LATVIJAS UNIVERSITĀTES ŽURNĀLS
JOURNAL OF THE UNIVERSITY OF LATVIA

Juridiskā zinātne

Law

11

ISSN 1691-7677

LATVIJAS UNIVERSITĀTE
ANNO 1919
UNIVERSITY OF LATVIA

LATVIJAS UNIVERSITĀTES
ŽURNĀLS

Nr. 11.

Juridiskā zinātne

JOURNAL
OF THE UNIVERSITY OF LATVIA

No. 11

Law

The publishing of Journal "Law" of the University of Latvia is financed by the Faculty of Law of the University of Latvia. The publishing of issue No. 11 is supported by "Eversheds Sutherland Bitāns" Law Office.

EVERSHEDS
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Proofreader **Andra Damberga**
Layout **Andra Liepiņa**

 Journal of the University of Latvia "Law" is included in the international database EBSCO Publishing.

ISSN 1691-7677
https://doi.org/10.22364/jull.11

Contents

Foreword

The XII annual conference of the Central and Eastern European Network of Jurisprudence "Jurisprudence in Central and Eastern Europe: Work in Progress 2017" was held at the Faculty of Law of the University of Latvia on September 14–17, 2017. The conference was organized by the Department of the Legal Theory and History in cooperation with the Central and Eastern European Network of Jurisprudence.

During the Conference, 40 legal theorists from 15 European countries presented their topical papers in legal theory, legal history, legal philosophy and legal sociology. This issue of the University of Latvia journal "Law" contains 11 scientific articles, which were prepared after the conference in accordance with high scientific standards for publication established by this Journal. All these articles have not been previously published and deal with conceptual issues of the jurisprudence in the Central and Eastern Europe.

This annual conference and the articles published after the event play an important role in development of jurisprudence in Central and Eastern Europe, and in strengthening the rule of law in this region.

The conference was organized with the support of the University of Latvia, law firms "Cobalt", "Eversheds Sutherland Bitāns" and "Fort", Professor Kārlis Dišlers' Foundation, as well as Central and Eastern European Network of Legal Scholars. The publication of the current issue of the journal "Law" is specially supported by law firm "Eversheds Sutherland Bitāns".

Organizers of the conference extend their sincere gratitude to all the supporters of the conference, and especially to sworn advocates Māris Vainovskis, Lauris Liepa and Sandis Bērtaitis. I would personally like to thank all the organizers – Madara Marija Ose, Ilze Ziemane, Jānis Gavars, Kristīne Gailīte, Elīna Kursiša, Jānis Priekulis, Dainis Pudelis, Andris Pumpišs and Eva Vīksna for their extensive involvement in the organization of the conference.

Jānis Pleps,
Assistant Professor, Chair of the Conference Organization Committee

https://doi.org/10.22364/jull.11.01

Positive Law and Morality – Violence and Coercion[1]

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The paper focuses on the conceptual analysis of law and morality from the perspective of their relationship with the concept of violence and coercion. The author makes a phenomenological analysis of the concept of law and morality pointing out their ambiguity and difficulties in defining their mutual relation. This analysis leads to a conclusion that there is a necessity to take into consideration three phenomena (law, morality and positive law) to define this relation correctly. This allows protection of the content of the positive law against dogmatism and ideologies. The author also challenges a thesis on a special role of morality in social relationships and strongly emphasizes the essential and primary role of the positive law in these relations.

Keywords: morality, positive law, violence, coercion, inter-subjective morality.

Content

Introduction

I would like to outline and address an issue connected with the relationship between law and morality, namely, the legitimization of law as a mandate for the use of coercion or violence. The idea is not new – it has been subjected to classical analysis in the philosophy of law and discussed at least since the time of Immanuel Kant.

We tend to associate positive law with coercion or violence, but the same is not true of morality. In other words, we legitimize violence in the sphere of positive law, but moral norms do not possess such legitimacy.[2]

[1] The following text was prepared as a part of research grant financed by the National Science Center (Poland), No. 2015/19/B/HS5/03114: "Democratic Legitimization of Judicial Rulings' Influence on Law Making".

[2] *Steinvorth, U.* Gerechtigket. In: *Martens, E.,* und *Schn*ädelbach, *H.* (Hrsg.). Philosophie: Ein Grundkurs. Reibek bei Hamburg: Rowohlt, 1991, ISBN 978-3499554087, pp. 306–308.

Coercion or violence usually is a clear factor enabling to distinguish moral norms from legal norms.

However, I am of the opinion that this distinction is sufficient for a certain understanding of morality, which I call subjective, but becomes insufficient when applied to the sphere I call the moral community. In my view, the coercion or violence associated with positive law must have its own moral legitimacy.

1. Subjective Morality and Moral Community (Inter-subjective Morality)

I shall begin by citing famous passages from Kant's "Die Metaphysik der Sitten" ("The Metaphysics of Morals"):

1. "[…] if a certain use of freedom is itself a hindrance to freedom in accordance with universal laws (i.e., wrong), coercion that is opposed to this (as a *hindering of a hindrance to freedom*) is consistent with freedom in accordance with universal laws, that is, it is right […]. Right and authorization to use coercion therefore mean one and the same thing."[3]
2. "Right is connected with an authorization to use coercion."[4]
3. "Right and authorization to use coercion therefore mean one and the same thing."[5]

Why do we not associate morality with violence, arguing that adherence to moral norms cannot be compelled through the threat of force, while legal norms have a legitimate recourse to coercion (or violence)?

The answer to this question is inextricable from the need to differentiate and analyze the three normative spheres:

1. Morality (which I call subjective)
2. Universal law (referred to by Kant), which can be identified with the moral community
3. Positive law

As for the morality I call subjective, the lack of legitimacy for enforcing its norms can be based on two well-known justifications.

The first was provided by Kant himself, while the second belongs to phenomenological considerations and can be reconstructed from the writings of the eminent philosopher Ernst Tugendhat.

Kant justifies the sphere of morality with the distinction between the noumenon and phenomenon. A person belonging to the noumenal world holds that he or she is subject to laws that have their basis in reason alone, and that "[…] the idea of freedom makes me into a member of an intelligible world, through which, if I were that alone, all my actions *would* always be in accord with the autonomy of the will […]."[6]

Thus, according to Kant, in the sphere of moral law, a person is the absolute legislator of the principles determining their conduct, and only the moral subject makes subjective judgments of their own actions. The problem of the compatibility of human deeds with the moral law derived directly from the categorical imperative,

[3] *Kant, I.* Metaphysics of Morals. Transl. *Mary Gregor*, Cambridge University Press, 1991, ISBN 0-521-31657-X, pp. 57–58.

[4] Ibid., p. 57.

[5] Ibid., p. 58.

[6] *Kant, I.* Groundwork for the Metaphysics of Morals. Transl. *Allen W. Wood.* New Haven and London: Yale University Press, 2002, ISBN 0-300-09487-6, p. 70.

and whether or not these actions can be regarded as having their source in goodwill falls under the domain of knowledge that Kant refers to as *Tugendlehre*[7], or the doctrine of virtue. However, evaluating actions from the point of view of the doctrine of virtue is by no means straightforward. Since the "thing-in-itself" is inaccessible to the subject, it follows by strict necessity that the subject cannot have a direct sense of their own noumenal self. This being the case, no external judgment can make that evaluation, and from the moral point of view cannot replace subjective judgment.

In the second justification (phenomenological), which can be reconstructed from the writings of Ernst Tugendhat[8], morality is related to such experiences as anger and indignation, or guilt and shame. First and foremost, it is important to emphasize this experience of guilt – a particular feeling of loss of self-worth – which is related to the feeling of anger with oneself or self-loathing. These are the phenomena that lie behind the notion of conscience. Of course, this does not exhaust the characteristics of conscience as a moral category – the issue is far more complicated. However, to characterise the concept of morality it is essential to grasp that the identification of guilt and anger can only occur – conceptually – in subjective experience (in conscience). Thus, the experience of guilt cannot be objectified, because no one can force me to feel guilty. Unless, that is, someone influences my will, but then we would lose a key 'component' of the notion of morality, namely, the will (autonomy), meaning the power to decide what to choose and how to create the future (in other words, the ability to say "I want" or "I do not want"). These analyses provide a confirmation of Kant's observations. Therefore, I treat morality as subjective: the lack of legitimacy for coercion is evident here.

Since guilt cannot be objectified, and the will should not be subject to interference (as that would mean its negation), then, in that case, what do we mean by the notion of morality in a given community? The justification of this morality is at issue here. We are not concerned with the subjective morality of every free subject, but rather with the inter-subjective morality. This issue has primarily been a challenge for philosophy and the philosophy of law, and this is evident from the historical development of the many concepts of natural law. It seems that such an understanding of morality (i.e., as inter-subjective) is what we normally have in mind when we invoke the concept of morality.

To make a clear distinction between subjective and inter-subjective morality, by inter-subjective morality I am referring to morality in the narrow sense (*sensu stricto*), because this is generally what is understood by morality in most philosophical and political discussions – the moral norms of a given community, conceived either as particularist (for any given community) or as universal (for any possible community).

The justification of inter-subjective morality is the most difficult from a philosophical point of view, as is evident from the struggles with this problem throughout the history of philosophy. For instance, the proof of such continual and concerted analysis is provided by two figures of modern social philosophy – Ernst Tugendhat and Jürgen Habermas.

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[7] *Kant, I.* Metaphysics of Morals. Op. cit., pp. 181–280.

[8] *Tugendhat, E.* Vorlesungen über Ethik. Berlin: Suhrkamp, 1993, ISBN 978-3-518-28700-2; Ibid. Dialog in Leticia. Berlin: Suhrkamp, 1997, ISBN 978-3-518-28902-0; Ibid. Aufsätze 1992–2000. Berlin: Suhrkamp, 2001, ISBN 978-3-518-29135-1.

Tugendhat was open about the fact that his attempts to solve ethical issues, particularly, the analysis of the concept of morality, continually ended in failure, and that every subsequent attempt resumed at the point where the former had become stuck[9] – and this included the issue of legitimizing violence.

I shall omit a description of Tugendhat's analysis and only outline the general conclusion arrived at from his critique of all kinds of justification of the moral community. After rejecting many transcendental assumptions, Tugendhat concludes that the moral community is based on mutual recognition, that it is the members of this community who establish the norms, and that the formation of the community results from the fact that a subject also belongs to the phenomenal realm. If they only belonged to the noumenal realm, they would be guided by Reason and the categorical imperative. But this is not the case. As subjects that also inhabit the phenomenal realm, we have to deal with situations, in which the norms of the community are not observed.[10]

Thus, the moral community is a kind of synthesis of the noumenal and phenomenal realms and now the issue is how to ensure that moral standards are obeyed. At this point, a conceptually paradoxical situation becomes apparent. On the one hand, we accept that moral norms cannot be imposed through the use of force, as this in itself it would be immoral – such coercion would violate the freedom of the subject. On the other hand, however, it is often the case that one subject infringes on the freedom of another subject. Therefore, it would seem that in order to talk sensibly about the existence of moral norms in a given community, the norms must also be realized.

Hence, there is a need for an organizational principle that could potentially contribute to the realization of these norms. On the one hand, we impose these norms upon ourselves in order to build communities, i.e. so as to live together, yet on the other hand, we do not respect them, because we seek to maximize our own vision of values, which are determined by various factors resulting from our human condition (as noumenon and phenomenon). In other words, the fact that there are norms that derive from the laws we impose upon ourselves – usually because of the common context of values that we prefer – does not necessarily entail that these norms will always determine our desire to follow them, because it is always possible that a person will no longer desire that which a person has desired previously. Thus, only if they were free from all empirical inclinations and governed exclusively by pure practical reason, would people always conduct themselves in accordance with the norms they imposed on each other. However, in that case, it could be said that they would thereby cease to be people, not only because we would have deprived them of such inclinations, but above all because we would have robbed them of their will. Kant did not take this dual human nature into account when considering the justification of morality. Tugendhat sums up Kant's attempted justification of morality, which only considers pure practical reason, with the relevant question: "So do we not lose this 'may', that freedom, which is the freedom to be moral or immoral?"[11] It could also be said that we would lose the whole notion of morality. Therefore, it follows that we also need to allow for the actual dimension of the laws that we have imposed on ourselves, and outline the idea of a certain organizational principle, which would take into account not only the normative dimension (the

[9] *Tugendhat, E.* Vorlesungen über Ethik. Berlin: Suhrkamp, 1993, ISBN 978-3-518-28700-2, p. 9.
[10] Ibid., pp. 336–363.
[11] Ibid., pp. 129–131.

rule of law), but also the whole problem of realizing a legally binding state of affairs. Therefore, as a community, we must justify the admissibility of using coercion (violence).

2. Idea of Positive Law

Presently, it could be argued that the best candidate for an organizational principle – which would reconcile the issue of the normative realization of obligations arising from laws (which we have imposed upon ourselves as a form of objectified morality) with the issue of actually implementing them – is the idea of positive law. In his attempt to justify positive law, Jürgen Habermas shrewdly perceives this conceptual tension, as well as the essential function of abolishing it by means of the normative concept of positive law, calling it simply a category of social mediation between facticity and validity[12]. He also speaks of the Janus face of law, namely, the fact that positive law contains within itself "[…] a system of norms that are coercive, positive and – so it is claimed – freedom-guaranteeing. The formal properties of coercion and positivity are associated with the claim to legitimacy: the fact that norms backed by the threat of state sanction stem from the changeable decisions of a political lawgiver is linked with the expectation that these norms guarantee the autonomy of all legal persons equally".[13]

Thereby, if a given community is defined normatively as a certain axiological unity, meaning that its members accept and follow moral principles, something like a fusion of the private and public spheres occurs. If moral norms are not only to apply but also to be realized, then the only way is to abandon the symmetry of rights in favor of power and the possibility of employing coercion (legitimized violence). This element differentiates positive law from morality, i.e. whenever there is symmetry of rights and obligations. This symmetry cannot appear in the concept of positive law due to the need of separating the roles of the legislator and the recipient. If we agree that some laws like morality exist, apart from the idea of self-determination and recognizing it in the form of positive law, the law ceases to be positive and thus legitimized by its recipients, and, as a result, it begins to control them, which can have a risk in the ideology and violence – "[…] the impersonal rule of law is as fundamental as the violence of the Leviathan it is supposed to enchain".[14]

Habermas argues that positive law is a remedy for the complexity of social relationships in increasingly diverse and complex communities, where the processes of reaching agreement are very likely to end in divergence and disagreement. Positive law – according to Habermas – derives its justification from the "alliance" of two elements, i.e. the normative decision of the legislator and the expectations of the sovereign, meaning the addressee of this normativity. Hence, a perfect tension is found here that "[…] reappears in the law. Specifically, it appears in the relation between the coercive force of law, which secures average rule acceptance, and the idea of self-legislation (or the supposition of the political autonomy of the united citizens), which first vindicates the legitimacy claim of the rules themselves, that is, makes this claim rationally acceptable"[15].

