liberal,"* claims that it is *"firmly within the Western liberal current: the historically very recent idea that the increase of human power over the rest of nature through the growth of knowledge and industry is possible and desirable;"*[8] and this claim is especially true in a time when the aforementioned 'increase of human power' is so perceptible.

Macleod's characterization places a modernistic emphasis on the possibilities and inventiveness that are inherent in human thought; however, it needs mentioning that this alone cannot be true to all of science fiction – and one should always be suspicious of overgeneralised statements about genre fiction, or any more or less identifiable cultural products. Science fiction intensely reflects on both the dark side of human inventiveness (in which case humankind is capable of altering its surroundings, the results, however, are redoubtable) and the limits thereof (in which case humankind proves incapable of avoiding some negative outcome). This pessimistic stream is the result of criticism of early utopian literature and the emergence of anti-utopias.[9] Thus, anti-utopias and dystopias are organic components of science fiction. This is especially actual in a time when 'climate fiction' is growing to become a subgenre within science fiction, a tendency catalysed by the impending climate disaster.

In his above-cited article, Friedman himself seems to have anticipated the attention of jurisprudence toward science fiction, as he devoted a few paragraphs to science fiction movies' representation of aliens, and pointed out that it had undergone a change throughout the decades: while earlier movies – *The War of the Worlds* and *The Invasion of the Body Snatchers* are mentioned as examples – represented aliens as inimical and menacing, the later ones showed more tolerance, and reflected a *'civil rights mentality.'*[10] And while it is hard to say that science fiction has in any way become mainstream in jurisprudence, various attempts can be traced to analyse

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8 Macleod, K. (2003) Politics and science fiction. In: James, E., Mendlesohn, F. (eds.). *The Cambridge Companion to Science Fiction*. Cambridge: Cambridge University Press, p. 231.

9 James, E. (2003) Utopias and anti-utopias. In: James, Mendlesohn (eds.)., op. cit., p. 220.

10 Friedman (1989), op. cit., p. 1591.

science fiction from a legal point of view, and science fiction offers topics that serve as promising jurisprudential topics. Some of the issues that have heretofore been discussed are the relationship of human beings to and their replaceability by artificial instruments,[11] the treatment of admixed embryos by law and fiction,[12] the relationship of law and culture in imagined futuristic societies,[13] or the ideological criticism of current conceptions of the legal system.[14]

Before finishing this section, I would like to devote some thoughts to the issue of science fiction and its alleged escapist tendencies, one of the most common charges brought against the genre. Escapism is a word with a variety of meanings. In the context of fiction, an escapist attitude may help us 'avoid, temporarily, unpleasant truths that we must live with,' but it may also drive one to 'avoid thinking about what we know to be so, not in the course of recreation or to keep unpleasant thoughts out of mind as long as they are not necessary, but as a defence against reality itself.'[15] The rationalities of these types of escapism differ accordingly: the former, the one that 'seeks a holiday now and again' from unpleasant thoughts, can arguably be held rational, the latter, however, carries in it the risk of diverting one's attention from real and important concerns.[16] Of these varieties of escapism, I think it is fair to say that science fiction may only be connected to the first one, the 'seek a holiday' variety because neither reason nor evidence proves that science fiction – or any cultural product of an imaginary nature – makes people forget about real problems and escape to an imaginary one. The question that needs to be asked, then, is whether the experience of finding a temporary refuge from real life makes science fiction – and many other genres and subgenres within popular culture – an inferior kind of entertainment.

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11 Rockwood, B. L. (1999) New Possibilities. *Legal Studies Forum*, 23 (3), pp. 273–274.

12 Travis, M. (2011) Making Space: Law and Science Fiction. *Law & Literature*, 23 (2), pp. 249–257.

13 Joseph, P., Carton, S. (1992) The Law of the Federation: Images of Law, Lawyers, and the Legal System in 'Star Trek: The Next Generation.' *University of Toledo Law Review*, 24 (1), pp. 43–86.

14 Hourigan, D. (2018) On the Possibility of Legal Form in Miéville's Speculative Fictions. *Law & Literature*, 30 (2), pp. 167–184.

15 Longeway, J. L. (1990) The Rationality of Escapism and Self-Deception. *Behavior and Philosophy*, 18 (2), p. 1.

16 Ibid, p. 17.

In my opinion, Kurt Fawver, an author of weird fiction, offered a persuasive answer to this question. In an essay, he argued that any types of fiction – realistic or speculative – take the reader to an imaginary world, therefore, both are open to escapist readings: the 'escape into the underbelly of 19th century London [as described by Dickens] is no different from entering into a textual world that is set in the distant future or in [a] blatantly alternate reality.'[17] The core of this argument is that fictional narratives are the products of our imagination, and neither speculative nor realistic fiction is an exception. This means that while, for example, Dickens' novels take place in real locations, the plot, the characters, their relationships and psychology are the products of the author's fantasy. It may be added that even biographies, which purport to relate the true story of their subject's life, inevitably contain a component of imagination, as they are inevitably the reconstruction of a life.[18] The imaginative element is therefore not lacking from literary genres other than speculative fiction, and this fact makes the condescending attitude toward science fiction dubitable, if not outright untenable. To cite Fawver one last time: *"[i]t is true that much speculative fiction will not stand up to rigorous intellectual scrutiny* […] *However, just as much non-genre fiction will suffer the same fate."*[19]

3 The Narrative of Legitimacy on the Moon

Luna is a science fiction novel trilogy authored by Ian McDonald. Its story takes place on the moon about a hundred years after our time. The trilogy follows the rivalry of five families (often referred to as the five 'Dragons') that set foot on the moon and pursue various business activities, each of them vital for human life and civilization to flourish. The established colonies live their lives in a sort of anarcho-capitalist way, and there is only contract law to regulate the lives of the inhabitants. Speaking about contract law may even be a bit of an overstatement, as in the novel, the term

17 Fawver, K. (2021) The Inevitability and Impossibility of Escapism in Speculative Fiction. *Academia Letters*, 2021 (April), p. 2.

18 In his section on judicial biography as a branch of legal narratology, Posner points out that the truth content of biographies is often questionable, and he reflects on the various purposes of biographies, which go beyond pure fact statements. Posner, R. A. (1998) *Law and Literature*. Cambridge: Harvard University Press, pp. 358–359.

19 Fawver (2021), op. cit., p. 4.

designates a practice by which contracts determine each individual's rights and duties, and there are no state regulations to limit their allowable contents. Court procedures also lack strict regulation, debates can be resolved in any possible way the parties agree on. This includes duels fought personally or employing a hired fighter, and the rules can be changed any time, provided that the parties come to an agreement.

The legal setting of the trilogy is accompanied by consciousness on the part of the moon's inhabitants, or at least some of them, and through their relationship to the peculiar state of affairs, the reader is offered legitimacy for the almost total lack of regulation hardly imaginable for the Western mind. The moon's society and its contract-based system of rights and duties have their own story, their own narrative, and this brings us to Robert Cover's thoughts on the narratives that are attached to any particular legal system. In his words, *"[f]or every constitution there is an epic, for each Decalogue a scripture."*[20] This oft-cited statement expresses Cover's theory that the law is a part of what he called a 'normative universe,' the totality of constructions that regulate social life and determine what is appropriate and what is not. Cover's argumentation contradicts the commonly accepted and interiorized conviction of the legal profession that law is conceptually distinct from other social phenomena, and instead emphasises that law is organically related to other components of the totality; and by pointing this out, he calls us to see that legal meaning is determined by the 'interpretive commitments' that constitute the normative universe.[21]

The bulk of the trilogy's plot is presented from the viewpoint of the Corta family and their corporation, the Corta Hélio, whose main business is the mining of helium-3. In the first volume, we can read the first-person narrative of Corta Hélio's founder, Adriana Corta, who came from South America and travelled to the moon to make her own fortune with the opportunities offered by the new world. Her story is a textbook 'rags to riches' narrative of an ambitious person who is intent to get to the top and become the fifth 'Dragon' by establishing a powerful corporation. During her life on Earth, Adriana's family became financially insecure due to the changes in the economy and the decrease in demand for human work. This decline was accompanied by her brother's totally drug-resistant tuberculosis and

20 Cover, R. M. (1983) Foreword: Nomos and Narrative. *Harvard Law Review*, 97 (4), p. 4.

21 Ibid, p. 7.

the family's inability to afford hospital or medicine. In this situation, Adriana's only hope to earn money to finish post-grad was to apply to work on the moon.[22] During the period she spent working for Mackenzie Metals, she discovered a market gap everybody else on the moon had overlooked until then: helium-3, the 'key to the post-oil economy.'[23] Even though the United States plays no role in the novel,[24] the narrative of Adriana Corta is nothing less than a story of an American dream come true. Hard work, a sharp eye, and an enterprising spirit bring their reward of money, power, and influence.