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[12] *Habermas, J.* Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy. Transl. *William Rehg.* Cambridge, Massachusetts: The MIT Press, 1996. ISBN 0-262-08243-8, p. 1.

[13] *Habermas, J.* Postscript to Between Facts and Norms. In: *Deflem, M.* (ed.). Habermas, Modernity and Law. London, Thousand Oaks, New Delhi: SAGE Publications, 1996. ISBN 0-7619-5137-7, p. 135.

[14] Ibid., p. 143.

[15] *Habermas, J.* Between Facts and Norms. Op. cit., p. 39.

There is nothing to stop this relationship being abandoned, or being terminated. Such an eventuality is not necessarily out of the question, and support for the law (power) – as Hannah Arendt writes – "[…] is never unquestioning, and, as far as reliability is concerned, it cannot match the indeed «unquestioning obedience» that an act of violence can exact […]. It is the support of the people that lends power to the institutions of a country, and this support is but the continuation of the consent, which brought the laws into existence to begin with".[16]

This explains why legitimacy is so easily lost, if the border dividing unacceptable moral norms from other organizational norms is crossed. Positive law – which is conceptually associated with the possibility of applying real coercion (legitimized empirical violence) – must therefore avoid those principles that are perceived as being morally ambiguous in the content of their norms, since this legitimized violence will lose its legitimacy. Therefore, we are justified in arguing that positive law should seek to avoid morality in its content, and to regulate only concerning values outside the moral sphere, or with regard to those which, although moral, do not 'undermine' its legitimacy. Positive law appears as the boundary (in the Greek sense of *nomos*) between the morality of the community (i.e. between the content of laws that are reciprocally imposed), and the morality of each subject (i.e., freedom of conscience). However, this is a boundary that must both divide and join. The fact that the content of moral norms is common to many subjects, primarily results from the mutual imposition of these norms, and only secondarily arises from the will of the legislator and the content of positive law. Since people can change their mind, due to their will (something, which is guaranteed by the idea of freedom), nobody can be coerced into – or prevented from – changing their mind. The one thing I cannot do is exert my own will in order to limit the freedom of other subjects. Thus, positive law will have its fullest legitimisation only if the content of its norms is mainly limited to broadly understood organizational rules that maximize the idea of freedom.[17] What is morally correct in a given case is so difficult and varied, and therefore complicated, that we often oversimplify when we try to class it under an (abstract) rule, and this applies not only to morality but also to positive law (we could even say: *especially* to positive law). The fact that some norms that are recognized by many subjects as moral norms are at the same time norms of positive law is a fact that can change at any moment, depending on many circumstances.

Conclusions

In the history of the philosophy of law, attempts at justification and reconciliation of two ideas: coercion (positive law) and freedom have engendered much struggle. Even if the norms of positive law held a content which the legislature would regard as moral (at the legislature's discretion), even in that case it would not be possible to make the norms morally obliging to an addressee without their prior approval, or without forcing the addressee to follow them, however, positive law would lose its legitimacy in that case.

Bearing the above in mind, we can assert that the phenomenon of positive law at the first sight appears to be something natural, necessary and immanent to social

[16] *Arendt, H.* On Violence. San Diego, New York, London: A Harvest/HBJ Book, 1970, ISBN 0-15-669500-6, p. 41.

[17] See *Bekrycht, T.* Positive law and the idea of freedom. In: *Wojciechowski, B., Bekrycht, T., Cern, K.* (eds.). The Principle of Equality as a Fundamental Norm in Law and Political Philosophy. Łódź: Łódź University Press, Book Series "Jurysprudencja" 2017, (8), ISBN 978-83-8088-410-6, pp. 59–78.

reality, yet with the idea of power and coercion it turns out to be somewhat of a problem: something unwanted and treated slightly like a necessary evil. Habermas writes: "The paradoxical achievement of law thus consists in the fact that it reduces the conflict potential of unleashed individual liberties through norms that can coerce only so long as they are recognized as legitimate on the fragile basis of unleashed communicative liberties".[18]

The phenomenon of positive law is an attempted synthesis of that which cannot be reconciled, i.e., the idea of freedom with the idea of necessity. The appearance of positive law is – using Habermas' metaphor – a wedge of the exalted idea driven into social complexity, namely, the idea of self-restraint of liberty in the name of itself.[19]

Thus, the boundary between positive law and the morality of community for many norms cannot be pinpointed with precision. The criterion of coercion or violence is not always a good measure for distinguishing moral norms from legal norms.

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[18] *Habermas, J*. Postscript to Between Facts and Norms. Op. cit., p. 148.
[19] Ibid.

https://doi.org/10.22364/jull.11.02

Die Bedeutung der Reinen Rechtslehre für die Ethisierung des Rechts

The Significance of Pure Theory of Law for Ethicalization of Law

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The current article is dedicated to the significance of the Pure Theory of Law for current legal thinking. This question will be viewed from an unusual perspective, aiming to reveal the efforts of biomedical practices and technologies with regard to the legal regulation. In the current legal science several theoretical attempts are made to deal with the transmission and transformation of non-legal (moral) standards into law. As an example, the author would like to point out the project called „Ethicalization of law", developed in the last years by German and American legal scholars. The following article is divided into three parts. The first part contains a brief introduction of the initial methodological starting points of the ethicalization of law. The second part provides discussion of some of the methodological (legal-dogmatic) weaknesses of the legal regulations in the area of biomedical practices and technologies, while the final part shows that the Kelsen´s principle of purity can be a useful doctrinal basis for the ongoing attempts dedicated to the ethical transformation of law.

Stichworte: Reine Rechtslehre, Hans Kelsen, Rechtsnormativismus, Rechtsethik, Ethisierung des Rechts, Reinheitsprinzip, Eigengesetzlichkeit des Recht.

Keywords: Pure Theory of Law, Hans Kelsen, Normative Theory of Law, legal ethics, ethicalization of law, principle of purity, autonomy of law.

Inhalt

Einleitung

Ohne Zweifel gehört die Reine Rechtslehre von Hans Kelsen zu den wichtigsten Rechtstheorien in der ersten Hälfte des 20. Jahrhunderts. Sie stellt eine kopernikanische Wende im modernen rechtswissenschaftlichen Denken dar. Natürlich können wir uns fragen, ob man sich heute noch ernsthaft mit dieser Theorie beschäftigen soll. Für einige Rechtstheoretiker ist das nur verlorene Zeit. Andere meinen, dass diese Theorie keine Bedeutung für das heutige Rechtsdenken hat. Die Beschäftigung mit ihr bezeichnen sie als eine „Sackgasse ohne Zweck und Ziel".[1] Wer sich noch heute mit dieser Theorie beschäftigt, der verbreite nach diesen Kritikern, inhaltsleere Stereotypen eines positivistischen Formalismus".[2]

Ohne Übertreibung kann man aber sagen, dass keine Rechtstheorie so stark kritisiert und abgelehnt wurde, wie die Reine Rechtslehre.[3] Die Kritik jeder Theorie ist legitim und notwendig für ihre weitere Entwicklung. Die Frage stellt sich aber, wie eine Kritik der Reinen Rechtslehre heute geführt werden soll. Grundsätzlich gilt, dass eine Kritik keine Theorie marginalisieren oder unkritisch behandeln darf. Wie kann man diese zwei Extreme in der Kritik vermeiden?

Mittlerweile wissen wir, wo die Schwächen der Reinen Rechtslehre liegen. Niemand wird in der gegenwärtigen Rechtstheorie die Ansicht von Kelsen vertreten, nach welcher die echte Rechtsnorm nur die sanktionierte Norm sei. Kein Rechtstheoretiker wird heute behaupten, dass nur die Normen die Struktur der Rechtsordnung bilden und dass diese Struktur auch noch hierarchisch geordnet sein muss. Diese Schwächen bedeuten aber nicht, dass die Reine Rechtlehre eine ungültige Rechtstheorie ist und ihre Postulate bis heute keine dogmatische Bedeutung hätten. Der wahre Feind der gegenwärtigen Rechtswissenschaft besteht nicht in der erneuten Rezeption von Kelsens Reiner Rechtslehre, sondern in verbreiteten Vorurteilen und einem unkritischen Rechtsdenken.

Der deutsche Rechtstheoretiker Mathias Jestaedt, der sich in seinen Arbeiten sehr intensiv mit Kelsen beschäftigt hat, schlägt vor, dass wir diese Theorie „mit neuen Augen lesen" und sie neu interpretieren sollen.[4]

In diesem Beitrag möchte ich zeigen, was es heißen könnte, die Reine Rechtslehre neu zu lesen und zu verstehen. Zwei Fragen scheinen mir dazu geeignet: a) Was können die gegenwärtige Rechtstheorie und Rechtsmethodologie von Kelsens Reiner Rechtslehre lernen? b) Welche ihrer Postulate sollen die aktuellen theoretischen Konzepte des Rechts als Grundsteine des modernen Rechtsdenkens behalten?

Diese Fragen werden aus einer ungewöhnlichen Perspektive beantwortet, nämlich aus der Perspektive, die sich in dem Bestreben der rechtlichen Regelung der biomedizinischen Praktiken und Technologien äußert, etwa bei der Gentechnik, Stammzellenforschung, Präimplantationsdiagnostik, usw.

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1 Übernommen von *Jestaedt, M.* Hans Kelsens Reine Rechtslehre. Eine Einführung. In: *Jestaedt, M.* (Hrsg.). *Kelsen, H.* Reine Rechtslehre. Studienausgabe der 1. Auflage 1934. Tübingen: Mohr Siebeck, 2008, S. XIV, XVI.

2 Der deutsche Rechtstheoretiker M. Jestaedt konstatiert in seiner Einleitung zur Studienausgabe von Kelsens Reiner Rechtslehre, dass diese Theorie oft mit vielen negativen Etiketten behaftet wurde: „Staatslehre ohne Staat", „Rechtsleere", „der reduktionistische Formalismus", „der blinde Normativismus" oder „der methodologische Nihilismus". Siehe dazu *Jestaedt*, (Fn., 1), S. XV.

3 Andererseits ist die Reine Rechtslehre aufgrund der radikalen Kritik der damaligen Rechtstheorien und Rechtskonzepten entstanden. Ohne diese Kritik wäre sie nicht existent.

4 *Jestaedt* (Fn., 1), S. XVII-XVIII.

In der gegenwärtigen Rechtswissenschaft sind mehrere theoretische Versuche bekannt geworden, die sich mit der Übernahme und Transformierung von außerrechtlichen (moralischen) Standards in das Recht beschäftigen. Als Beispiel will ich das Projekt der „Ethisierung des Rechts" nennen, das in den letzten Jahren von deutschen Rechtswissenschaftlern in Zusammenarbeit mit den amerikanischen Rechtswissenschaftlern entwickelt wurde.[5]

Der folgende Beitrag wird in drei Teile gegliedert. Im ersten Teil werden kurz die methodologischen Ausgangspunkte der Ethisierung des Rechts vorgestellt.

Im zweiten Teil werde ich auf einige methodologische (rechtsdogmatische) Schwächen der rechtlichen Regelungen der biomedizinischen Praktiken und Technologien eingehen.

Im letzten Teil wird gezeigt, so paradoxal es klingen mag, dass das Reinheitspostulat von Kelsen eine brauchbare rechtsdogmatische Basis für diese momentan laufenden Transformierungsversuche darstellen kann.

1. Worum geht es bei der Ethisierung des Rechts?

In den letzten Jahren kann man in der deutschen Rechtswissenschaft eine Renaissance der Rechtsethik beobachten. Diese Tendenzen wollen nicht nur die Rechtsphilosophie von dem Etikett einer Naturrechtslehre befreien, sondern auch die Defizite des positiven Rechts und seiner Rechtssetzung und Rechtsanwendung beheben. Als Beispiel sind hier die Konzepte der Rechtsethik von deutschen Rechtstheoretikern wie Dietmar van Pfordten oder Stephan Kirste zu erwähnen.

Pfordten geht davon aus, dass durch die tatsächlich bestehenden Normen der Moral die ethische Dimension des Rechts nicht zu rechtfertigen ist.[6] Dazu bräuchte man eine kritische Rechtsethik, die diese Rolle nur als eine normative Ethik spielen könnte. Ihre Grundfrage lautete: „Welches Recht ist gerecht?"[7]. Anders gesagt, alle rechtsethischen Fragen werden unter dem Gerechtigkeitsmaßstab gestellt. Pfordten will damit das Recht öffnen, aber nur unter der Kontrolle von rechtsexternen ethischen Maßstäben. Diese deshalb, weil er überzeugt ist, dass das Recht im Wesentlichen eine Realisationsform von Politik sei, so dass die Rechtsethik gleichzeitig auch eine politische Ethik sei. Anders gesagt, die Rechtsethik soll sich nicht nur mit der ethischen Rechtfertigung des gerechten Rechts beschäftigen, sondern ebenfalls die politischen Entscheidungen legitimieren.[8] Damit wäre garantiert, dass auch die Rechtsanwendung gerecht sein würde.