Achieving success and fulfilling the dream – and merely avoiding abuse and harassment – sometimes require measures that contravene the semi-legal framework, even by the moon's standards:

> *"I told you about the stink of the moon. What it stank of most was men. Testosterone. You breathed constant sexual tension. Every woman had been assaulted. It happened to me: once. An older worker* […] *tried to slip the hand. I caught and threw him the length of the lock* […] *I had no trouble from that man, or any other man, but I was still scared they would come as a gang* […] *There were contracts and codes of behaviour, but there were only company managers to enforce them. Sexual violence was a disciplinary matter."* [25]

This passage indicates a state of affairs that resembles more a state of nature as imagined by classic social contract theories, than an organised community. Personal safety is not warranted, the rules in themselves are unable to fulfil this purpose, and the officials in charge do nothing about abusive behaviour. On the moon, not only can anything be commodified – including one's urine and even one's recyclable body parts after death – but the individual is exclusively responsible for the enforcement of their rights. The reader is also assured that by definition, crimes do not exist on the moon,

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22 McDonald, I. (2015) *Luna. New Moon*. [e-book] New York: Tom Doherty Associates, pp. 82–83.

23 Ibid, p. 222.

24 The five Dragons of the trilogy are connected to various countries or continents: Corta Hélio and the Cortas originate from South America, the Taiyang and the Sun dynasty come from China, VTO and the Vorontsovs are Russian, AKA and the Asamoah family were rooted in Africa, and Mackenzie Metals and the Mackenzie dynasty, the corporation that resembles the emerging corporation of the US in the industrial age, are related to Australia.

25 Ibid, pp. 209–210.

as there is no criminal law to determine what counts as a crime,[26] which means that there isn't any state-enforced system of legal regulations whose purpose is to suppress behaviours that threaten the foundations of a functioning society. Individual self-reliance and abandonment that Adriana experiences become normalised on a collective level by ascribing a callous and relentless personality to the moon. Discussing the future of Corta Hélio in a cutthroat competition, Ariel Corta remarks that *"[t]he moon does not suffer losers."*[27] In her reminiscence, Adriana Corta mentions the following when recalling her impressions about travelling to the moon: *"I realised that the moon was not a safe place. It knew a thousand ways to kill you if you were stupid, if you were careless, if you were lazy, but the real danger was the people around you."* [28] The moon's ethos is rigorous individualism.

Adriana Corta's narrative is a story about prevailing in an indifferent and sometimes outright hostile environment. The moon's legal system reflects this and is elaborated to aid the needs of a highly individualistic community. The basic values and legitimacy of this legal setting can be best studied through the thoughts of Adriana's daughter, Ariel Corta, one of the fiercest lawyers in her profession. An extensive passage from her conversation with her legal intern, Abena Asamoah, is particularly insightful.

> *"I'm a lawyer. I see society as sets of individual but interacting contracts. Webs of engagement and obligation. Society is this* […] *My problem with democracy is that I think we already have a more effective system* […] *We're not a state; we're an economic colony. If I were to make a terrestrial analogy, it would be with something enclosed and constrained by its environment. A deep sea fishing boat, or perhaps an Antarctic research base. We're clients, not citizens. We are a rentier culture. We don't own anything, we have no property rights, we are a low-stakes society* […]
>
> *The problem with a democracy* […] *is free-riding. There will always be those who don't want to participate, yet they share the benefits of those who do engage. If I could get away with free-riding, I certainly would* […] *You can't compel people to engage politically – that's tyranny. In a society with low benefits to participation you end up with a majority of free-riders and a small engaged political caste. Leave democracy to those who wish to practise it and you always*

26 'There are no crimes on the moon, no theft, no murder.' Ibid, p. 56.
27 Ibid, p. 44.
28 Ibid, p. 84.

> *end up with a political class. Or worse, a representative democracy. Right now, we have a system of accountability that engages every single person on the moon. Our legal system makes every human responsible for their life, security and wealth. It's individualistic and it's atomising and it's harsh but it is understood. And the limits are clear. No one makes decisions or assumes responsibilities for anyone else. It doesn't recognise groups or religions or factions or political parties. There are individuals, there are families, there are corporations. Academics come up from Earth to Farside and tut and roll their eyes about us being cut-throat individualists with no concept of solidarity. But we do have what they would call a civil society. We just believe it's best left to negotiation, not legislation. We are unsophisticated grudge-bearing barbarians. I rather like it."*[29]

Ariel and Asamoah are different characters: the former is a shrewd lawyer and orator, the latter is a naïve and talented student of political science. The above-cited thoughts are expressed during a conversation between a master and an apprentice. Ariel gives her intern some practical advice on how to be an efficient rhetorician, and she explains her opinion on the proper ways society should work. She not only factually describes the basic guidelines of social life on the moon, but she also expresses her satisfaction, legitimating such a way of living together. Her explanation seems to be coming from two sources. First, the moon colony is a separate world that is not in close reach of the rest of human civilisation. In the trilogy's world, people who come to the moon from the earth have a limited time to decide if they want to get back to earth, otherwise, their bodies will irreversibly be adapted to the physical conditions of the moon. This is even more true of people born on the moon, as earth conditions would be fatal for them. The colony's primary purpose is economic, not social. People come here to assume the risk and try to earn a fortune, which makes life here an individual enterprise.

Second, individualistic morality is simple, and in a sense 'pure.' One doesn't need to be aware of a great bunch of rules: one is only responsible for oneself and one's contractual duties. The legitimacy of such a way of life boils down to self-interest, that most effective motive for rational behaviour. This includes the imperative of selfishness (or a heightened focus on rational

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29 McDonald, I. (2017) *Luna. Wolf Moon*. [e-book]. New York: Tom Doherty Associates, pp. 158–159.

self-interest). The logic of self-interest is contrasted with the basic principle of majoritarian democracy, which Adriana criticises on the grounds of its lack of motivation for its members. For Adriana, a democratic establishment would encourage people to become 'free-riders' instead of becoming involved in the life of the community; a flaw that cannot be corrected by forcing people to get involved, because that would constitute tyranny. According to her argumentation, democracy would, in an ironic twist, end up in the rule of a handful of people over the majority who are not inclined to participate in public life.

To summarise what has been discussed above: in McDonald's trilogy, the moon is an individualistic society that strongly values a markedly atomistic version of individualism, to which the legal system conforms as well. McDonald offers us not only an insight into the basic principles of this legal system but we are also provided with a personal story that can be considered a narrative that provides legitimacy for such an establishment.

4 *Luna* and Fight Theories

The next thing we should note concerning Ariel's praising monologue about the moon's legal system is the stress placed on the principle that civil society is best left to negotiation. The trilogy shows various examples which affirm that literally *everything* can be negotiated, to such a degree that litigating parties can at any time come to an agreement concerning their debate or change the conditions of the procedure – for better or worse, depending on bargaining power and boldness. When Adriana Corta was working on establishing the Corta Hélio on the moon, she encountered legal obstacles set in her way by Mackenzie Metals. She wanted to clear away these obstacles once and for all by calling out the CEO of the corporation, Robert Mackenzie, for a duel, a challenge she won immediately for the simple reason that she knew that Robert Mackenzie would never fight a woman.[30] Ariel performs a similar trick on a child custody trial in one of the opening scenes of the first volume that introduces her as the devoted and ambitious lawyer she is: she personally stands out for a duel against the defendant, even insisting that the fight should go on until death, instead of only first blood.[31] Her bluff works: the defendant withdraws.

30 McDonald (2015), op. cit., pp. 305–306.
31 Ibid, p. 12.

These trial performances already give us a hint of what the exclusively contractual lunar law is like. Before moving on, I would like to cite the three principles of lunar law in McDonald's world, because the oncoming discussion will be related to these characteristics. Right at the beginning of the novel, in the first trial scene, we learn that

> *"Lunar law stands on three legs. The first leg is that there is no criminal law, only contract law: everything is negotiable. The second is that more law is bad law. The third leg is that a fly move, a smart turn, a dashing risk is as powerful as reasoned argument and cross-examination."*[32]

The first two points have been explicitly or implicitly covered to a certain degree: we saw that the moon's society rests on the foundation of atomistic individualism. But this feature is organically related to the third 'leg:' the procedural characteristics of lunar law, a kind of free-for-all tactical game where cunning and guts may legitimately prevail over calm, abstract reasoning. While the courts do I have the power to regulate procedural rules,[33] even these rules can be stretched to the limits, as exemplified by Ariel Corta's tactics.[34] But from a legal theoretical standpoint, such a system of procedure looks like a real-life manifestation – perhaps even distortion – of what Jerome Frank called the 'fight theory.'

In his late treatise entitled *Courts on Trial*, Frank distinguished two types of procedural principles that influence the outcome of a trial. 'Fight theory' is the principle under which the lawyer strives to win the litigation – the fight – by all available formal and informal means, including the education of his client's witnesses to behave 'well' in court, or assuming a manner that may perplex or even intimidate adverse witnesses. 'Truth theory,' on the other hand, places more emphasis on methods that are meant to uncover the objective facts of the case as they are. Frank grievously lamented that lawyers *"freely boast of their success with these tactics,"*[35] Frank even argued that it is unfair and undemocratic that a litigant may lose a trial they ought to win, solely because of their lack of funds.[36] He urged the legal community to create *"a legal system in which the courts can and do strive tirelessly*

32 Ibid.
33 Ibid. pp. 304., 306.
34 Ibid, p. 12.
35 Frank, J. N. (1950) *Courts on Trial*. Princeton: Princeton University Press, p. 83.
36 Ibid, p. 89.

to get as close as is humanly possible to the actual facts of specific court-room controversies." [37]

Before I return to *Luna*, I ike to briefly recall the views of another legal theorist whose late work was strongly connected to the concept of fighting. This theorist is the German legal scholar of the 19th century, Rudolf von Jhering, whose later work included the essay 'The Struggle for Law' *(Der Kampf um's Recht)*. The ground thesis of this treatise is that law is maintained by fights, struggles in various senses. For instance, if a still existing law is supported only by certain group interests, a struggle ensues for the erasure of the obsolete rules.[38] On the individual level, a person is bound to demand through the courts what rightfully belongs to him and engage in a lawsuit to struggle for his law. This is not only an individual right, not even an individual duty, but a duty towards society: if a litigant rightfully wins a lawsuit, the result reaffirms a small proportion of the law, and by this, the law ceases to fall prey to desuetude, so it is there to further serve the interests of society.[39]

The reason for the inclusion of these two thinkers into this study is that both of them are original and highly influential legal theorists, who believed that fight is a salient feature of the law. Jhering's theory goes contrary to the common belief that law is meant to provide a normative order by which people generally abide and so there is a settled way to behave during the various interactions. Instead, Jhering claims that the struggle is nothing less than the essence of law, so legal debates cannot be evaded, and in fact, participating in litigations is desirable and it is part of the normal course of things. Similarly, the legal system in *Luna*'s moon society is about engaging in conflicts at least as much as about settling relationships by regulating them in individual agreements. The existence of contracts, or, in other words, consensual means of the regulation of particular relationships, does not necessarily entail that the parties will keep themselves to the contractual provisions; rather, they are easily motivated to contest these provisions by all available methods. This comprises the 'antagonism'.

Frank was critical about what he called the 'fight theory' in American law, but the analogy between the irrationality of the fact-finding process and the 'free-for-all' character of litigation in *Luna* that makes everything

37 Ibid, p. 102.
38 Jhering, R. v. (1992) *Der Kampf um's Recht*. Propyläen Verlag, p. 68.
39 Ibid, p. 80.

contestable is clearly perceptible. On the moon, the primary instrument of regulation is contract, and yet, the possibilities that lie in the broad range of procedural techniques – including duels – can motivate the parties to sue whenever the irrational, non-formal circumstances are on their side. This is dictated by the overall primacy of self-interest, and so the legitimising principle leads to antagonism by inducing debates.

It should be noted that Jhering's theory can be applied for analysis of *Luna*'s legal environment with great circumspection, because on the one hand, Jhering expressly had state law in mind when he discussed the individual's duty to enforce their lawful rights, and on the other hand, because Jhering expressly includes solidarity in his theory, in the sense that individual enforcement of a right is the interest of the whole society. Of course, there is no solidarity on the moon: litigation takes place exclusively out of self-interest. However, the ruthless fighting character of the moon's law, the situation that one has to be resourceful to protect one's interest, even before a court, if necessary, doubtlessly carries in itself an ethos of struggle.

In a sense, the lunar legal system renders the word 'fact' meaningless. In a legal culture where *"[l]aw is personal,"*[40] everything is negotiable, and *"there's no assumption that judges are impartial*,*"*[41] litigation is not so much a process by which the litigants present their legal claims and evidence and rely on an impartial forum to bring a reasoned decision, as an occasion to get to an agreement that can be sanctified by the court. Yet Frank's remarks about the distortions in an adversarial process are not entirely off the mark. In a sense, the trial system in *Luna* seems to be an exaggerated illustration of Frank's views on the irrationality of the fact-finding process in the court,[42] yet the whole act is about having a good impression on the judges. In Ariel's view, *"[a]ll trials are theatre*,*"*[43] while at another instant, we see her surveying the properties of the courtroom to measure how she can make the best impression.[44]

It can also be noted that the individualist system seems to fail at the end of the first volume of the trilogy. The corporations Mackenzie Metals and Corta Hélio were long-time economic rivals: Mackenzie Metals earned

40 McDonald (2017), op. cit., p. 223.
41 McDonald (2015), op. cit., p. 261.
42 Frank, J. N. (1953) Judicial Fact-Finding and Psychology. *Ohio State Law Journal*, 14(2), pp. 183–189.
43 McDonald (2015), op. cit., p. 13.
44 McDonald, I. (2019) *Luna. Moon Rising* [e-book]. London: Gollancz, p. 323.

its profit from extracting minerals, but this hegemony was outshadowed by Corta Hélio which discovered the promise of profit in helium-3, a highly effective way to gain energy. With the help of some manipulation, the rivalry of the two corporations resulted in the ambush and destruction of the Corta Hélio headquarters by the Mackenzies. This scene demonstrates that the moon's legal system is fundamentally flawed by relying on individual bargaining power: in this case, the law could provide no protection against the illicit ambush and the raw power of the Mackenzies, and the only recourse the surviving Cortas had was flight and the plan of vengeance. Without clear and enforceable rules, the antagonism of the two corporations was destined to escalate into open violence sooner or later.

5 Conclusion: Simultaneous Consent and Antagonism in the Moon's Society

We could see earlier that the moon's legal culture rewards the inventive, the bold, the strong, and that this state of affairs serves as a legitimacy for the legal culture of boundless individual freedom. This boundless freedom is twofold. On the one hand, the principle that everything is negotiable carries within itself endless possibilities, as the individual's chances can be continuously moulded within the framework of the actual situation. The fact that everything can be the subject of a contract on the moon implies pervasive respect for the contractual rights and duties of others. Besides, the moon's individualism can also lead groups to realise that the collective interest of survival requires setting up certain boundaries. In her reminiscence of the old times, Adriana recalled an affair when her girlfriend Achi was harassed by one of her male colleagues, and the other male workers stopped the man: they *"understood that we had to find a way to live together."*[45] And the network of promises and obligations can work as a factor that can stop quarrels before they get too bad. In this sense, the moon's legal culture and practices can maintain a singular social order.

On the other hand, we have seen earlier that 'contracts and codes of behaviour' are not insurmountable barriers that hinder every culprit from breaking the rules: as a female worker, Adriana had to concoct her own vengeance to scare off her attacker from attempting another rape.

45 McDonald (2015), op. cit., p. 210.

On the moon, there is no solidarity, and the mere concept of states *"with identities and sets of privileges and obligations and geographical boundaries"* [46] are completely alien to the natives of the moon, even though there are collectives to belong to in the form of families and corporations. The moon's legal system does not and cannot offer absolute proof from illicit attacks either on the individual or the collective level. We could see that the moon's litigation system is basically a battle of negotiations, bluffs, and duels; this institutional framework is openly not meant to provide firm guidelines for social life. And as to the collective level, the closing scene of the first volume of the trilogy, in which the Corta Hélio is attacked by Mackenzie Metals, suggests that the individual-focused normative order may have its limits.

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46 McDonald (2017), op. cit., p. 73.

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Vagueness and Theory of Gaps*

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Abstract

This contribution is dedicated to the concept of gap (lacuna in Latin, Lücke in German), more precisely to the theory of gaps and its role in legal thought, particularly in the Czech Republic. The starting point to this analysis is the notion of vagueness. For the beginning, different meanings of vagueness shall be presented and explained. Then the focus shall be laid on the relation between the 'theory of gaps' and vagueness. Therefore main attention is paid to the theoretical distinctions between various types of legal gaps and their usage in the legal practice. As a conclusion I will try to resolve the question whether or not the notion of 'gap' shall apply for instances of vague terms (uncertainty) of normative text.

Keywords

Vagueness; Uncertainty; Indeterminacy; Legal Gap; Genuine Gap; Interpretive (non) Gap.