Der andere Theoretiker, Stephan Kirste, lehnt die normative Konzeption der Rechtsethik ab. Rechtethik stellt ihm zufolge eine deskriptive Ethik dar, die keine externen ethischen Kriterien an das Recht benötigt. Die moralische Richtigkeit des Rechts soll sich nur von innen, durch die innere Reflexion konstituieren oder korrigieren.[9] Die Aufgabe der Rechtsethik als Wissenschaft sieht er darin, dass sie Aussagen über das Recht aufstellt und zu zeigen hat, wie das Recht wirklich ist,

[5] Siehe dazu *Vöneky, S., Haarman-Beylage, B., Höfelmeier, A., Hübler, A.-K.* (Hrsg.). Ethik und Recht – Die Ethisierung des Rechts. Ethics and Law – The Ethicalization of Law. Heilderberg: Springer, 2013.

[6] Siehe mehr dazu *Pfordten, v. der D.,* Rechtsethik. München: Verlag C. H. Beck, 2001, S. 1.

[7] Ibid., S. 1.

[8] Nach Pfordten nimmt die Rechtsethik eine Zwitterstellung ein. Auf der einen Seite gehört sie zu der Philosophie, bzw., zur praktischen Philosophie und angewandten Ethik. Auf der anderen Seite gehört sie auch zur Rechtswissenschaft und dort zur Rechtsphilosophie. Siehe dazu *Pfordten* (Fn., 6), S. 14–21.

[9] Siehe dazu *Kirste, S.* Eine Deskriptive Ethik. In: *Byrd, S. B., Hruschka, J., Joerden, J.* (Hrsg.). Jahrbuch für Recht und Ethik. Berlin: Duncker & Humblot, 2011, Band 19, S. 251.

und nicht wie es sein soll. Das heißt nun nicht, dass er sich nicht damit beschäftigt, wie das Recht auf Grund von außerrechtlichen Normen ethisch rechtfertigt werden soll.[10] Kirste sucht dazu einen anderen Weg und knüpft an die Ideen des neu-kantianischen Philosophen Ernst Cassirer an, der sich mit dem theoretischen Begriff vom Gerechtigkeitsgehalt des positiven Rechts auseinandergesetzt hat.[11] Das ist auch der Grund, warum er im Unterschied zur normativen Ethik danach frägt, was das Recht für die Gerechtigkeit leistet? Einfacher ausgedrückt, das Recht soll die außerrechtlichen Standards erst dann übernehmen und transformieren, wenn sie zur Harmonie der Gerechtigkeit mit dem Gemeinwohl beitragen können.[12]

Beide Konzepte der Rechtsethik streben nach der Begründung der ethischen Rechtfertigung des Rechts und der Rechtsordnung. Sie unterscheiden sich in den Wegen, die dazu führen sollen. Der eine Weg verlässt sich nur auf die inneren Rechtsmechanismen und der andere bezieht dabei auch äussere rechtsethische Kriterien mit ein.

Für manche deutsche Rechtstheoretiker der verschiedensten Rechtsfächer sind diese rechtsethischen Konzepte zu theoretisch, weil sie keine neue methodologische Perspektive an dem grundsätzlichen Verhältnis von Recht und Ethik (Moral) aufzeigen.[13]

Wie schon erwähnt, könnte eine Alternative zum Problem der Rechtsethiken die Ethisierung des Rechts sein. Im Folgenden werde ich mich mit den Konzepten befassen, die im Buch „*Ethik und Recht-die Ethisierung des Rechts*" präsentiert sind.[14]

Das Wort „Ethisierung" wird in der rechtswissenschaftlichen und rechtstphilosophischen Diskussion neu verwendet. „Ethisierung" ist als Begriff in den Sozialwissenschaften schon länger bekannt und wird besonders häufig von Soziologen verwendet. Sie sprechen zum Beispiel von der Ethisierung der Technikkonflikte.[15] In diesem Kontext verstehen sie unter der Ethisierung eine Anerkennung der wissenschafts- und technikpolitischen Themen als Fragen der Ethik. Es geht darum die neuen Techniken und Technologien nicht nur als gute oder schädliche Tätigkeiten und Handlungen zu rechtfertigen, sondern als Risikoträger zu entdecken. Dadurch liesse sich eine Begründung für ihre Bewertung, Regulation und Kontrolle finden.[16]

Die Ethisierung des Rechts fördert „*die Öffnung des Rechts* für ethische *außerrechtliche Standards bzw. den Verweis des Rechts auf ethische ausserrechtliche Standards*."[17] Mit anderen Worten, mit der Ethisierung soll die Rechtswissenschaft ihre interdisziplinäre Isolierung überwinden. Die ethische Rechtfertigung des Rechts soll besonders die Standards oder Kodizes berücksichtigen, die in den letzten Jahren bei der Regelung der neuen biomedizinischen Technologien diskutiert werden. Diese nicht-rechtlichen Regelungen werden von Organisationen

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[10] Siehe dazu *Kirste, S.* Eine Deskriptive Ethik. In: *Byrd, S. B., Hruschka, J., Joerden, J.* (Hrsg.). Jahrbuch für Recht und Ethik. Berlin: Duncker & Humblot, 2011, Band 19, S. 251.

[11] *Kirste, S.* Einführung in die Rechtsphilosophie. Darmstadt: WBG, 2010, S. 110.

[12] Ibid., S. 109, S. 141–147.

[13] Diese Meinung vertreten Autoren des Projektes der Ethisierung des Rechts. Siehe dazu *Vöneky, S.* (Fn., 5), S. VII. Ausführlich *Nida-Rümelin, J.* Recht und Moral. In: *Vöneky, S.* (Fn.,5), S. 3–16.

[14] Siehe dazu *Vöneky, S.* (Fn., 5).

[15] Siehe dazu mehr *Bogner, A., Menz, W.* Glogale Technik-lokale Ethik. In: *Bora, A., Bröchler, S., Decker, M.* (Hrsg.). *Technology Assessment in der Weltgesellschaft*. Berlin: Edition Sigma, 2007, S. 83–97.

[16] Ibid., (Fn., 15), S. 84.

[17] *Vöneky, S.* (Fn., 5), S. VII.

und Institutionen, die keine Rechtssubjekte sind, als wichtig angesehen. Durch ihre Anerkennung soll das positive Recht eine neue inhaltliche Dimension der Gerechtigkeit gewinnen, die nicht nur von internen, sondern auch von externen ethischen Maßstäben der Rechtfertigung vertieft und ergänzt werden.

Die neue ethische Rahmung der Rechtssetzung und Rechtsanwendung zeigt sich heutzutage an drei Tendenzen: Erstens durch die Verwendung von Öffnungsklauseln, die auf außerrechtliche normative Maßstäbe verweisen; zweitens durch die Etablierung von sogenannten Ethikkodizes etwa in der biomedizinischen Forschung, aber auch in der Privatwirtschaft; drittens durch die Einrichtungen von Ethikgremien und Ethikkommissionen oder Ethikräten.[18]

Kurz gesagt, es handelt sich um Standards, Prozeduren und Institutionen, welche zwar selbst nicht Teil des Rechtsystems sind, jedoch faktisch dem Recht analoge Bindungswirkung entfalten, indem das Recht sie mit seiner Autorität sozusagen belehnt. Gleichzeitig wird behauptet, dass diese neuen Klauseln und Standards die Positivität des Rechts und der Rechtssicherheit nicht entkräften dürften. Als ein „Filter" für die Richtigkeit und Gültigkeit des Standards dienen die Grundrechte; die neuen Standards dürfen nicht den Grundrechten widersprechen oder sie verletzen. Der Rechtsinhalt der neuen Regelungen wird also aus der Rationalität der Begründung gewonnen.[19] Die außerrechtlichen (externen) ethischen Standards werden ihre Aufgabe dann erfüllen, wenn sie sich auch als rechtsinterne ethische Korrektive auswirken.[20]

Die genannten Autoren berufen sich auf bekannte Praktiken, um zu demonstrieren, dass die Ethisierung eine zunehmende Tendenz auf allen Ebenen und Gebieten des Rechts hat; sie betrifft besonders das Völkerrecht und das Europarecht, ist aber auch im privaten Recht zu sehen.[21] Gleichzeitig wird betont, dass diese Entwicklung nicht unproblematisch sei, weil sie eine ganze Reihe von rechtstheoretischen und rechtsmethodologischen Fragen aufwirft. Die gegenwärtige Rechtswissenschaft hat für diese Fragen keine eindeutige Antwort.[22]

Die folgenden Teile konzentrieren sich auf zwei methodologische Fragen der Ethisierung des Rechts, die in den letzten Jahren mit der rechtlichen Regelung der dynamischen Entwicklung von biomedizinischen Technologien verbunden sind. Fraglich ist, ob die allgemeine Ethik und besonders die Bioethik, ein Instrumentarium haben und in der Lage sind, die wissenschaftlichen Fortschritte im Bereich der Biowissenschaften sachgerecht zu thematisieren und zu diskutieren. Der ethische Rahmen der Ethisierung des Rechts ist nicht neutral und bietet verschiedene Argumente und ethische Positionen. Ungelöst aber bleibt, welche Gründe gut oder nicht passend sind. [23]

Allen Versuchen um die Ethisierung des Rechts ist gemeinsam, dass sie sich mit dieser Entwicklung nur als ein Problem der Öffnung des Rechts gegenüber sensiblen ethischen Problemen und Konflikten präsentieren. Diese Perspektive ist in zweierlei Hinsicht zu eng.

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[18] Siehe dazu mehr *Vöneky, S.* (Fn., 5), S. 130.

[19] Ibid., (Fn., 5), S. 140–142.

[20] Manche Autoren unterscheiden zwischen der externen und internen Ethisierung des Rechts. Siehe dazu *Gruschke, D.* Externe und interne Ethisierung des Rechts. In: *Vöneky, S.* (Fn., 5), S. 41–66.

[21] Siehe dazu *Vöneky, S. (*Fn., 5), S. 129–149.

[22] Ibid., S. 41.

[23] Manche Autoren kritisieren am Beispiel der UNESCO-Erklärung über Bioethik und Menschenrechte, dass deren Bestimmungen nicht passend sind, weil sie von utilitaristischen Prinzipien von Menschenrechten ausgehen. Vgl. *Vöneky, S.* (Fn., 5), S. 139.

Erstens ermöglicht sie nicht die biomedizinischen Praktiken als eine soziale Handlung zu beobachten, die die gesellschaftlichen Strukturen radikal verändern kann. Im Rahmen der derzeitigen Bioethik sind solche Praktiken und Technologien nur als ein wissenschaftliches Handeln thematisiert, das zu guten oder schlechten Resultaten führen kann.

Zweitens, die ethischen Motive zur Rechtsetzung der neuen Regelungen können nicht die normative Eigenständigkeit des Rechts ersetzen. Die Rationalität der rechtsethischen Rechtfertigung besitzt nicht genügend konstitutive Kraft zur Rechtssetzung und Rechtanwendung einer Norm.

Der bekannte deutsche Rechtssoziologe Niklas Luhmann bietet in seinem posthum erschienenen Buch „*Kontingenz und Recht*" eine Betrachtung des Rechts unter den Bedingungen der Kontingenz. Er versucht, die methodologischen Grundlagen zu interdisziplinären Kontakten des Rechts und anderen Sozialwissenschaften zu begründen.[24] Luhmann betont, dass die Kontaktfähigkeit der Rechtswissenschaft nicht nur eine Frage der Aufgeschlossenheit für fremdes Gedankengut ist. Die Offenheit und mögliche Abwandlungen des Rechts *„müssen in eigenen Abstraktionsleistungen der Rechtswissenschaft begründet werden"*.[25]

Mit anderen Worten, die Ethisierung des Rechts kann man nicht durchführen, ohne eine Rechtstheorie, die mit jedem möglichen Recht kompatibel ist,[26] ohne die selbst entwickelten rechtsdogmatischen Mechanismen und ohne eigenen Begriffsapparat.

Im letzten Teil des Beitrages werden wir die Aufmerksamkeit einigen rechtsdogmatischen Postulaten der Ethisierung des Rechts widmen. Dabei wird gezeigt, was die Reine Rechtslehre dazu beitragen kann.

2. Die methodologischen Schwierigkeiten der Ethisierung der rechtlichen Regelungen der biomedizinischen Praktiken und Technologien

Die Problematik der rechtlichen Regelungen der biomedizinischen Technologien ist sehr komplex. Im Folgenden werde ich mich konkret auf die Regelung der Präimplantationsdiagnostik (PID) berufen, die in den vergangenen Jahren in Deutschland in Kraft trat. An diesem Beispiel lassen sich die Schwächen der Ethisierung des Rechts gut aufzeigen. Aufgrund verschiedener Vorschriften des Embryonenschutzgesetzes war die PID lange Zeit in Deutschland verboten. Die legislative Initiative, die PID gesetzlich zu regeln, geht auf ein Urteil des Bundesgerichtshofes zurück.

Im Jahre 2010 sprach der Bundesgerichtshof einen angeklagten Berliner Frauenarzt frei. Er hatte bei drei Paaren mit erblicher Vorbelastung nach einer künstlichen Befruchtung die Embryonen untersucht und den Frauen nur die eingesetzt, die nicht Träger der kranken Gene waren. Die anderen wurden „aussortiert". Daraufhin hat sich der Mediziner selbst angezeigt, um für rechtliche Klarheit zu sorgen. Der Bundesgerichtshof sprach den Mediziner frei und forderte eine eindeutige rechtliche Regelung.[27]

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[24] Siehe dazu *Luhmann, N.* Recht und Kontingenz. Frankfurt: Suhrkamp, 2013, S. 9–25.

[25] Ibid., S. 11.

[26] Ibid., S. 13.

[27] BGH, Urt. v. 6.7.2010-5StR 386/09. Zugänglich auf: https://dejure.org/dienste/vernetzung/rechtsprechung?Gericht=BGH&Datum=06.07.2010&Aktenzeichen=5%20StR%20386/09.