1 Preface

This contribution is dedicated to the concept of gap (*lacuna* in Latin, *Lücke* in German), more precisely to the theory of gaps and its role in legal thought, particularly in the Czech Republic. The starting point to this analysis is the notion of vagueness. For the beginning, different meanings of vagueness

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shall be presented and explained. However, it is not the scope of this contribution to present either a comprehensive comparison of theories of vagueness, or an innovative theory of vagueness. Instead, the main focus shall be laid on the relation between the 'theory of gaps' and vagueness. Therefore, the main attention is paid to the theoretical distinctions between various types of legal gaps and their usage in the legal practice. As a conclusion, I will try to resolve the question whether or not the notion of 'gap' shall apply for instances of vague terms (uncertainty) of normative text.

2 Vagueness – a threat or a benefit of legal discourse?

There are several possible meanings of what we call 'vagueness'. If we apply this term in legal speech (legal discourse), we usually mean that the text does not tell us complete information which we would like to recognise by means of this text. Practitioners usually call for 'vagueness' of normative texts when they want to criticise legislators due to their low quality of normative text (legislative drafting). As a result, vagueness is sometimes understood as a negative connotation – when a normative text (usually a statute) is vague, it is not well elaborated. This point of view is often shared by the legislators (i. e. practicioners participating in legislative drafting). In short, legal community does not want vague laws (sometimes called in practice 'gummy' laws). By the way, this is remarkable even from the point of view of the cult of legal text, which appeared in Europe in 19th century because of great codex movement (Code Civil, ABGB, BGB…). As can be seen, we still implicitely participate in this idea of normative text as a complete, precise, always certain and wise work of legislators without any deficiencies. Legislature is based on a linguistic approach which is very near to 'precization'. Semantically, that means adding more and more features and elaborating complicated legal definitions and explications, also by drafting categorical lists[1] of elements subordinate to the explained term. However, this attitude constitutes eventually a gate to legal entropy.[2] It is a matter of dispute

1 Tiersma, P. M. (2005) Categorical List in the Law. In: Bhatia, V. K., Engberg, J., Gotti, M., Heller, D. (eds.). *Vagueness in Normative Texts*. Bern: Peter Lang, European Academic Publishers.

2 See Holländer, P. (2006) *Filosofie práva*. Plzeň: Aleš Čeněk, p. 217. This effect is called a paradox of legal language – the more precise is the expression of law, the more enthropical the law is.

whether the attitude based on precising legal text or employing vague terms represents a more serious threat to the rule of law. Some authors also argue that vagueness as a characteristic feature of normative texts shall be dealt with by the use of law in material sense.[3]

Legal theory distinguishes precisely and more specifically the term vague or vagueness and other similar notions. Vagueness may be defined as a situation, when an application of a term (notion, concept) is unclear.[4] This constitutes so called 'borderline cases', in which is uncertain (not clear), whether or not a term covers the situation of its application. As a result, a legal term is either applicable to the case, or non-applicable.[5] This kind of uncertainty (imprecision) is one of the reasons why theory and practice talk both about hard (borderline) cases. Vagueness then is often characterised as a quality feature which may be quantified, i. e. that some legal terms are more vague than other terms. As we could see, there are several synonyms or higher concepts representing vagueness ('uncertainty', 'imprecision' or 'unclearness'). Traditionally, the distinction is made between vagueness and ambiguity. By use of ambiguity (ambigous term) we understand a term, the semantic field of which is formed by two or more separate meanings.[6] But this is usually a matter of context of the usage of the term. In practice, if a term is applied correctly (from a pragmatic point of view), an adressee would not have the other meanings in mind because of the context. For example, if we use the term 'suit' in legal text, we would prefer to interpret this term as a 'law-suit', i. e. a kind of petition to the court, but not a piece of garment. But, on the other hand, it does not mean that a 'suit' may not be used in a normative text in the second possible meaning – a kind of clothing (descriptive concept). Applying legal terms in practice we are usually not in a non-contextual situation (let us compare it to a 'dictionary'), because our mind always begins to interpret from a certain point defined by the situation defining facts of the case.

3 See Solan, L. M. (2005) Vagueness and Ambiguity in Legal Interpretation. In: Bhatia, V. K., Engberg, J., Gotti, M., Heller, D. (eds.). *Vagueness in Normative Texts.* Bern: Peter Lang, European Academic Publishers, p. 79; For recent Czech papers endowed to this topic see Kadlec, O., Blažková, K. (2018) Co je právo? Právně-teoretický pohled na rozhodnutí Soudního dvora ve věci Al-Chodor. *Jurisprudence*, 1, pp. 16–27.

4 See Dahlman et. al. (2012) The Effect of Imprecise Expressions in Argumentation. In: Araszkiewicz, M., Myška, M., Smejkalová, T. Šavelka, J., Škop, M. (eds.). *Argumentation. International Conference on Alternative Methods of Argumentation in Law*, p. 17.

5 Ibid.

6 See Solan (2005), op. cit., pp. 73–74.

To give a certain answer to the question whether vagueness is an enemy for legal discourse we shall mention situations, where vagueness is a part of communicative strategy of the legislator. Among these situations are particularly understood vague terms, general clauses and discretion.[7] A vague term is a term whose content and extension are uncertain.[8] A vague term may refer to facts as well as normative content. General clause is a special case of a vague term, which is in fact a normative clause with a broadly expressed antecedent (e.g. referring to bonos mores, validity of legal conduct, public interest and certain legal values).[9] Discretion is not a semantic problem itself. Involving discretion in a norm (rule), normative text remains open to creative attitude of a judge or administrative body when applying this norm. Every discretion has its limits which are drawn by legislative context.

Timothy Endicott argues that precision of a normative text has its value both in the sense of guidance and procedure. Indeterminacy is a natural companion of law-making, because *"the law does not say everything"*.[10] Then he concludes that vagueness simply is neccesary and distinguishes two types of vagueness: a trivial vagueness and 'hedging terms'.[11] In my opinion, this 'neutral' view of vagueness is useful. Facing an indeterminate text or more specifically a vague legal term we should always remember that the law does not function without interpretation. Eventually, precision and imprecision are not objective categories, but intersubjective. Vague term is vague because of our recognition of its content by means of its linguistic features (semantic field), which is shared by us as members of a communicative legal community.

In my view, vagueness is neither an enemy nor a risk to the principles of rule of law. It is a natural companion of the very existence of law. It could be in some aspects a benefit, particularly where a certain autonomy of adressees of legal normative text is provided (e. g. contract law).

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7 Engisch, K. (2010) *Einführung in das juristische Denken*. 11. edition. Stuttgart: Kohlhammer Verlag, pp. 188–235.

8 Ibid., p. 193.

9 See Melzer (2011) *Metodologie nalézání práva*. Praha: C. H. Beck, pp. 115–116 (quoting to this point a Swiss theorist Ernst Kramer).

10 Endicott, T. (2005) The Value of Vagueness. In: Bhatia, V. K., Engberg, J., Gotti, M., Heller, D. (eds.). *Vagueness in Normative Texts*. Bern: Peter Lang, European Academic Publishers, pp. 30–35.

11 Ibid.

3 Legal Gaps and Relevant Contexts of This Theory

Theory of gaps in law does not represent any consistent theory. There are many authors who have spent plenty of scientific work on this problem, and – as a result – construed certain models (schemes) offering some explanations and classifications. This is the reason why there are many alternatives for the classification of the legal gaps. On the other hand, the notion of gap seems to be an unavoidable construction to deal with the incompleteness of the law faced by those who are supposed to interpret it (mainly judges and administrative bodies or public authorities in general). Some authors even compare this theory to a legend which is imanent to the legal thinking.[12] One might say that the concept of legal gap is somehow implied in any attempt to analyse law as a system and source of legal rules designed to resolve legal cases stemming from social life of the individuals and the whole society. It has become an integral part of both systematic and methodological theoretical analysis of legal systems. Thus, the analysis of the role of gaps in law has remained an important part of both theoretical and practical dimensions of legal life.

Of course, legal gaps are often mentioned as a part of a traditional conflict between iusnaturalism and positivism, more precisely, positivist and non-positivist theories. Theory of gaps is supposed to be rather a non-positivist approach in legal theory; however, it depends on the sort of the source used to fill-in the gaps. Non-positivist authors often see the source for covering legal gaps in morality (or moral discourse). Positivist authors argue that legal gaps can be filled by using judicial and administrative discretion (act of will). For example, American theorist Scott Shapiro argues that law can never be a complete system.[13] His statement has been critisised by those who can recognise law as conceptually complete phenomenon[14]

12 For a deep analysis of the various theories of gaps see Chiassoni, P. (2006) Civil Law, Common Law and Legal Gaps. A Tale of Two Traditions. *Analisi e Diritto*, pp. 51–74. Available at: http://www.giuri.unige.it/intro/dipist/digita/filo/testi/analisi_2007/03chiassoni.pdf

13 Shapiro, S. (2017) The Planning Theory of Law. *Yale Law School*. Public Law Research Paper No. 600. Available at: http://uchv.princeton.edu/workshops/DHVP/Shapiro.pdf

14 This critical standing point is made by Beltrán, J. F., Ratti, G. B. (2012) Theoretical Disagreements: A Restatement of Legal Positivism. In: Canale, D., Tuzet, G. (eds.). *The Planning Theory of Law: A Critical Reading.* Springer Science & Business Media, pp. 172–173.

or as an autopoeitic system in which each 'operation' can be characterized as legal or non-legal one (N. Luhmann). This problem has been sometimes simplified by the practitioners considering law as an incomplete system using the following (and well known) argumentation: the lawmaker is not able to predict all the cases which may arise in future application of his laws. This idea has been reflected also by some theories among which a special attention should be paid to Alchourrón and Bulygin who discussed this problem in their monography Normative Systems.[15] These authors argue that the cause of the incompleteness of the legal system of norms in the uncertainty and vagueness of legal concepts. They also discussed the problem of logical difference between norms and norm-propositions. As for the notion of legal gap, they distinguished between normative and axiological gaps. This typology has been adopted also by Czech theorist and judge Zdeněk Kühn.[16]

Another very important context of the theory of gaps is the ideological background of law. This context was analysed for example by Bernd Rüthers in his famous work 'Die Unbegrenzte Auslegung'. In this book Rüthers concentrated on the methods of interpretation used in the judicial practice in the time of National Socialism governement in Germany until 1945. From this point of view, recognizing and filling legal gaps seems to be an ideologically determined technique of interpretation which can be very easily misused and abused. Legal system is not protected from the political and ideological influences, which may be recognised as also a part of the pre-understanding of judges and other public authorities deciding legal cases. The more uncertain and vaguer the wording of legal norms is, the greater space for the person interpreting it to include his or her own ideas, personal views and political and racial prejudices and constructions into the semantics of legal text.

In my view, it is neither necessary nor suitable to disccuss all these theoretical contexts of the theory of legal gaps.[17] The scope of this contribution

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15 Alchourrón, C. E., Bulygin, E. (1971) *Normative Systems.* California University: Springer Verlag, pp. 110, 114; further see Rodríguez, J. L. *Normative Systems, Legal Gaps and Logical Closure.* Available at: https://www.academia.edu/23130960/Normative_Systems_Legal_Gaps_and_Logical_Closure

16 Kühn, Z. (2002) *Aplikace práva ve složitých případech. K úloze právních principů v judikatuře.* Praha: Karolinum.

17 For a more detailed survey in a theory of gaps summarizing all important attitudes and differentiation see Večeřa, M. (2012) O soudcovském dotváření práva. In: Gerloch, A., Tryzna, J., Wintr, J. *Metodologie interpretace práva a právní jistota.* Plzeň: Aleš Čeněk, p. 228.

is to offer a brief insight into Czech legal discourse and its ways of understanding the problem of legal gaps. I would like to present a short theoretical survey of this problem first and then demonstrate some of the applications of this model in the judicial practice. I will focus mainly on the role of gaps in the constitutional discourse on human rights and freedoms in the Czech Republic. The Constitutional Court practices both the abstract and the concrete constitutional review. While using both competences it applies the notion of the gap in certain contexts. As a conclusion, I would like to discuss the efficiency of the model of gaps in practice and the relation to the concept of vagueness discussed at the beginning.

4 Concept of Gap in Theoretical Discourse

In my opinion, the usage of the gap model in contemporary Czech legal theory must be seen from the point of view of contemporary Czech legal thinking and its development within the last three decades. Under the socialist regime, the Czech legal thinking derived from the marxist legal theory first and later from the socialist normativism which appeared to be a simpler mixture of formalist and normativist theories. Thus, discussion on the legal gaps in 1960's and 1970's was very rare in Czechoslovak legal theory.[18]

In the Czech legal discourse, it is essential to distinquish between the genuine and non-genuine (interpretive) gaps also non-gaps.[19] This conceptual framework of gap model was introduced into the modern legal theory by German legal philosopher Ernst Zitelman[20] and further developed particularly by Hans Kelsen.[21] Zitelman analysed the concept of legal gap from the point of view of the German civil code (BGB) and assumed that

18 One of those theorists who analysed this problem at that time was Viktor Knapp, one of Czechoslovak world renown legal philosophers. See e. g. Knapp, V. (1958) Některé otázky aplikace a interpretace občanského práva ve vztazích socialistických organisací. *Právník*, 97, p. 235; further also Knapp, V. (1969) Soudcovská tvorba práva v socialistických zemích. *Právník*, p. 81; and following, also Knapp, V. (1989) Řešení problému tzv. mezer v právu ve velkých buržoazních kodifikacích. In: *Velké kodifikace: sborník příspěvků z mezinárodní konference, taking place in Prague 5th–8th September 1988. Volume 1*. Praha: Univerzita Karlova, p. 273ff.

19 For instance, one of the latest Czech books published in this field, relies upon this difference. See Melzer (2011), op. cit., pp. 224–232.

20 Zitelman, E. (1903) *Lücken im Recht.* Leipzig: Duncker & Humblot.

21 On the other hand, this distinction has been criticised by many authors, especially K. Larenz and C. W. Canaris. See to this point Canaris, C. W. (1964) *Feststellung von einer Lücken im Gesetz.* Berlin: Duncker & Humblot, p. 132.

BGB contains legal gaps as well as any other code. In Zitelman's view, the problem of the gaps discloses the fundamental problems of both legal theory and practice: the relationship between the judge and the legal system, between the laws and the legal system as a complex of rules, between freedom and coercion and between positive and natural law.[22] In the theoretical discourse, the notion of the gap serves as a specific figure in reasoning for i) the incompleteness of the legal system (openness of the legal system), ii) the methodological tool for solving hard cases.

In the former Czechoslovak legal system, legal theory and the theory of legal interpretation (legal hermeneutics) were affected by the ideology of an 'easy' application of the law. This theoretical attitude was based on the belief that no interpretive gaps existed; had there occasionally appeared a case with the features of a complex (hard) case (which could have been recognised as an interpretive gap) it was believed to be the fault of the legislator who failed to regulate such a legal relationship properly in order to enable the interprets to do their job well. Indeed, in the socialist normativism as a type of legal thinking there was only space for so called genuine gaps: i. e. relationships not regulated by any statute at all.

During the social and political transformation in the 1990's, the debate on the gaps in law started to be more intensive. It was obvious that building-up a state (based on the rule of law) with functioning human rights protection, division of powers and judiciary based on the respect to these values will need a deeper understanding of the structure of the system of law. This might also be viewed as a result of the activity of the Federal Constitutional Court and the Constitutional Court of the Czech republic (since 1993). Constitutional review had to face the problem of the axiological discontinuity of the legal order which – on the other hand – has remained formally unchanged since the socialist times and has been amended gradually until nowadays. The tension between the formal continuity and the axiological discontinuity was undoubtedly one of the factors which has brought the problem of the legal gaps back to light.

Pavel Holländer, a former judge of the Constitutional Court of the Czech Republic and legal philosopher, argues that the theory of legal should be grounded on the doctrine of denegatio iustitiae.[23] For him, this prob-

22 Zitelman (1903), op. cit., pp. 6–7.

23 Holländer, P. (2003) *Ústavněprávní argumentace. Ohlédnutí po deseti letech Ústavního soudu.* Praha: Linde, p. 17.

lem is a part of so called 'traditional toolbar' of methodology. He distinguishes between the genuine gaps and the interpretive gaps (non-gaps). The genuine gaps could arise in situations in which (particularly public) legal regulation (e. g. procedural rules) are missing although they are necessary for the court to exercise its powers. The non-gaps are – in his view – the axiological gaps in their nature. In these cases, legal regulation seems not to be absent, however, compared to the legal regulation issued in similar cases (but regulated by different laws) the interpreter finds out that the rule is missing. In both these situations, Holländer suggests that the interpreter may fill in the gap with the means of legal reasoning (e. g. analogy, elimination, and other teleological approaches).[24] Holländer presents some of the constitutional cases where the gaps of both the above-mentioned types had been recognised by the Constitutional Court and either filled in, or not. In this respect, the most important theoretical challenge is to understand for which reasons the Court had to choose one or another way of dealing with certain legal issue where a legal rule is absent.