Im Jahre 2011 hat der Deutsche Bundestag die neuen Regelungen für die PID verabschiedet. Das Gesetz ändert die Verordnungsermächtigung des Embryoschutzgesetzes. Nach dieser Änderung ist die PID im Grundsatz verboten und strafrechtlich sanktioniert, sie erfolgt aber nicht rechtswidrig und ist damit zulässig, sofern aufgrund der genetischen Veranlagung der Eltern, das hohe Risiko einer schwerwiegenden Erbkrankheit beim Kind oder eine hohe Wahrscheinlichkeit für eine Tot- oder Fehlgeburt gegeben ist.[28]

Es handelt sich um eine strafrechtliche Norm, in der die tragenden Tatbestandsmerkmale mit neuen Begriffen beschrieben sind; „hohes Risiko einer schwerwiegenden Erbkrankheit" und „Feststellung einer schwerwiegenden Schädigung des Embryos".[29] Die Bedeutung der Begriffe ist nicht nur semantisch, sondern auch sachlich nicht eindeutig. Der Terminus „die schwerwiegende Erbkrankheiten" kann man sehr schwer von anderen Erbkrankheiten unterscheiden. Ähnlich unklar ist, was „ein hohes Risiko" bedeutet.[30]

Die Rechtsinterpretation der Bedeutung von diesen Begriffen ist ohne Hilfe von medizinischen Kenntnissen nicht möglich. Aber man muss sich fragen, handelt es sich hier noch um eine Rechtsinterpretation? Außerdem hat das Gesetz auch die Beratung der Ethikkommission neu formuliert. Sie soll eine zustimmende Bewertung zur Zulässigkeit der PID in einzelnen Fällen abgeben. Manche Kritiker behaupten nicht ohne Grund, dass die juristische Rechtswidrigkeit des Falles erst aufgrund dieser Entscheidung präjudiziert ist.[31] Die Kritik des Gesetzes (PräimpG) enthüllt die grundsätzliche Schwäche der Rechtsregelungen der biomedizinischen Technologien.

Die Gefahr, dass das Recht instrumentalisiert und die soziale Wirklichkeit nach genetischen Gesetzen geregelt wird, hat sehr treffend der französische Philosoph Michel Foucault in seinem Konzept der Bio-macht und Biopolitik schon in den 80-er Jahren des 20. Jahrhunderts benannt.

Bekanntlich hat er die Frage nach dem Leben im politischen Diskurs problematisiert. Er analysiert die Bio-macht, die nicht nur eine Fürsorge um das Leben ist, sondern auch eine, die das Leben kontrolliert. In seinem letzten Werk prognostiziert er die radikale Veränderung der Bio-macht durch die neue Entwicklung der Medizin und Biologie.[32] Medizin und Biologie produzieren eine Macht, die das Leben als eine biologische Tatsache sichern und verbessern kann. Foucault stellt sich die Frage, wenn das Ziel der neuen Bio-macht darin besteht, das Leben zu sichern und zu verbessern, warum lässt sie das Leben töten und die Menschen sterben. Wie kann sie ein „Todesgrenze" ziehen? Er meint, dass diese Funktion des Rassismus als eine Machttechnologie übernimmt. Dadurch wird die neue Bio-macht die Grenzen zwischen Leben und Tod ziehen; zwischen denjenigen, die überleben sollen und Recht auf Leben haben und den Anderen, die

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[28] Siehe dazu Artikel 1, §3a, Abs. 2., Gesetz zur Regelung der Präimplantationsdiagnostik. (Präimplantationsdiagnostikgesetz –PräimpG), BT-Dr. 17/6400. Zugänglich auf: https://dejure.org/Drucksachen/Bundestag/BT-Drs._17/6400.

[29] Siehe dazu mehr *Hübner, M., Pühler, W.* Die neuen Regelungen zur Präimplantationsdiagnostik - wesentliche Fragen bleiben offen. In: *Medizinrecht,* Heft 12, 2011, S. 792.

[30] Ibid., S. 792.

[31] Ibid., S. 792.

[32] Siehe dazu *Foucault, M.* Jak třeba bránit společnost, Praha:Filosofia, 2005, S. 215–234. Es handelt sich um die Arbeit, deren deutscher Titel lautet: In Verteidigung der Gesellschaft. Vorlesungen am College de France (1975–76).

das Lebensrecht verloren haben.[33] Das Leben der einen wird auf Kosten der anderen verbessert. Foucault zeigt uns die Gefahr auf, die aus dem Recht auf Leben ein exklusives Recht macht. Das Recht auf Leben verliert seine unbedingte und absolute Geltung nicht dadurch, dass das Leben keinen Wert hat, aber dadurch, dass die Biotechnologien das Leben unterschiedlich bewerten.

Die andere Gefahr besteht darin, dass die neue biomedizinische Macht mit Berufung auf die Sorge um das Leben auch die Rolle des Gesetzgebers übernähme.[34] Mit anderen Worten, das Lebensrecht wird nicht mehr durch das Rechtsgesetz geschützt, sondern nach den Gesetzen der Biologie und Genetik. Foucault konstatiert, dass das Recht dadurch seine rechtliche Qualität verliert. Als Folge verringern sich die Rechtskontrolle und Rechtsregelungen der biomedizinischen Praktiken. Rechtlich geschützt bleiben nur die subjektiven Rechte.[35] Er warnt vor der Enddogmatisierung der Rechtsetzung der Normen, die die biomedizinischen Praktiken regeln sollen.[36] Foucault konstatiert, dass das Recht in der Zeit der neuen Bio-macht sich verändern muss. Andernfalls wird diese Entwicklung zu fatalen Folgen führen, letztendlich zum Zerfall des Staates und dem Untergang der Gesellschaft.

Foucault bietet mit seinen Konzepten der Bio-macht und Biopolitik nur eine Diagnose aber keine Therapie. Im letzten Teil meines Beitrages will ich zeigen, dass die dogmatischen Postulate der Reinen Rechtslehre als eine sehr wirksame Therapie dienen können.

3. Was kann die Reine Rechtslehre zu der Ethisierung des Rechts beitragen?

Diese Frage können einige Rechtstheoretiker als eine Provokation auffassen. Die Ethisierung des Rechts entwickelt sich als die Suche nach neuen Perspektiven, die es ermöglichen sollten, die traditionellen rechtspositivistischen Konzepte der Beziehung von Recht und Moral zu überwinden. Bekanntlich vertritt Kelsen eine radikale Trennung des Rechts von der Moral. Die Trennung des Rechts von der Moral beschreibt er mit folgenden Worten: „… *Damit wird natürlich durchaus nicht die Forderung abgelehnt, dass das Recht moralisch, d.h. gut sein soll. Diese Forderung versteht sich von selbst; was sie eigentlich bedeutet, ist eine andere Frage. Abgelehnt wird lediglich die Anschauung, dass das Recht als solches Bestandteil der Moral, dass also jedes Recht, als Recht in irgendeinem Sinne und irgendeinem Grade moralisch ist.*“[37]

Kelsen fordert, das Recht durch seine rechtlichen Merkmale zu erkennen. Das Gesetz ist nicht dadurch moralisch und gerecht, dass sein Inhalt mit moralischen Merkmalen und Begriffen ausgedrückt ist. Die Moral und andere sozialwissenschaftliche Kenntnisse sind für das Erkennen von Recht als Recht

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[33] Siehe dazu *Foucault, M.* Jak třeba bránit společnost, Praha:Filosofia, 2005, S. 227–231.

[34] Ibid., S. 218–219.

[35] Vor dieser Entwicklung warnt auch Silja Vöneky in ihrer Analyse der Ethisierung des Völkerrechts. Dies soll gerade die Ethisierung des Rechts verhindern. Siehe mehr dazu *Vöneky, S.* Völkerrecht und Ethik: Ethisierung des Völkerrechts. ANCILLA IURIS (anci.ch) International Law and Ethik, publiziert 18.1.2012. Zugänglich auf: http://www.anci.ch/start?first=20.

[36] Siehe dazu *Foucault, M.* Vůle k vědění. Praha: Nakladatelství Herman a synové, 1999, S. 167 [Auf Deutsch: Der Wille zum Wissen].

[37] *Kelsen, H.* Reine Rechtslehre. Studienausgabe der 1. Auflage 1934. Tübingen: Mohr Siebeck, 2008, S. 25.

unwichtig. Damit ist aber nicht gesagt, dass das Recht keine moralische Wirkung habe. Kelsen ist überzeugt, dass der Inhalt der Normen sich nur durch die richtige Rechtsform konstituieren und äußern kann. Die Aufgabe einer Rechtstheorie bestehe darin, diese Rechtsmerkmale begrifflich zu beschreiben und ihre normativen Eigenschaften objektiv zu erklären.[38]

Mit anderen Worten, die moralischen Merkmale, die nach Kelsen nur die subjektiven Eigenschaften besitzen, dienen zur Abgrenzung des Rechts als ein in sich normativ geschlossenes System, das autonom und selbständig ist.

Der zitierte Rechtstheoretiker Jestaedt konstatiert sehr prägnant, dass Kelsen eine selbständige Variante des Rechtspositivismus darstellt, die vor allem ein Normativismus ohne (Rechts-) Moralismus und ein Positivismus ohne (Rechts-) Naturalismus sei.[39] Aus diesem Grund nennt Kelsen seine Theorie auch die Reine Rechtslehre. Aus dieser Perspektive muss man auch die Funktion des Reinheitspostulats verstehen und interpretieren. Es garantiert die konstitutiven Bedingungen der Existenz und der Geltung des Rechts, bzw. der Rechtsnorm.

Die Entwicklung der Ethisierung des Rechts offenbart ihre Schwächen gerade bei der Erhaltung der normativen Selbständigkeit des Rechts. Hier kann die Reine Rechtslehre aus meiner Sicht eine wichtige Rolle zur Lösung spielen. Und zwar mit Hilfe ihrer dogmatischen Funktion. Diese beinhaltet zwei Momente.

Erstens, Kelsen verlangt einen Willensakt zur Erzeugung von positiven Normen. Ein Willensakt ist unumgänglich. Es gilt, dass wenn die Rechtserzeugungsregel von neuen Standards keinen Willensakt verlangt, diese nicht Teil einer positiven Normenordnung sein können.[40] Man kann zwar behaupten, dass die Regelungen der biomedizinischen Technologien von einem Willensakt des Subjektes (Ethikgremien, Ethikkommissionen, usw.) geschaffen wurden, die der juristischen Person „Staat" zuzurechnen sind. Kelsen vertritt aber die These, dass die Bedingungen der Rechtserzeugung und die Geltungsgrundlagen nicht im Willen des Staates liegen, sondern im Recht selbst liegen müssen.[41]

Die genannten Transformierungsversuche könnten die ethischen Standards als gute Gründe ins verbindliche Recht inkorporieren. Kelsen zeigt uns, dass man den Willensakt nicht auf den Erkenntnisakt reduzieren darf. Die Rechtsgewohnheiten, die Analogie, die Begründungsrationalität, alle diese Transformationswege sind nach dem Reinheitsprinzip keine genügenden Quellen zu der Rechtserzeugung der neuen Normen.

Zweitens, Kelsen weist nach, dass das Recht nach eigenen rechtlichen Gesetzen entsteht und vergeht.[42] Er spricht in der Reinen Rechtslehre von der Eigengesetzlichkeit, die ein autonomes Recht definiert und das Recht als Objekt des wissenschaftlichen Erkennens ausmacht.

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[38] Kelsen beginnt seine Reine Rechtslehre mit der Erklärung, warum sie eine Theorie des positiven Rechts ist. *„Als Theorie will sie ausschliesslich und allein ihren Gegenstand erkennen. Sie versucht, die Frage zu beantworten, was und wie das Recht ist, nicht aber die Frage, wie es sein oder gemacht werden soll."* Ibid., S. 15.

[39] *Jestaedt, M.* (Fn., 1), S. XXXII.

[40] Siehe dazu *Kammerhofer, J.* Die Reine Rechtslehre und die allgemeinen Rechtsprinzipien des Völkerrechts. In: *Aliprantis, N., Olechowski, Th.* (Hrsg.). Hans Kelsen: Die Aktualität eines grossen Rechtswissenschafters und Soziologen des 20. Jahrhunderts. Band 36. Wien: Manzsche Verlag, 2014, S. 32–33.

[41] Siehe dazu Kelsen (Fn., 37), S. 16–21.

[42] Jestaedt verwendet synonym die Eigengesetzlichkeit als die Autonomie sowie auch Selbstrationalität. Siehe dazu *Jestaedt, M.* Das mag in der Theorie richtig sein... Von Nutzen der Rechtstheorie für die Rechtspraxis. Tübingen: Mohr Siebeck, 2006, S. 30.

Demnach kann man sagen, die Eigengesetzlichkeit ist das, was im Recht nicht nur erkannt, sondern bei der Rechtserzeugung und Rechtsanwendung geschützt sein soll. Jestaedt bezeichnet die Eigengesetzlichkeit als ein Schutzgut der Rechtstheorie. Er unterscheidet zwischen der Eigengesetzlichkeit des Rechts und der Eigengesetzlichkeit der Rechtswissenschaft.[43] Nach ihm hat Kelsen die Eigengesetzlichkeit des Rechts durch die duale Modalität des positiven Rechts bestimmt: Koinzidenz von seins-bezogener Positivität und sollens-bezogener Normativität.[44] Es wäre ein Missverständnis die Trennung des „Sollens" von „Sein" als eine Isolierung von zwei Gegenteilen zu interpretieren. Kelsen berücksichtigt die sozialen Beziehungen, aus denen das Recht entstanden ist. Er ignoriert nicht die Bedeutung der sozialen Realität für die Rechtsnormativität. Recht entsteht zwar nur kraft tatsächlicher Umstände, aber welche Tatsachen rechtserzeugend wirken, lässt sich nicht aus der Welt der Tatsachen und nach dem Gesetz der Kausalität bestimmen.[45] Kelsen zeigt damit, dass die Rechtsnormativität nicht als Resultat des menschlichen Handels entstanden ist, sondern dass die Regelung des menschlichen Handels sie erfordert hat.

Kelsen stützt mit der These von der Eigengesetzlichkeit des Rechts die Autonomie und den system-selbstreferentiellen Charakter der Rechtsnormativität. Das Recht reflektiert und reguliert selbst die Erzeugung und Veränderung von Recht.[46] Nach Kelsen garantieren diese Postulate des kritischen Rechtsdenkens eine Demaskierung aller ideologisierten und politisch instrumentalisierten Rechtkonzepte.

Schlussfolgerungen

In dem Beitrag habe ich das Projekt der Ethisierung des Rechts analysiert, das nach Ergänzung der rechtlichen Normen durch ethische außerrechtliche Standards strebt. Durch solche Ethisierung soll das Recht eine effektive Regelung, besonders der neuen biomedizinischen Praktiken und Technologien erhalten, die sich heute sehr dynamisch entwickeln. An dem Projekt der Ethisierung des Rechts könnte man alle Schwierigkeiten demonstrieren, die die Anforderung auf normative Offenheit des Rechts ohne klare methodologische Begründung beinhalten. Alle Versuche um eine Präimplantationsdiagnostikgesetz Ethisierung des Rechts ermöglichen nicht die biomedizinischen Praktiken als eine soziale Handlung zu reflektieren, die zu neuen sozialen Konflikten führen und die gesellschaftlichen Strukturen radikal verändern können. Dadurch kann das Recht die Praktiken und Technologien nur als eine schlechte oder gute Handlung regeln. Das zweite Problem liegt darin, dass die normative Kraft der neuen Regelungen von der Rationalität der Begründung abhängig ist.

Zur Beseitigung dieser Schwächen der Ethisierung des Rechts bietet die Reine Rechtslehre eine Reihe von methodologischen Postulaten an. Diese Postulate sind nicht nur wichtig für die Reine Rechtslehre, sondern sind konstitutiv für das moderne Rechtsdenken.

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[43] Jestaedt verwendet synonym die Eigengesetzlichkeit als die Autonomie sowie auch Selbstrationalität. Siehe dazu *Jestaedt, M.* Das mag in der Theorie richtig sein... Von Nutzen der Rechtstheorie für die Rechtspraxis. Tübingen: Mohr Siebeck, 2006, S. 30–42.

[44] *Jestaedt M.,* (Fn., 1), S. XXVI.

[45] Siehe *Kelsen* (Fn., 37), S. 20–24.

[46] *Jestaedt*, *M.* (Fn., 42), S. 35.

Der Beitrag der Reinen Rechtslehre für die Ethisierung des Rechts besteht also darin, was sehr banal klingen mag, dass sie gezeigt hat, wie die Juristen als Juristen denken sollen; warum sie die mandatorische Formalisten sein sollen, und warum das Rechtsdenken ein normatives und kritisches Denken bleiben muss.

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https://doi.org/10.22364/jull.11.03

Critique of the "Juridical": Some Metatheoretical Remarks[1]

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In the context of the renaissance of critical legal theory and in particular its growing popularity in Central and Eastern Europe, the paper aims at a preliminary metatheoretical enquiry concerning the identity of critical legal science. In particular, the paper enquires about the identity of critique as applied in critical legal science, as well as about the method and object of that critique. It also highlights the importance of the triangular relationship between the juridical, the political and ideology as the central theme of critical legal science.

Keywords: critical legal science, the juridical, the political, law and critique, ideology.

Content

[1] The present article was prepared as part of a research project of the National Science Centre (*Narodowe Centrum Nauki*, Poland), project No. UMO-2016/21/D/HS5/03912. All the views expressed by the author are exclusively personal and do not represent the position of any institution.

A distinctive feature of critical scholarship is a deep perplexity about law. We perceive law as involving both negative and positive characteristics.

Alan Hunt[2]

Introduction

The renaissance[3] of critical legal science[4] and its growing popularity in Central and Eastern Europe[5] justify an enquiry into the fundamental conceptual framework of this form of legal research. In particular, it seems necessary to define exactly what is *critical* legal science (also known as 'critical legal theory',[6] 'critical legal thought/thinking',[7] 'critical legal studies',[8] 'critique of law'[9] or 'law and critique'[10]), and how it differentiates itself from other branches of legal science (other specific legal sciences). Only then will it be possible, first of all, to identify which scientific approaches can be deemed to represent critical legal science, and secondly, to undertake such research in full conscience (starting out from criticism, as critique *in itself*, to a critique *for itself*).[11]

Consequently, the present article will discuss the following conceptual issues. Firstly, it will attempt to give an answer to the question on the nature of legal critique, namely, where the *critical* element of critical legal science is the same as in other critical theories, or is it different (specific for the juridical field). Secondly, it will enquire whether the object of critique undertaken by critical legal science is the form of law or its substance, or its external effects, and what are the relations between these aspects. Thirdly, it will make the claim that ultimately, the main object of critical legal science is a critique of the triangular relationship between law, ideology and the political.

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2 *Hunt, A.* The Critique of Law: What is 'Critical' about Critical Legal Theory? *Journal of Law and Society*, Vol. 14, No. 1, 1987, p. 11.

3 See e.g. *Stone, M., Rua Wall, I.*, *Douzinas, C.* New Critical Legal Thinking: Law and the Political. London: Birkbeck Law Press, 2014; *Mangabeira Unger, R.* The Critical Legal Studies Movement: Another Time, A Greater Task. London: Verso, 2015.

4 As Hesselink put it, 'unless legal scholars cannot be said to be *producing knowledge*, their use of the term science seems legitimate' (*Hesselink, M.* A European Legal Method? On European Private Law and Scientific Method. *European Law Journal*, Vol. 15, issue 1, 2009, p. 21). For an overview of the debate on the scientific character of law see *Pietrzykowski, T.* Naturalizm i granice nauk prawnych. Esej z metodologii prawoznawstwa. Warszawa: Wolters Kluwer 2017, pp. 31–44.

5 See especially: *Mańko, R.*, *Cercel, C. S.*, *Sulikowski, A.* (eds.). Law and Critique in Central Europe: Questioning the Past, Resisting the Present. Oxford: Counterpress, 2016. Cfr. *Šulmane, D.* Grāmata par kritisko tiesību skolu Centrāleiropā. *Jurista Vārds,* 38(992), 12.09.2017.

6 See e.g. *Hunt, A.* The Critique of Law: What is 'Critical' about Critical Legal Theory? *Journal of Law and Society*, Vol. 14, No. 1, 1987, pp. 5–19; *Douzinas, C.*, *Perrin, C.* Critical Legal Theory. London: Routledge, 2011.

7 See e.g. *Sulikowski, A.* Prawa a ideologia. Prawa jednostki z perspektywy krytycznej myśli prawniczej i społecznej (wybrane zagadnienia). Roczniki Nauk Społecznych, Vol. 7, issue 4, 2015, p. 19 ('*krytyczna myśl prawnicza*'). Cfr. *Stone, M., Rua Wall, I.*, *Douzinas, C.* New Critical Legal Thinking, op. cit.

8 This term has been particularly popular in the United States and is often used to denote the North American school of critical legal science.

9 See e.g. *Hunt, A.* The Critique, ibid.

10 Akin to 'law and economics', 'law and politics' or 'law and ideology'. Cf. *Mańko, R., Stambulski, M.* Law and Ideology: Critical Explorations. *Wrocław Review of Law, Administration and Economics*, Vol. 5, issue 1, 2015, pp. 1–4. The main journal of British critical legal science bears the title *Law and Critique,* Springer Verlag, ISSN 0957-8536.

11 See e.g. *Hegel G. F. W.* Lectures on the History of Philosophy. London: Kegan Paul, Vol. I, 1892, pp. 20–21.

The nature of the present article is purely theoretical. It situates itself on a metatheoretical level towards critical legal science and aims at theorising about the nature, methods and object of that particular type of legal science.[12] The analysis used in the article is, above all, conceptual analysis. The findings of the article can be useful for critical legal science in its concrete critique of the law, as well as for general jurisprudence in its aim of ordering and classifying the various methodological approaches to legal research. The article has a normative approach (within its metatheoretical scope), and not necessarily a descriptive one *vis-à-vis* the existing critical legal literature. Hence, the concepts and categories, especially dichotomies, used therein do not necessarily reflect the way that critical legal theorists themselves have hitherto conceptualised their scientific endeavour.

1. Identity of Legal Critique: Universal or Particular?

Adam Sulikowski – the chief representative of critical legal science in Poland – claims that the sources of legal critique should be understood broadly, as encompassing the three great critical thinkers of the turn of the 19th and 20th century, namely, Marx, Freud and Nietzsche,[13] as well as those who later developed their ideas, including Lacan, Žižek or the French School (Foucault, Derrida). Sulikowski characterises critical legal and social legal thought as "a set of emancipatory discourses, whose local legal variation is the critical legal studies movement, not only in its American, but also European version".[14] Putting together Marx, Freud and Nietzsche could be perplexing, but it was already Paul Ricoeur who linked them, dubbing the three great thinkers as representatives of the "school of suspicion".[15] Brian Leiter, who used the term "hermeneutics of suspicion"[16] to treat the three authors jointly, points out that "Marx, Nietzsche, and Freud are best read as primarily naturalistic thinkers, that is thinkers who view philosophical enquiry as continuous with a sound empirical understanding of the natural world and the causal forces operative in it. When one understands conscious life *naturalistically*, in terms of its real causes, one contributes at the same time to a *critique* of the contents of consciousness: that is, in short, the essence of a hermeneutics of suspicion."[17] As Leiter further explains, referring to Marx, Nietzsche and Feud helps to make philosophy "relevant because the world – riven as it is with hypocrisy and concealment – desperately needs a hermeneutics of suspicion to unmasks it."[18] In the words of Tomasz Pietrzykowski, what is common for various schools of critical legal science is "a general research approach and the understanding (…) of the tasks of jurisprudence. The latter should be oriented on the disclosure of the actual origins, the social and economic functions, and the political and cultural entanglements of concrete legal solutions, modes of reasoning and argumentation, as well as the legal ideologies and theories legitimising them.

[12] On the possibility and desirability of theorizing the methods and objects of critical legal science, see e.g. *Hunt, A.* The Critique, ibid., pp. 6–10.

[13] *Sulikowski, A.* Prawa a ideologia. Prawa jednostki z perspektywy krytycznej myśli prawniczej i społecznej (wybrane zagadnienia). *Roczniki Nauk Społecznych*, Vol. 7, issue 4, 2015, p. 19.

[14] Ibid.

[15] *Ricoeur, P.* Freud and Philosophy. New Haven: Yale University Press, 1970, p. 32.

[16] *Leiter, B.* The Hermeneutics of Suspicion: Recovering Marx, Nietsche and Freud. The University of Texas School of Law. Public Law and Legal Theory Working Paper, No. 72, 2005. Available: http://ssrn.com/abstract=691002 [last viewed 02.10.2017].

[17] Ibid., pp. 150–151.

[18] Ibid., p. 153.

The task of the legal researcher is therefore critically to deconstruct their socio-cultural genesis and actual functions."[19]

One cannot but agree with Sulikowski, when he points out that various critical theories are not only heterogeneous, but even "openly contradictory".[20] Nonetheless, they do have a certain common core, which can be summarised as encompassing the following elements:

(1) a hermeneutic of suspicion (interpretive aspect);

(2) an emancipatory goal (normative and praxeological aspect).[21]

This coincides with the classification of sciences put forward by Paweł Skuczyński, according to whom, "If the sciences are to be divided on the basis of the research interests which constitute them, one can identify empirical-analytical disciplines, which have a *technical* interest; historical-hermeneutic disciplines, which have a *practical* interest, and *critical social sciences*, which have an *emancipatory* interest."[22] In this sense, critical legal science is a project of developing legal science with an explicit emancipatory goal.[23]

Considering the question, whether the notion of critique in the concept of critical legal science/theory/studies denotes a universal form of critique applied locally, or a local (independent) form of critique, which shares only the term, but not the concept, the final answer proposed here is that "critique" in legal critique is a universal form of critique, applied to the legal field.[24] Such an answer has fundamental methodological consequences, for it legitimises the use of various critical discourses (from Marx down to Žižek) locally within the legal field. All such attempts will belong to the discourse of critical legal theory.

2. Object of Critique: Form, Substance or External Effects?

The second fundamental problem of legal critique is whether it is a critique of the legal form, or of legal substance, or both, and, in the latter case, what is the relationship between the critique of legal form and of legal substance.[25] By legal substance we shall understand here both the normative content of legal rules (the content of law)[26] and the effects of law upon other social phenomena, in particular, upon the political, the social and the economic (effects of law).[27] Critique of the juridical form means a critique of the juridical (the notion itself will be defined

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19 *Pietrzykowski, T.* Naturalizm, ibid., p. 127.

20 *Sulikowski, A.* Prawa a ideologia, ibid., p. 19.

21 *Mańko, R.* W stronę krytycznej filozofii orzekania. Polityczność, etyka, legitymizacja. Łódź: Wydawnictwo Uniwersytetu Łódzkiego, 2018, p. 77.

22 *Skuczyński, P.* Typy myśli krytycznej w prawoznawstwie. Od krytyki poznania do walki o uznanie. In: *Zirk-Sadowski, M., Wojciechowski, B., Bekrycht, T.* (eds.). Integracja zewnętrzna i wewnętrzna nauk prawnych, Wydawnictwo Uniwersytetu Łódzkiego, Łódź, 2014, p. 133.

23 In parallel, one can also speak of 'radical lawyering', understood as practical participation in the legal discourse (especially judicial) with the aim of bringing about an emancipatory change. Cfr. *Skuczyński, P.* Typy myślenia krytycznego, ibid., p. 134.

24 *Mańko, R.* W stronę, ibid., pp. 77–78.