Later, some other theoretical models have appeared and have been based on different theoretical views. Particularly Alchourrón and Bulygin's typology of gaps seems to have a deep influence on the Czech theoretical discourse. This typology is accepted particularly by Zdeněk Kühn[25] and Jan Tryzna. These authors distinguish normative and axiological gaps. As for the normative gaps, the explanation seems like the Zitelmann's notion of the genuine gap: completely missing legal rule – the norm regulating a type of legal relation is missing. On the contrary, the axiological gaps can differ in several alternative situations:

a) the normative system has not satisfied the normative need of the legal community and has not produced a legal rule that – from the point of view of the values of the legal order – would be:
   - Eligible (then analogy is expected); or
   - Superfluous or excessive (then teleological reduction is expected).

b) there is legal rule regulating the concrete relationship but from the axiological point of view this rule is not applicable (a controversy between the legal norm and equity, fairness, justice in material sense etc.).

The axiological gaps are closely connected with the concept of hard cases. Ronald Dworkin would probably call these cases as 'interpretive gaps'

24 Holländer (2003), op. cit., p. 18.
25 Kühn (2002), op. cit., pp. 215–216.

and – according to his own words – these gaps can be identified and filled only by using *"the best political and moral consideration of a judge"*.[26] In the Czech theoretical discourse, however, Dworkin's theory of gaps is not often referred to as one of the main ideological sources of this theory. This is mainly since German theories have always been regarded as closer to the Czech legal thinking.

Further, but rather rarely in practical context, some authors make use of some other typologies of gaps like technical gaps, apparent and hidden gaps, distinction between de lege lata and de lege ferenda gaps, as well as the distinction between intentional and non-intentional gaps in the law (from the point of view of the legislator). In practice, lawyers often talk about the legal gaps mirroring the problem of so called *general clausules* (the concept of a very generally formulated legal rule causing the uncertainty and the lack of clarity). These gaps are regarded as the typical example of the obvious legal gaps – missing reference norm, legislative inactivity – creating a very complicated task to deal with (even in the context of the constitutional law).

This is the main area where the problem of vagueness combines with the idea of indeterminacy of legal normative text. The question which is quite apparent sounds as follows: shall we these types of vagueness or uncertainty of legal rule subsume under the concept of gaps? The traditional division between interpretation and creative adjudication (filling-in gaps) is at stake here. Facing this question, K. Engisch stays a bit aside the problem and argues, that these types of incomplete legal regulation is 'planned' by the legislation, and that is why this is not a gap in a 'genuine sense'.[27] As a result, we shall use terms like not-gap or an interpretive gap to cover these situations. However, he admits that the difference between finding the law and creative adjudication *(Rechtsfortbildung)* is not quite clear. It depends on how far we would like to extend the concept of gap. [28]

In my view, theory of gaps should comprise also the situations of planned vague expressions used in legal communication. Therefore, the concept of a non-gap, let us say an interpretive gap is crucial for this analysis. My reasoning to this point results from the idea of mutual interconnection

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26 This conclusion is made more explicit in R. Dworkin in his work Justice in Robes. Quoted in Chiassoni (2006), op. cit., p. 66.

27 Engisch (2010), op. cit., pp. 240–242.

28 Ibid.; See also Reimer, F. (2016) *Juristische Methodenlehre*. 1. edition. Baden-Baden: Nomos, pp. 247–252.

between interpretation and filling-in gaps (creative adjudication). Both interpretation and filling-in gaps lead to formulation and re-formulation of legal normative text. If vagueness may cause the feeling of incompleteness, then it is legitimate to use the theory of gaps to describe it theoretically.

5 Principles of Dealing with Gaps under Czech Legal Order

The theory of gaps uses traditionally a two-steps process: a) identification of the gap; b) filling-in the gap.[29] Of course, both two steps can be used only if filling a gap is not forbidden by the principles of a particular legal order (e. g. prohibited analogy in malam partem in criminal law) and thus the legislatory intent of non-regulation of the concerned relationship is presumed. The crucial step in deciding whether it is possible to fill in a gap is to consider the relevant legal context of the act of interpretation.

The Czech legal order contains some provisions on both the constitutional and statutory level regulating the filling-in activity of law applying bodies. As far as the constitutional level is concerned, there is no provision in the Czech legal order concerning judicial *'Rechtsfortbildung',* i. e. filling-in gaps. Unlike e. g. German Grundgesetz, the Czech Constitution provides that judges are to be bound by the statutory law and by the international treaties, which have become an integral part of the Czech legal order according to Art. 10 of the Czech Constitution. Judges also vow loyalty to the constitutional order; however, they are not strictly bound in decision making by the secondary legislation (the legislation of the executive bodies) and local authority legislation. For a judge hearing and interpreting a hard case and facing the problem of a gap, there are two possible ways how to deal with such a case: judges may either decide the case according to their best consideration (to fill in a gap) or they may submitt the case to the Constitutional Court, seeking the abrogation of the statute (or the derogation of certain provision of the statute) which should have been applied if the judge regards it as unconstitutional. In the context of the EU law, there is also the third way how to deal with the legal gaps;

29 Recognizing and filling-in gaps can be understood as very closely connected procedures. See e. g. Canaris (1964), op. cit., pp. 140–141; also Rüthers, B. (2005) *Die Unbegrenzte Auslegung. Zum Wandel der Privatrechtsordnung im Nationalsozialism*. 6. edition. Tübingen: Mohr Siebeck, p. 189.

then the court may initiate a preliminary ruling before the Court of Justice of the European Union (Art. 234 TFEU). This tool is semantically based on lex clara (claritas) doctrine (acte clair, acte eclaire).[30] It is also worth to noticing that on the grounds of the principle of denegatio iustitiae courts are always obliged to decide about the rights and duties of the individuals (implicitely see Art. 90 of the Czech Constitution).

As far as the private law is concerned, it is traditionally tied with the analogous reasoning and the autonomous status of parties. This supposition has been recognised even by the socialist legal system and is still valid and used in the contemporary Czech legal practice. These principles enabled the parties to enter contracts not explicitely regulated by the private law. Moreover, the Czech private law has been facing a transition period – the new Civil Code which entered to force since 1st January 2014 has been partly inspired by ABGB, BGB and ZGB and represents the true revolution in some aspects of the Czech civil law discourse. As to the problem of filling in gaps, the new Civil Code provides concrete provision (§ 10) inspired by § 7 ABGB which categorizes the sources of private law provided for filling in gaps as follows:

a) explicit statutory provision
b) statutory provision applied on the grounds of an analogy
c) principles of equity
d) principles of the Civil Code.

Besides, the Civil Code mentions two corrective aspects designed to lead an interpreter to find the right answer in the sense of *'the eligible (reasonable) state of rights and duties'*: i) settled legal doctrine and ii) well established judicial case law. The crucial methodological attitude has not been changed: the analogous reasoning which is anticipated by the legislator to be used for filling in gaps.[31]

As far as public law is concerned, the exemption clauses expressing the principle of legality of public power will be used. The crucial (but not largest) legal branch of public law is the criminal law. Norms of the criminal law are subject to the constitutional limit of the principle *nullum crimen*

30 Žák-Krzyžánková, K. (2019) *Právní interpretace – mezi vysvětlováním a rozuměním.* Praha: Wolters Kluwer, pp. 31–32.

31 See e. g. Tryzna, J. (2012) Garance právní jistoty z hlediska metodologie interpretace práva předvídané novým občanským zákoníkem. In: Gerloch, A., Tryzna, J., Wintr, J. (eds.). *Metodologie interpretace práva a právní jistota*. Plzeň: Aleš Čeněk, pp. 190–205.

sine lege, nulla poena sine lege expressed in Article 39 of Czech Charter of Fundamental Rights and Freedoms (similarly, Art. 7 of the European Charter). The law itself – in the context of the most evasive limitation of human freedom – restricts itself from extending beyond its semantic limits (Penal Code). As a result, the use of analogy and the purpose filling-in gaps is not allowed; however, the legal theory discusses the application of argumentum a simile, in other words, reasoning per analogiam intra verba legis.[32] The legal regulation of criminal conduct thus seems to be complete and may only be interpreted by means of interpretation sensu stricto. This attitude has been criticised by authors who consider this form of analogy to be prohibited as well as other – more extensive – forms of analogous judgments.[33]

The situation is much more complicated under the constitutional and adminstrative law (the procedural administrative law and the constitutional law are the other branches of the public law). Under the administrative law, there are some subsystems in which analogy (and teleological reduction) in malam partem of the subjects of rights and duties are prohibited: duties may be laid down by the statutes only (Art. 2 of the Constitution). As far as the administrative punishment law is concerned, there exist similar rules like in the criminal law which have been legitimated mainly by the means of case law of the administrative courts. As far as the procedural laws are concerned, it is not quite clear whether analogy can be used for filling-in gaps and if so, within what extent. The legislator has not implemented any legal norms or principles into the procedural codexes concerning the filling-in gaps. There are no doubts about using the extensive interpretation or analogy intra verba legis. On the other hand, the filling-in the genuine gaps has remained a controversial problem. Those, who defend the use of analogy to fill-in the procedural law, refer to the right of fair trial (Art. 36 of the Charter) and therefore, analogy in the procedural law is often hidden in the constitutionally coherent interpretation (in a broader sense).[34]

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32 The legislator sometimes includes statutory imperative for searching ‘similar’ kinds of conduct and opens the antecedent of criminal legal norm to other forms of conduct that are not explicitely mentioned.

33 Marijan Pavčnik mentions this problem. Further see Pavčnik, M. (2012) Questioning the Nature of Gaps in the Law [(organic) gaps in the law]. In: *i-lex*, 16, pp. 119–128 (www.i-lex.it); In Czech legal theory, this problem is emphasized by Filip Melzer. See Melzer (2011), op. cit., pp. 236–239.

34 Interpretation in broader sense means a creative interpretation. See Barak, A. (2005) *Purposive Interpretation in Law*. Princeton: Princeton University Press, pp. 67–68.

As to the constitutional law, the continuous discussion has been lead on the role of the constitutional customs in the Czech republic as a source for filling-in gaps. This problem relates to the role of the president and other state bodies (government, Parliament) in the constitutional system of the state. Some authors criticise the lack of constitutional directives on the interpretation which would lay down some guidelines for the creative application and interpretation of law used by both the state authorities and the Constitutional Court.[35]

6 Relevant Case Law – Constitutional Discourse

The case law of the Constitutional Court has become essential for the understanding, defining, and dealing with the problem of gaps. Since 1990's the Federal Constitutional Court followed by the Constitutional Court of the independent Czech Republic have introduced the concept of gaps into the judicial discourse. First, the Constitutional Court very clearly proclaimed the duty of the courts to decide in coherence with the constitutional order.[36] The directive of constitutionally coherent interpretation comprises two typical situations:

a) teleological gap
   - i.e. the existing legal rule is interpreted and enriched by the constitutional values and principles)
     1. open teleological gap,
     2. hidden teleological gap.

b) genuine gap
   - i.e. the absence of the rule is solved by creating a new rule by means of analogy and teleological approach.

Sometimes a gap results from legislative inactivity of the legislator.[37] These cases comprise both the situations of the technical (genuine) gaps where no relevant legal rules exist to be applied in the legal case and the situations

35 Malenovský, J. (2013) O legitimitě a výkladu české ústavy na konci století existence moderního českého státu. *Právník*, 8, pp. 745–772.

36 One of the first judgments was the case decided in 1996 – Judgment no. Pl. ÚS 48/95 issued on 26th March 1996.

37 See more detailled analysis of this problem Tryzna, J. (2008) Právotvorba legislativní: role parlamentů a výkonné moci. In: Gerloch, A. a kol. *Teorie a praxe tvorby práva*. Praha: ASPI, pp. 63–85.

where there is some relevant legal framework, but it is not constitutionally correct (which is the conclusion usually deduced by the Constitutional Court reviewing the laws in the light of their compliance with the Constitution). This is the reason why some authors talk about 'mixed' or 'combined' gaps[38] (the distinction between the gap and non-gap seems to be insufficient to deal with these cases). However, this practical concept has not become very frequent under case law. In the following part I will present some examples from the case law where the tools of the theory of gaps (the main two types mentioned above) appear in the legal reasoning.

6.1 Genuine Gaps

As for the cases belonging to the situations of the genuine gaps, the Constitutional Court declared that *"only exeptionally analogy may be admissible to fill-in a genuine (logical or technical) gap in the law. This kind of gap represents the situation in which legal order regulates certain legal proceedings, though does not regulate which body is competent to rule on it."*[39] This kind of genuine gap was also recognized by Hans Kelsen.[40] In other cases of genuine gaps, in the words of Constitutional Court (hereinafter also "the Court"), interpreters should not reach over the semantic borders of the normative text. In one of later cases, the Court decided was dealing precisely with this kind of gap. The case concerned the expelling of a judge of the Supreme Court who demonstrated a bias during the proceedings consisting in his friendship with another disciplinary suspected judge (the vice-president of the Supreme Court).[41] The court was facing the absence of the delegatory norm in the applicable law allowing it to determine the deputy to the vicepresident of the Supreme Court. The court finally concluded that this genuine gap could have been filled-in by the application of the internal regulation of the proceedings before the Supreme Court (Code of Proceedings).

Further, an interesting conclusion was also deduced by the Constitutional Court in case concerning so called leges imperfectae (legal norms which do not include sanctions). The Constitutional Court held that it is not possible to regard leges imperfectae as the situations of the legal regulation

38 Melzer (2011), op. cit., p. 232.
39 See Case I. ÚS 318/06.
40 Kelsen, H. (1960) *Reine Rechtslehre*. 2. edition. Wien: Franz Deuticke Verlag, pp. 254 –255.
41 See Judgment no. Pl. ÚS 9/09.

having a legal gap; a norm without sanction does not give to the courts or the public authorities an opportunity to create law. In this context, the Constitutional Court makes no difference between the public law and the private law because this opinion was held in the case concerning the review of an under-statutory governmental labour regulation (insurance of an employer for damages resulting from a labour injury or disease).[42]

6.2 Teleological gaps (non-gaps)

As far as teleological gaps are concerned, the case concerning the constitutional convenants on the use of the President's veto power (the right of the President not to undersign a statute passed by the Parliament) belongs among the most influential cases decided by the Constitutional Court.[43] This case is one of the most cited cases with the theoretical ambition to argue for a plurality of sources of law among which legal principles of a general manner play the most important role. The idea that *"a mechanic equivalence between law and legal texts has become a handy tool of totalitarian regimes. It changed/transformed the judiciary into a obedient and non-thinking tool of arranging totality",*[44] has become one of the leading legal opinions of the Constitutional Court of that time (i.e. 1990's) and accompanied the transition period in the Czech society. As to the problem of an interpretive gap faced by the Constitutional Court in this case, the judgment contains the following argumentation: *"Textual approach represents only the first step to reconstrue legal rule from normative text. It is only a ground for its explanation and elucidation of sense and scope; this can be also provided by the means of logical, systemic and e ratione legis reasoning."*[45] The Constiutional Court found the missing rule in the background of the system of lex scripta formed by general principles like *ignorantia legem neminem excusat, lex retro non agit* etc. One of those principles is also the principle according to which a legal term may not expire when the consequence of its expiration would be the incapacity of the competent subject to apply his competence. Therefore, the court filled in a gap in the Constitution consisting in the absence of the rule for counting the course of time; the case was decided in favour of the president's power to return the statute without

42 See Judgment no. Pl. ÚS 7/03.
43 See Judgment no. Pl. ÚS 33/97.
44 Ibid.
45 Ibid.

signature in fifteen days; if the last day of the deadline fell on a holiday, the deadline would not expire. The rule or the principle which was recognised as absent in the context of the constitutional legislatory proceedings was found in general principles of law. However, not all members of the court were convinced by this conclusion and claimed that no such general principle ever existed under Czech legal order.

Another very interesting case concerned the situation of the absenting rule for awarding a reward for a bankruptcy administrator nominated by the court in cases where the value of the bankrupted business did not cover the expenses of the bankruptcy proceedings.[46] The court found a non-gap (axiological or interpretive gap) and employed the per analogiam iuris reasoning concluding that the bankruptcy administrator had the right to reward. It is very interesting to note that the Constitutional Court considered the alternative of a direct constitutionally coherent interpretation that may have been used to fill-in this gap; however, eventually resigned to re-create the legal rule and derogated the relevant provision with the reasoning that *"... this attitude is not possible in the present case for the relevant provision could not have been interpreted in the way to find the legal rule stating who is to pay for the reward and by which financial sources."* The relevant statutory provisions were derogated in both these cases as unconstitutional.[47] However, this reasoning seems to be rather a self-justification of what the court simply did not want to do, although the content of the desired legal rule was clear: the obligation to pay for the reward of the bankruptcy administrator binds the state (similarly to the other appointed officials by the court – e. g. attorneys and notaries). These two judgments have become popular and often quoted for the reasoning heading towards a teleological (axiological, constitutionally coherent) interpretation of law.[48]

In the latest development of the constitutional case law, two important groups of cases should be pointed out. First of them is the case concerning the legality of the state regulation on the rents. This regulation was criticised as an unlawful restriction of the property rights of the landlords (owners of flats). The second group of cases concerns the church restitutions. As far as the regulation of tenancy is concerned, the attitude

46 See Judgment no. Pl. ÚS 36/01.

47 Sometimes, Constitutional Court restricts itself from derogating the law and provides some time for the legislator to amend the relevant legal rules.