25 On the dichotomy see e.g. *Mańko, R.* Form and Substance of Legal Continuity. Zeszyty Prawnicze, Vol. 17, issue 2, 2017.

26 Cfr. *Pietrzykowski, T.* Naturalizm, ibid., pp. 31–32.

27 See e.g. *Šulmane, D*. Versatility of Effects of Legal Provisions. In: The Quality of Legal Acts and its Importance in Contemporary Legal Space. Riga: University of Latvia Press, 2012. On the notion of 'effectiveness' in contemporary sociology of law see *Šulmane, D*. "Legislative inflation" – an analysis of the phenomenon in contemporary legal discourse. *Baltic Journal of Law & Politics*, Vol. 4, issue 2, 2011, pp. 78–101, at pp. 88–91.

in section 4.2 below) *qua* form,[28] i.e. the use of juridical discourse (such as the 'language of rights',[29] juridical normativity, etc.) in order to express interests of groups and individuals, instead of (or alongside) other discourses (such as moral, ethical, political or economic discourse). The critique of juridical form can either be purely theoretical, or it can also rest on more or less empirical data to show that, for instance, using the language of rights by the oppressed ultimately leads to an acceptance of the *status quo*.[30] Critique of the juridical form is therefore closely linked to critical legal science's quest for a merger of a theoretical *and* practical approach at the same time.[31] As for the critique of legal substance (the content of legal norms) and their social effects, both have an empirical character and are of paramount importance for the tasks of critical legal science.

3. Perspective: Internal or External?

A third question regarding the nature of legal critique is whether it adopts and internal or external perspective of the law. Conventional Anglo-American legal theory, epitomised in the works of Hart and Dworkin, openly opts for the internal perspective, i.e. that of the judge and lawyer and seeks to defend the law from external critique. Polish legal philosopher Artur Kozak also opted for an internal perspective when he put forward the project of juriscentrism (*juryscentryzm*). A juriscentrist philosopher of law is, according to Kozak, a believer in law (*wyznawca prawa*) and not just a legal expert (*znawca prawa*).[32]

Kozak described as external theories of law those, which approach it from an external point of view, such as sociology or political science. Indeed, very often the authors of sociological or politological accounts about law in practice ignore its inner workings, either by design (on purpose) or simply due to their ignorance (lack of specialised legal knowledge), or due to a combination of both. However, any "good ideology critique" is an "immanent" one, using the "norms and values" of the criticised ideology "against their historical realization in specific institutions", as James Bohman reminds us.[33] Hence, critical legal science cannot simply shun the internal perspective. It needs to factor it in its epistemology. Critical legal scientists need to know not only what judges, legislators and lawyers do, but also how they think and what is their internal perspective regarding the law. Of course, this internalisation of the lawyer's perspective ends here, otherwise the critical legal science would commit the common error of the mainstream positivism of being "too close to its subject matter".[34] Therefore, to use Kozak's terms, the critical legal scientist needs to be an excellent expert (*znawca*) and should understand the

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[28] Cfr. *Mańko, R.* Form and Substance, ibid., pp. 221–223.

[29] One of the first to use this expression seems to be *De Búrca, G.,* The language of rights and European integration. In: *More, G., Shaw, J.* (eds.). New Legal Dynamics of European Union. Oxford: Oxford University Press, 1996. For a recent use of the concept, see *Choukroune, L.* The Language of Rights and the Politics of Law: Perspectives on China's Last Legal Ditch Struggle. *International Journal for the Semiotics of Law*, Vol. 29, issue 4, 2015, pp. 779–803.

[30] Cfr. *Douzinas, C.* The End of Human Rights. Hart Publishing, 2000. Douzinas makes the truly dialectical claim that the form of 'human rights', which initially had a rampant emancipatory potential, ended up as a means of legitimating the status quo.

[31] *Mańko, R.* W stronę, ibid., pp. 38–39, 81–82.

[32] *Kozak, A.* Dylematy prawniczej dyskrecjonalności. Między ideologią polityki a teorią prawa. In: *Staśkiewicz, W., Stawecki, T.* Dyskrecjonalność w prawie. Warszawa, 2010, p. 68.

[33] *Bohman, J.* Critical Theory, op. cit.

[34] *Hunt, A.* The Critique of Law, op. cit., p. 10.

perspective of the legal believer (*wyznawca*), but must remain sceptical about the object of faith of the latter. After all, a legal believer is unaware of the juridical's ideological character.[35] In order words, critical legal science must take a truly dialectical approach[36] to the object of its critical enquiry: the internal perspective is negated by the external one, but it is their synthesis (the informed critical perspective), which critical legal science needs to adopt.[37]

Referring the above to the dichotomy of "legal doctrine" (*nauka prawa*, *Rechtslehre*) versus "legal science" (*nauka o prawie, Rechtswissenschaft*) recently put forward by Tomasz Pietrzykowski,[38] critical legal science certainly is on the side of *legal science*, not *legal doctrine*. This is because its object is the phenomenon of law as such, and not just a reconstruction and systematisation of the law in force. In the words of Pietrzykowski, "legal science is oriented upon the explanation of mechanisms regarding the creation of law and its functioning, where law is understood as a certain complex of facts. (…) The object of legal science is the description and explanation of the entirety of empirical aspects of the functioning of the legal order."[39] Of course, *critical* legal science is interested not only in the "description and explanation", but also – and above all – in critique with view to emancipation. And precisely due this reason critical legal science is, in Pietrzykowski's terms, a *legal science* (*nauka o prawie*), but one of its ambitions is to influence *legal doctrine* (*nauka prawa*), in order to influence legal interpretation and legislation in line with what follows from the emancipation-oriented critique.[40] Just like it is appropriate to characterise critical legal scholarship as a synthesis of an external and internal approach, so too, its involvement within the doctrinal and scientific aspects of legal study can also be described as dialectical.

4. Method: Theoretical or Empirical?

A further methodological choice that critical legal science is faced with regards its positioning towards empirical research. As Alan Hunt argued, 'empirical evidence has an important role in the critical project through its ability not only to alert us to deficiencies in existing theories but also to open up constructive lines of enquiry and conceptualisation which may contribute to a more satisfactory understanding of those elements of law.'[41] Whilst the deconstruction of conventional theory can be pursued by way of an 'armchair critique', critical legal science would lose too much, if it did not rely on empirical material. The notion of 'empirical research' is used here in two senses: firstly, as 'empirical desk research', i.e. research focused on the critique of texts produced by the juridical, especially judicial decisions and writings of the *la doctrine*; secondly, as 'empirical field research', i.e. research involving interviews or questionnaires, aimed especially at critically evaluating the effects of law on society (for instance, how neoliberal legal policies are leading to growing social inequalities, alienation or subjection).

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35 *Sulikowski, A.* Postmodernistyczne tropy w juryscentryzmie. In: *Jabłoński, P. et al* (eds.). Perspektywy juryscentryzmu. Wrocław, Prawnicza i Ekonomiczna Biblioteka Cyfrowa, 2011, p. 107.

36 In the Hegelian sense as expounded e.g. in *Hegel, G. F. W.* Phenomenology of Spirit. Oxford: Clarendon Press, 1977.

37 *Mańko, R.* W stronę, ibid., pp. 80–81.

38 *Pietrzykowski, T.* Naturalizacja, ibid., p. 46–68.

39 *Pietrzykowski, T.* Naturalizacja, ibid., p. 64.

40 Cfr. *Pietrzykowski, T.*, Naturalizm, ibid., p. 128.

41 *Hunt, A.* The Critique of Law, op. cit., p. 16.

Persuasive empirical research can be a powerful tool in furthering the emancipatory agenda, which lies at the heart of critical legal science, at the same time increasing its credibility within scientific legal discourse in general. As regards a specific methodological toolbox, Pierre Bourdieu's critical sociology could be an interest possibility – amongst others – for designing empirical research agendas (in both senses, textual desk research, and fieldwork). Bourdieu's methodology, despite its certain rigidity, has the advantage of putting in the centre of its interest questions of power, cultural capital and ideology (which Bourdieu theorises as *doxa* and as *sensus communis*[42]), which makes it *prima facie* well suited for a critical research agenda. Of course, as any research methodology, Bourdieu's framework should not be accepted uncritically, especially with a view to its embeddedness in French juridical reality of the 20th century, which may require adequate modifications to suit research of the Central and Eastern European juridical field of the 21st century. Of assistance to critical-empirical legal studies is also, undoubtedly, Berger and Luckmann's sociology of knowledge.[43] As for a critical reading of texts – especially produced by the judiciary – various tools can be deployed, especially including elements of Critical Discourse Analysis, various forms of symptomatic or quasi-symptomatic reading, conceptual metaphor theory,[44] and in general any methods of critical analysis of texts faithful to a hermeneutic of suspicion, be it Marxist, psychoanalytical[45] or belonging to so-called French Theory (Foucault,[46] Derrida,[47] Deleuze & Co.).

Undoubtedly, further empirical critico-juridical research is necessary, especially on the case-law of supranational judicial institutions and the neoliberal ideological agendas, which are hidden behind the purportedly neutral language of law and rights that they employ.[48] Critical legal science should not shun empirical research, and the answer to the question 'theoretical or empirical?' can only be 'both!'.[49]

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[42] See *Dębska, H.* Law's Symbolic Power: Beyond the Marxist Conception of Ideology. *Wrocław Review of Law, Administration and Economics*, Vol. 5, issue 1, 2016, pp. 5–23.

[43] For an application, combined with Bourdieu's critical sociology and critical discourse analysis, see e.g. *Dębska, H., Warczok, T.* Sacred Law and Profane Politics. The Symbolic Construction of the Constitutional Tribunal. *Polish Sociological Review*, 4(188), 2014, pp. 465–478; *Dębska, H., Warczok, T.* The Social Construction of Femininity in the Discourse of the Polish Constitutional Tribunal. In: *Mańko, R., Cercel, C., Sulikowski, A.* (eds.). Questioning the Past, op. cit., pp. 106–130.

[44] For a recent application see e.g. *Zalewska, M.* Znaczenie metafor pojęciowych na przykładzie prawa autorskiego. Filozofia Publiczna i Edukacja Demokratyczna, Vol. 5, issue 1, 2016, pp. 111–128.

[45] See e.g. *Stambulski, M.* Edukacja prawnicza na poziomie Wyobrażeniowym, Symbolicznym i Realnym. Krytyka Prawa, Vol. 8, issue 3, 2016.

[46] For an application of Foucault for a critical examination of Romania legal history see e.g. *Cercel, C. S.* Droit et totalitarisme: aspects d'une réflexion biopolitique. *Romanian Journal of Comparative Law*, Vol. 1, No. 2, 2010, pp. 322–339.

[47] For a use of Derridean concepts combined with conceptual metaphor theory in a critical analysis on contemporary discourse on Roman law see Święcicka, *P.* From Sublimation to Naturalisation: Constructing Ideological Hegemony on the Shoulders of Roman Jurists. In: *Mańko, R., Cercel, C. S., Sulikowski A.* Law and Critique in Central Europe, op. cit.

[48] For a seminal attempt in this direction, see e.g. *Mańko, R.* Symbolic violence in technocratic law and attempts at its overcoming: politicisation through humanisation? *Studia Erasmiana Vratislaviensia* 11, 2017.

[49] *Mańko, R.* W stronę, ibid., pp. 82–83.

5. Towards a Social Ontology of the Juridical: Law, Ideology and the Political

5.1. Why Does Critical Legal Science Need Social Ontology?

Social ontology is 'the subfield at the intersection of metaphysics and philosophy of social science that investigates the nature of the social world'.[50] Its task 'is broader than cataloguing what entities exist: we want an account of how the social world is built'.[51] It is submitted that critical legal science needs to build its own account of the nature of the social world, and specifically of the juridical field, which is in the focus of its interest, in order to organise its research endeavours. Hence, certain structural choices need to be made. This is not to say that the proposed narrative is absolute and universal, just that it is impossible to pursue the tasks of critical legal science without *some presumptions* regarding social ontology, and more specifically, social ontology of the juridical and adjacent phenomena. This is because an *ad hoc* methodological approach, focusing on disjunctive, local narratives will not allow to create an intersubjectively accessible body of critical legal knowledge. If the ambition of critical legal science is not only to understand, but also to change the world, then it must develop its position on social ontology without doubt.

In the following paragraphs I will outline the basic structure of a possible social ontology, which could be adopted as the basis for critical legal science. It rests upon a triangular relationship between the juridical, the political and ideology. In order to approach the problem of social ontology in an orderly manner, I will first approach the question of segmentation of social life, and then move on to the problem of ideology.

5.2. Segmentation of Social Life: the Juridical as a Distinct Field

There seems to be a *communis opinio* of major systems of social science and social theory that social reality is segmented or compartmentalised. However, the exact social ontology of those segments or compartments is conceptualised differently. Not only do different schools of social thought use different terms, but also different concepts of social segments or compartments are expounded. To name but a few, we could mention: Pierre Bourdieu's account of *fields*;[52] Niklas Luhmann's account of *systems*;[53] Peter Berger's and Thomass Luckman's account of *institutional worlds*,[54] or Alexander Koževnikov's account of *social phenomena*.[55] From a metatheoretical perspective, all these categories have a common trait in that they attempt to come to grips with the variety of forms of social life in which social actors are involved, and they usually admit *at least* the three following segments as distinct ones: the *juridical* one, the *political* one, and the *economic* one.[56]

It is necessary to make an important terminological, and also conceptual distinction, namely, that between law (*le droit*) and the juridical (*le juridique*).[57]

[50] *Epstein, B.* A Framework for Social Ontology. Philosophy of the Social Sciences, Vol. 46, issue 2, 2016, pp. 147–167, at p. 147.
[51] Ibid., p. 148.
[52] *Bourdieu, P.* La force du droit: Eléments pour une sociologie du champ juridique. *Actes de la recherche en sciences sociales*, Vol. 64, 1986.
[53] *Luhmann, N.* Law as a social system. Oxford: OUP, 2008.
[54] *Berger, T., Luckmann, T.* The Social Construction of Reality. London: Penguin, 1966.
[55] *Kojève, A. [Koževnikov, A.].* Outline of a Phenomenology of Right. Lanham: Rowman & Littlefield, 2007.
[56] *Mańko, R.* W stronę, ibid., pp. 119–120.
[57] *Mańko, R.* W stronę, ibid., p. 151.