48 Holländer, P. (2003) *Ústavněprávní argumentace. Ohlédnutí po deseti letech Ústavního soudu*, pp. 31–33.

of the Czech Constitutional Court was influenced by a the Polish case Hutten-Czapska decided by ECHR.[49] The court derogated the unconstitutional legal regulation on flat rents[50] and appealed the legislator to provide for such a regulation of tenancy which would be in compliance with Art. 4 sec. 4 (minimalisation of limitation of fundamental rights and freedoms) and Art. 11 of Charter (ownership); however, the legislator remained passive. As a result, the Constitutional Court issued an opinion declaring that general (lower) courts are obliged to fill in this gap by creative adjudication by means of applying Art. 4 sec. 4 of the Charter. Otherwise, it would have to be considered as a breach of the principle of denegatio iustitiae. The court explicitely held that *"... courts are not allowed to dismiss the claims for damages against the state a priori but they are obliged to consider them individually from the point of view of Art. 11 sec. 4 of the Charter ..."*. This opinion created the explicit directive to the courts to apply this constitutional provision directly without any corresponding statutory regulations (in the Czech republic, there was no statute regulating the state liability for damages in case of not adopting of certain national legislation; the only exception is represented by the European legislation where the liability of a member state is confirmed by the treaties and the case law of the Court of Justice of the European Union).

Another recent legal case tied up with the theory of gaps is the restitutions case law, concretely in cases where the entitled subject was the Church. In the beginning of 1990's, the problem of restitutions of the property (lands and forests), which has been expropriated in the time of the socialist regime (1948–1989), gradually appeared. The state adopted the relevant legislation to recover these legal injuries (the law no. 229/1991 Coll). In this legislation, the concrete explicit provision (§ 29) stated that this legislation could not be applied to the churches and religious personalities (monasteries, congregations) to restitute their property. These restitutioners were obliged to wait until the proper (special) legislation was adopted. However, the legislator remained inactive and failed to adopt this regulation. The Constitutional Court in a quite long series of its judgments criticized this situation.[51] Finally, the court held that this situation represents

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49 See Judgment of the great panel of ECHR issued on 19th June 2006 (complaint no. 35014/97).

50 Judgments no. Pl. ÚS 3/2000, Pl. ÚS 8/02, Pl. ÚS 2/03.

51 For details, see Judgments no. II. ÚS 528/02, followed by Judgments no. I. ÚS 663/06, I. ÚS 562/09 remarked on that unfulfilled duty of the legislator.

a gap in the legal order which should be filled in by the courts. As the Court stated, *"the petition of a claimer is admissible, however, it is an untypical petition sui generis aiming an filling in a gap resulting from a long inactivity of the legislator breaching the promise given by the legislation from 1991."* Nowadays, this problem has been settled by the treaty among the state and the churches which has been regarded by both the public and by professionals as highly controversial.

Legal conclusions of the Constitutional Court as to the filling-in teleological gaps can be summarised into one idea which, in my view, represents the crucial point of this case law. The request of the Constitutional Court to the judiciary is as follows: Problems with the application of law may not lead the court to resign on the duty to fulfil the constitutional order, and particularly Article 4 of the Czech Constitution. Under this provision, fundamental rights and liberties shall be protected by the judiciary. This must be understood in the sense of the whole constitutional order, not considering only the rights and liberties in the subjective sense.[52] On the other hand, if the abstract constitutional review is applied, the Constitutional Court often behaves more restrictively and favorizes the legislator to adopt the relevant provision or statute in a constitutionally correct way instead of filling-in the gap by the means of the judicial law-making (creative interpretation).

7 Conclusions

The theory of gaps is currently a recognised part of the Czech methodological thinking both in theory and practice. It plays the most important role in the constitutional discourse on human rights and freedoms. In my opinion, the problem of legal gaps is no longer understood as a part of the conflict between the positivism and the natural law theories, even though this reflection can still be influential from the point of view of the legal theory. Legal gaps have been seen more as a matter of the ideology of application of law – shall the interpreter be more creative or more restrictive while deaing with the normative legal text? Answering this provoking question is not only a matter of conviction, theory, tradition, and context, but also a matter of the interpretive (hermeneutical) courage of the judges and other interprets.

52 See Filip, J. (2010) In: Bahýľová, L. a kol. *Ústava České republiky: komentář*. Praha: Linde, p. 74ff.

Respecting all possible and well-known theoretical differences, for the Czech discourse the traditional difference between genuine gaps and interpretive gap has remained to be influential and relevant. However, the Constitutional Court applies the theory of gaps in two following attitudes: first, to fill-in a non-gap by the constitutionally coherent interpretation, and second, to legitimate the derogation of a statutory or under-statutory regulation in cases where the interpretation would be creative too excessive. An important group of cases analyzed in this article dealt with the problem of the legislative inactivity. Recognising and filling-in gaps (gap judgments) are mutually tied procedures of the legal thinking. They follow one another in a scheme of a hermeneutic circle.

However, in other areas of legal discourse lead by the general (lower) courts or the administrative authorities, the theory of gaps is usually not recognized as useful tool. In case of a teleological gap, the lower courts must decide according to the present case whether they are entitled to fill-in a gap or to consider the legal rule as unconstitutional and initiate the constitutional review. In my opinion, interprets who apply law (officials, clerks, or judges) have no other possibility than to interpret the normative legal texts in such a way allowing them to find an answer to the question they are dealing with. Recognising and filling-in legal gaps in an interpretive sense is a part of their everyday practice. As Bernd Rüthers concluded, the judge is to apply the law on the facts and therefore must interpret it in the way to make the inference possible.[53] That means that in adjudication process, a judge must deal with indeterminacy, uncertainty, ambiguity and vagueness as to be able to apply the normative text the best he or she can.

I do agree with Aharon Barak who talks about many 'voices of a normative text'. Only one of these voices represent a gap.[54] In my opinion, it is not necessary to talk about the non-gaps (teleological, interpretive gaps), because in all these situations the legal rule itself may be re-constructed by the creative interpretation (interpretation in a broader sense). These are the situations of interpreting uncertain vague concepts, collision of rules etc. The concept of gap does make clear sense (particularly for the practicioners) only in cases of the genuine gaps resulting from the failure or the unconstitutional inactivity of the legislator to adopt relevant legislation. However, the constitutional discourse represents a space in which talking

53 Rüthers (2005), op. cit., p. 445.
54 Barak (2005), op. cit., pp. 67–68.

about interpretive (axiological) gaps could be understood as reasonable and useful, particularly from the point of view of the Constitutional Court as a negative lawmaker.

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ARGUMENTATION 2021

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ARGUMENTATION 2021

This volume contains a collection of papers presented at the Argumentation 2021 conference and accepted for publication in its proceedings. The conference follows up on an already established tradition of discussing alternative methods of argumentation in law. As the first ever Argumentation was held in 2011, this year's conference marks its 10-year anniversary, connecting scholars from all over the world.

This year, the main topic for our discussions centred around conceptualization in law.

Recently, the traditional analytic method of conceptual analysis in law has been criticized as not being able to take in wider social context, such as globalization. Social sciences have long been developing methods to study conceptualization, yet law seem to be quite wary when it comes to making use of them. Only carefully, the analysis of legal concepts ventures into borrowing methods from other disciplines (e.g. semantics and pragmatics, sociology – even though they claim that their study is not to be considered legal theory). Legal concepts are the object of intensive study in the field of Artificial Intelligence and Law, especially in the context of development of legal ontologies and the use of Semantic Web technology. In addition, legal scholarship has been moving towards a more empirical direction recently, allowing us to introduce external factors in our understanding of law, which is the space where we would like our year's conference discussions to fit in.

In addition, already established areas of the Argumentation conference concerning the areas of law and logic, cognitive science, law and literature, or law and visualisation were discussed.

This volume contains five papers. Terezie Smejkalová and Markéta Štěpáníková discuss the processes of conceptualization of a chosen vague legal concept in the light of Czech legal style, burdened by the normativist and socialist-formalist heritage. Linda Tvrdíková connects findings of cognitive science and ideas of American legal realists related to intuition. She then discusses the role of intuition in decision-making processes. Ondřej Glogar argues to what extent law may be understood as language, the drawbacks and advantages of such an approach. András Molnár chooses a tradition law and literature approach to discuss The Dynamics of Consent and Antagonism in Ian McDonald's Luna Trilogy. Lukáš Hlouch concludes this volume with a paper discussing vagueness in law.

Let us thank all the authors of these papers as well as all the participants of the International Conference on Alternative Methods of Argumentation in Law (Argumentation 2021), members of the Programme Committee and all our friends and colleagues who share our enthusiasm and help us keep this conference alive.

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