What is at stake here is to make a clear ontological distinction between *law* – understood as a set of norms, usually incorporated into texts – on the one hand, and the *juridical* understood as a social phenomenon. Whilst the law is undoubtedly central to the juridical, both epistemologically and praxeologically, the two concepts should not be conflated. In terms of social ontology, both law and the juridical exist, but are distinct from each other.[58] As regards the concept of 'law' (opposed to that of the 'juridical'), it is submitted that the classical legal positivist definition is most suitable.[59] The critical endeavour of critical legal science should not lose its energy on positing fancy definitions of law, which would encompass patently non-legal phenomena to make some kind of point.[60] Being far from negating the plurality of normative orders in society (law, morality, customs etc.), which is an undisputable fact, blurring the law/non-law distinction does not serve anything.

Having made this distinction, I wish to make a minimalist proposal regarding the criteria for identifying the juridical (and differentiating it from other spheres of social life) by referring to the recent programmatic article by Michał Paździora and Michał Stambulski.[61] They have proposed to rely on the binary code characteristic of each sphere in order to outdifferentiate it from others.[62] The idea is not new, and they refer specifically to Carl Schmitt as their source of inspiration, noting that he did not identify the juridical as a distinct sphere of social life.[63] According to this approach, the juridical is characterised by the legal/illegal code, as distinct from the friend/enemy code of the political, the profitable/not profitable code of the economic, the moral/immoral code of morality, and so forth.[64]

The relationship between law (as defined above) and the juridical rests, first of all, in the fact that the juridical's binary code (legal/illegal) is a direct reference to the law. The juridical produces, sustains and utilises the law, not the other way around. Law would not be possible without the juridical, and the juridical is not possible without the law. Paździora and Stambulski claim that the relationship between politics and the political is, in Heideggerian terms, one of the ontic to the ontological.[65] They indicate that politics refers to 'concrete actions', whilst the political constitutes 'the conditions of possibility of those actions'.[66] The same can be said, *mutatis mutandis*, about the relationship between law (concrete norms, in force in a concrete time and space, according to a concrete rule of recognition) and the juridical (conditions of possibility of the law). In light of the foregoing, the first part of the title of the present paper – *Critique of the Juridical* – instead of the usual 'critique of law' or 'legal critique', becomes evident. The task of critical legal science

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[58] One is tempted to say that the law is different from the juridical, just like politics is different from the political, which will be made explicit later on.

[59] Cfr. *Leiter, B.* Marx, Law, Ideology, Legal Positivism. *Virginia Law Review*, Vol. 101, 2015, pp. 1179–1196.

[60] Contra *Hunt, A.* The Critique of Law, op. cit., p. 13.

[61] *Paździora, M., Stambulski, M.* Co może dać nauce prawa polityczność? Przyczynek do przyszłych badań. Archiwum Filozofii Prawa i Filozofii Społecznej, No. 1, 2014, pp. 55–66. Cfr. *Stambulski, M.* Polityczność jako etyka polityczna prawa. In: *Dudek, M., Stępień, M.* (eds.) Aksjologiczny wymiar prawa. Kraków: Nomos, 2015.

[62] *Paździora, M., Stambulski, M.* Co może dać nauce prawa polityczność, op. cit., pp. 55–66.

[63] Ibid., p. 57.

[64] *Mańko, R.* Ideology and Legal Interpretation: Some Theoretical Considerations. In: *Torgāns, K.* (ed.). Constitutional Values in Contemporary Legal Space. Riga: LU Apgāds, Vol. I, 2016, pp. 117–126, at p. 118.

[65] *Paździora, M., Stambulski, M.* Co może dać nauce prawa polityczność? Op. cit., p. 57.

[66] Ibid.

cannot be limited merely to the critique of concrete normative systems and their social effects (though it is, of course, a very important part of the critical jurist's vocation), but must extend to a critique of the juridical as such.

5.3. No Escape from the Political

If we agree with Pašukanis that law is born out of conflict,[67] and if we add to this that it is a *social conflict*, i.e. that every conflict is an individual instance of a broader social conflict (consumer-trader, owner of business v. worker, etc.), we cannot escape the ultimate conclusion that law is by its very essence *political*.[68] In consequence, therefore, one of the primary tenets of critical legal science is that, precisely, for the juridical *there is no escape from the Political*; in Lacanian terms, the political is the *symptom of the Juridical*,[69] something which the juridical attempts to repress, deny and conceal, but which actually underlies its existence and returns in the form of cracks in the fabric of the juridical's ideological lie.[70]

Therefore, any attempts at building an „apolitical judiciary", „apolitical legal science" are a typical ideological denial.[71] What is more, they are a dangerous utopia which undermine the very foundations of a truly democratic *polis*. Instead of making steps into the pitfall of this utopia, we should realistically ask about *what political choices* should judges make, as they will inevitably make them, openly or in the guise of ideological masks. The chief task of critical science is, in this respect, firstly, to unmask the genuinely political character of adjudication (hermeneutic of suspicion towards the myth of an apolitical legal science and apolitical adjudication) and, secondly, to advance informed proposals as to the concrete political choices to be made, both in legislation and adjudication. Such choices can and should be informed by solid empirical research revealing the social effects of existing regulations, especially on the working class.

However, for this task to be accomplished, critical legal science needs to perform and effective critique of ideology – both external ideology (like neoliberalism), which enslaves the law, and law's internal ideology (like the positivist myth of separation of law from politics), which continues to pontificate on the law's alleged apolitical character.

5.4. Critique of Ideology

A final point that needs to be made is the role of ideology in the social ontology of critical legal science. The classical Marxian account of ideology boils down to the statement that it is "an inferentially related set of beliefs about the character of the social, political and economic world [that] falsely represents what are *really* the interests of a particular economic class as being in the general interest (…) [which

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[67] *Pashukanis, E. B.* Law and Marxism: A General Theory. London: Pluto Press, 1983, p. 81.

[68] Cfr. *Salter, M. G.* Carl Schmitt: Law as Politics, Ideology and Strategic Myth, p. 30.

[69] On the concept of a symptom in Lacan's psychoanalytical philosophy, see, e.g. Žižek*, S.* The Sublime Object of Ideology. London: Verso, 1989, p. 85.

[70] *Žižek, S.* First as Tragedy, Then as Farce. London: Verso, 2009, p. 65.

[71] Anecdotal evidence from Poland indicates how insensitive judges have been e.g. to the victims of evictions by the so-called "cleaners of tenancy houses" (*czyściciele kamienic*) who obtained entire houses from municipal authorities, under highly dubious legal titles, and treated the inhabitants as the "meat filling" (*wkładka mięsna*) that needs to be removed at any cost. The main activist defending the rights of tenants – Jolanta Brzeska – was ruthlessly murdered (burnt alive) near the Kabaty Forest, in the elegant southern district of Warsaw (Wilanów). Of course, neither the prosecution service, nor the police, nor the judiciary showed any interest in finding the perpetrators. See e.g. *Woś, R.* To nie jest kraj dla pracowników. Warszawa: WAB, 2017, pp. 210–213.

is] possible because those who accept the ideology are mistaken about (or ignorant of) how they came to hold those beliefs".[72] This classical definition of ideology focuses on the false consciousness of ideological subjects. However, it is increasingly observed that the subjects of ideology *know very well* that the claims of ideology are false, and they also know very well that the ideology *does not serve their interests*, yet they still continue to function *as if* the ideology were true or *as if* they laboured under the two mistakes. Slavoj Žižek provides the way out of this paradox by radically redefining ideology. He posits that ideology "is not a dreamlike illusion that we build to escape insupportable reality; in its basic dimension it is a fantasy construction which serves as a support for our "reality" itself: an "illusion" which structures our effective, real social relations and thereby masks some insupportable, real, impossible kernel (conceptualized by Ernesto Laclau and Chantal Mouffe as "antagonism": a traumatic social division which cannot be symbolized). The function of ideology is not to offer us a point of escape from our reality but to offer us the social reality itself as an escape from some traumatic, real kernel."[73]

What is of particular relevance in Žižek's concept of ideology is that he stresses the objective, rather than subjective character of ideology, thereby expanding its scope beyond mere false consciousness.[74] He does so, specifically, by positing Sloterdijk's formula of the "cynical reason" – "they know very well what they are doing, but still, they are doing it", instead of the traditional formula of ideology *qua* false consciousness ("they do not know it, but they are doing it").[75] Žižek rightly observes that this cynically-ideological approach is typical in modern societies as a way of demonstrating a certain distance towards the hegemonic ideology, and that this distance becomes an integral part of the ideological game itself. Paradoxically, this subjective distancing from ideology not only does not weaken its hegemony, but even strengthens its grip upon society.

With a view to crucial role of ideology in the social ontology of critical legal science, it is necessary that this aspect of research be pursued in all possible directions and using all conceivable methods. Specifically, apart from theoretical research and theoretical critique (showing how conventional legal philosophy is permeated by liberal ideology), there is a large space for empirical desk research unmasking the ideologies at play in judicial decisions and doctrinal writings, as well as in shaping of legislative proposals.[76] Furthermore, apart from this genetic aspect (ideology and genesis of laws), there is the aspect of instrumentalisation of law (legal texts) by the hegemonic ideology, often done with little consciousness both on the side of drafters and citizens.[77]

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[72] *Leiter, B.* Marx, Law, Ideology, Legal Positivism, p. 1183.

[73] *Žižek, S.* The Sublime Object of Ideology. London: Verso, 2008, p. 45.

[74] *Mańko, R.* 'Reality is for Those Who Cannot Sustain the Dream': Fantasies of Selfhood in Legal Texts. *Wroclaw Review of Law, Administration and Economics*, Vol. 5, issue 1, 2015, pp. 24–47, at pp. 28–29.

[75] *Žižek, S.* The Sublime Object of Ideology, op. cit., pp. 24–30.

[76] For a recent case study on the role of ideology in legislation see Šulmane, D. Ideology, Nationalism and Law: Legal Tools for an Ideological Machinery in Latvia. *Wroclaw Review of Law, Administration and Economics*, Vol. 5, issue 1, 2015.

[77] Cfr. the examples given in *Mańko, R.* Reality is for Those Who Cannot Sustain the Dream.

Conclusions

1. Critical legal science (otherwise known as 'critical legal studies' or 'critical jurisprudence' or 'critical legal theory') differentiates itself from other branches of legal science (especially the dogmatic ones) by its critical methodology. In other words, the object of study of critical legal science is the same (it is the legal phenomenon), whereas the method of study is different.
2. The critical methodology of critical legal science draws inspiration on the critical methodologies of other critical scientific endeavours, and in particular rests upon the critical legacy of the 'philosophers of suspicion' (Marx, Freud, Nietzsche), as well as their followers and successors in social and political theory (Frankfurt school), philosophy (French Theory) and psychoanalysis (Lacan, Žižek). In other words, critical legal science can be described as a local application of critical theory within the field of the juridical.
3. Critical legal science rests upon a methodological pluralism, where various approaches are bound by two shared elements: firstly, a hermeneutics of suspicion towards the official narratives about the law; secondly, the purpose of expanding human freedom by unmasking and eliminating all forms of domination and violence. Critical legal science is, therefore, in line with Marx's famous 11th thesis on Feuerbach, not only focused on understanding the legal phenomenon, but also at changing it in order to expand the sphere of human freedom (emancipation). Critical legal science is a theoretical practice which aims also at influencing other practices of the juridical, especially legislation (the creation of general legal norms) and adjudication (deciding individual cases). For critical legal science, the links between theory and practice are intimate and all aspects of practicing the critique of law (within the academic field, teaching law, judicial practice) are in its reach.
4. The object of critique of critical legal science extends both to the form of law *per se* and to the substance of law (content of legal norms), as well as to the social effects of the law. The form of law, based on abstraction and formal equality, should be deconstructed by pointing to the actual and concrete inequality and partiality, hidden behind those abstractions. The substance of the law, understood as the content of legal norms, both contained in legislative texts and judicial decisions, is subject to critique especially from the point of view of concrete interests that are protected (the 'haves' vs. the 'have nots') and those interests and perspectives, which are suppressed and subject to symbolic violence. The critique of the social effects of the law, apart from the aforementioned critique, also includes the critique of discrepancies between the officially declared general interest, which legislation is to serve, and the actual effects of legal regulation, which often serves only narrow interests of privileged groups, rather than the society at large.
5. An important aspect of legal critique is the critique of ideology, including the fact of sustaining the hegemonic ideology within the law, and the existence of law's internal ideology, which serves to legitimise the social power of lawyers in society (presented as an impersonal 'rule of law not men'). The critique of ideology is part and parcel of the general critique of law, and needs to take into account that today the so-called 'cynical mode of ideology' prevails, where subjects are fully aware of the falseness of ideology (false consciousness), but nonetheless decide to follow ideology in organising their practical affairs.

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https://doi.org/10.22364/jull.11.04

Case Law and its Binding Effect in the System of Formal Sources of Law

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The author proposes changes to the traditional concept of formal sources of law. This concept originates in the 18th century, but it fails in adapting to the development of the law, especially in relation to principles of legal certainty and predictability of legal decisions. The definition of formal sources of law is also vague and unclear and it brings more problems than it offers solutions and insight. To replace it, the author offers a new distinction – based on the criterion of autonomy of the sources of law.

To support his arguments, the author compares the status of court decisions in common law and civil law systems, but also focuses on the difference between individual countries belonging to the civil law system. The comparative criteria are mainly focusing on nature and strength of the binding effect of the case law for the lower courts, but also on institutional aspects within the court hierarchy, e.g. if a judge can be liable in any way for ignoring a source of law.

Keywords: binding effect of judicial decisions, principle of legal certainty, predictability of judicial decisions, formal sources of law, case law, autonomy of sources of law, precedential binding effect, legal state, rule of law.

Content

Introduction

The goal of this paper is to sum up a current debate in legal theory in the Czech Republic concerning the binding effect of judicial decisions. I will also try to provide some insights into our thinking about formal sources of law in *civil law* (continental, Romano-Germanic) system, while also comparing these concepts to the *common law* (Anglo-American) system.

The best way to introduce the problem is to summarize concepts presented to students in faculties of law when they begin studying legal theory. In general, sources of law can be divided into formal sources of law and material sources of law. Material sources of law are reasons why the law is what it is, i.e. why the law has been enacted to regulate certain area.[1] Formal sources of law are the law itself. Formal sources of law contain normative rules of behavior, and it is possible to say that in general there are four types of formal sources of law.[2]

The first and the most important of them is legislation, i.e. legal acts in any form, whether they are statutes or other forms of legislation issued by lower entities than by national parliaments (e.g. municipal legislation). Then we have normative treaties. Treaties with applicability even on subjects that are not parties to the treaty itself. Even then normative treaties provide rights and obligations to those subjects. And again – we can see normative treaties with various normative powers. There are international treaties that some countries in some circumstances even consider more normatively powerful than their own statutes.[3] On the other hand, we can see collective treaties in labor law amending rights and obligations between employees and the employer. Their status is exactly opposite, since their normative power is lower than the normative power of statutes and even a lot of legislation of under-statutory level (e.g. orders and regulations of the government and of state departments).

And then we have two types of formal sources of law that have problematic status in the *civil law* context. The first of these is a legal custom. A legal custom was definitely a source of law from the historical perspective. However, nowadays in most *civil law* countries (including the Czech Republic), a particular legal custom is a source of law only in those cases when another source of law refers to it.[4] Therefore, its status of source of law is derived from another source of law (in most cases, a statute). Last, but not least, a source of law in formal sense is also a precedent. We know precedents mostly from Anglo-American legal context. To be

[1] See *Gerloch, A.* Teorie práva. 6th edition. Plzeň: Aleš Čeněk, 2013, ISBN 978-80-7380-454-1, p. 71.

[2] See *Knapp, V.* Teorie práva. Praha: C.H.Beck, 1999, ISBN 80-7179-028-1, pp. 129–130. Also *Gerloch, A.* Teorie práva. 6th edition. Plzeň: Aleš Čeněk, 2013, ISBN 978-80-7380-454-1, p. 71.

[3] E.g. the Czech Republic does so in Article 10 of the Czech Constitution, which states: "*Promulgated treaties, to the ratification of which Parliament has given its consent and by which the Czech Republic is bound, form a part of the legal order; if a treaty provides something other than that which a statute provides, the treaty shall apply.*" It, therefore, does not state that international treaties are higher in the hierarchy of sources of law than Czech statutes. To be precise, it is only provided that their applicability is preferential. An international treaty applies and the Czech statute does not apply in case of the conflict between these two. But the statute is not derogated only by the fact of this conflict.

[4] See *Knapp, V.* Teorie práva. Praha: C. H. Beck, 1999, ISBN 80-7179-028-1, p. 136.

exact in my analysis, I will use the term "precedent" only in its traditional meaning, i.e. only in the context of *common law* system, where precedents are indisputably a formal source of law. When talking about *civil law* system, binding effect and role of court decisions in this system, I will use the term "case law".

However, I believe there is no great distinction between precedents in *common law* system and case law in the *civil law* system. I think that we still perceive them as distinct notions in legal theory only because of the historical context. In the contemporary legal systems, excessive distinguishing between conceptions of case law in *civil law* system and precedents in *common law* system is rather detrimental and is obscuring the development that legal systems of both civil law and common law nature made in recent decades. Yet, I believe there are some differences, so it is still useful to differentiate those two terms in this analysis. My goal in this article is to demonstrate problems of using the dualism of formal and material sources of law. I want to examine, whether the traditional view of sources of law based on this criterion is still actual and not outdated. Because especially concerning court decisions, the division on formal and material sources of law produces several paradoxes. I will argue there is another way to classify sources of law that is not as vague as the traditional classification of sources of law. It also provides new perspectives of sources of law. I am talking about division on autonomous and non-autonomous sources of law.

My goal is also to describe the way legal systems' perception of case law changed over time. I want also to show how legal theory perceives legal systems only in general contours and fails to acknowledge that the general claims about legal systems are not in accordance with state of the law in the particular legal systems. Even though the main method used in this paper is normative and its goal is to point out problems of current notions of legal theory, the paper uses comparative method concerning the status of case law in individual countries of *civil law* and *common law* system to show that the problem of case law is not so easy and clear as it is presented by the main body of the legal theory doctrine.

1. Binding Effect of Case Law

Each legal theory textbook openly and explicitly states that *civil law* systems do not know precedents and do not recognize them as a source of law. There are some exceptions to when we can consider a judicial decision as a source of law, and the Czech legal system knows only one exception of this kind. It is a situation when the Constitutional Court derogates a provision of a statute or another legislation because of its unconstitutionality.[5] This court decision has, therefore, the status of a formal source of law just because it in some way changes the legislation (which is a source of law). The term for this is "negative legislation" and it is considered as one of the types of *abrogation* as the statutory rule involved is no longer deemed

[5] For the Czech example, see *Gerloch, A.* Teorie práva. 6th edition. Plzeň: Aleš Čeněk, 2013, ISBN 978-80-7380-454-1, p. 71. It is the same, hovewer, in *civil law* system in general. E.g. German constitution provides in § 31(2) that, in several cases and especially where the court invalidates legal norms, these decisions have the force of statutes ('*Gesetzeskraft*'). See *Alexy R., Dreier, R.* Precedent in the Federal Republic of Germany. In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, p. 26. The same goes for decisions of the Constitutional Court of Italy. See *Taruffo, M., La Torre, M.* Precedent in Italy. In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, pp. 154–155.

to "exist" in the legal system, it is not perceived as a full-fledged precedent as we know it from *common law*.[6] However, it is the only one instance where we can (in the traditional perspective) indisputably state that a decision of a court is a source of law in the context of *civil law*. Therefore, we must conclude that from the traditional perspective, the *civil law* system recognizes as a source of law only two of all four possibilities – legislation and normative treaties.

The case law has, in eyes of the legal theory, the same position since the 18th century.[7] In the traditional view, it is forbidden to courts in *civil law* system to make new general legal rules, to create new legal norms. The court is there to solve a problem of two parties in a dispute and its decision is binding only to those two parties, i.e. we call this effect an *inter partes* binding effect. What is forbidden, at least from this theoretical historical perspective, is for a court to make a rule that would be applicable *erga omnes*, even to parties not participating in this dispute. Therefore, a court cannot make a general rule that would be binding for other courts when deciding a case in a future which is similar to a case already decided. Therefore, from this proposition it is understood that the *civil law* system does not recognize precedents as the *common law* system does.

If we look at the binding effect of a decision from another perspective, we can also differentiate cassational and precedential binding effects. *Cassational binding effect* needs no further explaining. This effect takes places if a higher court derogates a lower court's decision. Therefore, when the lower court is making a new decision, it is logically bound by the decision made by the higher court. This type of effect is binding only to the parties of the proceedings, especially the lower court. It has, therefore, only *inter partes* effect. Cassational binding effect is undisputed and is part of all court systems which are based on the hierarchy of courts.

The second type of binding effect is called *precedential*. This might be at the heart of a dispute because the term precedential might imply that this effect applies only in legal systems where precedents are recognized as a source of law. However, this thesis would not be right. Precedential binding effect means that a decision that was previously made, is in some way binding for other courts. And I must make one clarification, because the word "binding" might be understood ambiguously. In legal theory, we tend to make one fundamental mistake as we consider a decision to be either fully binding or not binding at all. To make an analogy, the patient is either alive or dead. There is no middle ground. We, therefore, can have precedents that are fully binding in a normative way, or there is no binding effect at all. In my opinion, the more valuable perspective is to perceive varying degrees of binding effect. A patient may be alive, but he is still not able to walk, he is in a coma, he has to be on a specific diet, or he depends on regular medications. By accepting a bipolar view of either binding or non-binding court decisions, we fail to differentiate all the possibilities, how a previous decision can be accepted by other courts in their own argumentation, or how ignoring a previous decision might in fact mean unlawfulness of a court decision or even its unconstitutionality.

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[6] See *Taruffo, M., La Torre, M.* Precedent in Italy. In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, pp. 154–155.

[7] One of the fathers, to whom we can award credit for the way how court decisions are regarded in *civil law* systems is Montesquieu, who in the middle of the 18th century formulated the division of powers in the way we perceive it nowadays – separating all three powers of a state – legislative, executive, judicial. See *Taruffo, M.* Institutional Factors Influencing Precedents. In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, p. 458.

In the following text, I will address a binding effect as a *precedential binding* effect, as I believe that it is an effect that is a part of all jurisdictions, even those of the *civil law* system. I want to note, however, that the issue of precedents and general applicability of rules postulated by courts is not a concept known only in *common law* countries. The history of the sources of law is more complicated than that. E.g., in the 16th century Italy court decisions had a binding character and we could look at them just like we perceive *common law* precedents today. *Regie Costituzioni* issued in 1729 stated that judges are bound, firstly, by the laws issued by the prince, secondly, by local statutes approved by the prince himself or by his predecessors, thirdly, by judicial decisions taken by the courts, and finally, by the i*us commune*.[8] In this sense, we would probably contend that case law was the formal source of law. However, in 1848, Article 73 of *'Statuto albertino'*, which later became the constitution of the new Italian kingdom, ascribed the power of interpreting the law with general validity only to the legislator.[9]

2. Historical Context of the Status of Case Law

The embodiment of the historical and traditional conception of case law not being a source of law can be found in § 12 of Austrian Civil Code[10] enacted in 1811. This provision states: "*The judgments given in individual cases and the judgments handed down by judges in particular disputes have never the force of a law; they cannot be extended to other cases or to other persons.*" The question I want to ask is, whether the rule as stated in § 12 of ABGB is still valid – if it is adhered to and if it is still applied. To be precise, it is controversial, whether this provision states a prohibition against the use of precedent.[11] Similarly, Article 5 of the Code civile[12] declares: "*it is prohibited for judges to decide by way of general provisions and rules on the cases that are brought before them*".[13]

What I want to bring up in contrast is § 13 of Czech Civil Code[14] enacted in 2014. This provision states: "*Anyone demanding legal protection may reasonably expect that his case will be decided in the same way as any other legal case that has already been decided and which corresponds to his or her legal case in essential consequences; if the case is decided otherwise, anyone seeking legal protection has the right to a compelling explanation of the reason for this deviation.*" This formulation of the rule seems to be in opposition to the statement that case law is not a source of law. To a legal theorist it may seem like a revolution, however, it is not so. This rule is only a result of a long process of development in the field of constitutional law and of other legal principles. An explanatory report to the Czech Civil Code in the reasoning for implementation of this provision into Czech legal order refers to Eugen Ehrlich, Austrian legal scholar and sociologist of law, who states that

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8 See *Taruffo, M., La Torre, M.* Precedent in Italy. In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, p. 183.

9 Ibid.

10 Allgemeines Bürgerliches Gesetzbuch (knows as ABGB), JGS Nr. 946/1811, Austrian Civil Code.

11 *Alexy, R., Dreier, R.* Precedent in the Federal Republic of Germany. In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, p. 32, quote Bydliski.

12 *Code civil des Français* enacted in 1804, French Civil Code.

13 See *Troper, M., Grzegorczyk, Ch.* Precedent in France. In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, p. 104.

14 Czech statute No. 89/2012, Civil Code.

adjudication of the same or similar cases differently is not the law, but arbitrarity and whim.[15] Reasonability of this normative rule is, however, argued not only on the basis of thoughts of legal theorists. The authors of the draft of the Civil Code also argue with the case law of the three highest courts of the Czech Republic – the Constitutional Court, Supreme Court and Supreme Administrative Court.[16] These courts refused "judicial arbitrarity" while deciding comparable cases differently.[17] The Constitutional Court emphasizes the importance of reasonable expectation that similar cases will be decided similarly to the previous decided cases, which are comparable.

Furthermore, authors of the Czech Civil Code argue that this normative construction (and they explicitly state that the conception of § 13 follows the principle of *stare decisis*)[18] has been accepted to promote legal certainty and stability of the law.[19] On the other hand, they warn against a conservation of decision-making practice while quoting E. Tilsch: "A statute is a rule written for present." It is, therefore, necessary to interpret and apply general legal norms with regard to the actual circumstances in the society.[20] That is the most frequently intimated objection to the binding effect of precedents, because the doctrine of *stare decisis* has a tendency to slow down and impede development of law. Authors of the Czech Civil Code, however, at this point state that this provision is not supposed to prevent changes in interpretation of the law and therefore hamper its development with regard to the current situation in the society.[21]

I think it is important to comprehend how the *civil law* system went from the premise that case law cannot create general legal rules and that it is not binding to other courts, to the new premise that case law has a precedential binding effect, which means that courts have to take into account previous decisions. Additionally,

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15 Explanatory report to the Czech Civil Code, § 13, p. 42, quotes *Ehrlich, E.* Grundlegung der Soziologie des Rechts. 1st edition. München: Duncker & Humblot, 1913, p. 106.

16 Explanatory report to the Czech Civil Code, § 13, p. 42.

17 Explanatory report to the Czech Civil Code, § 13, p. 42 quotes the decision of Czech Supreme Administrative Court No. 398/2004.

18 This is very interesting, since *stare decisis* is a concept from the *common law* system. It is the principle, which forms the ground of binding effect of precedents in Anglo-American legal system. However, applicability of this principle is refused even by many of those, who claim that case law has a binding effect even in the *civil law* systems. See *Morawski, L., Zirk-Sadowski, M.* Precedent in Poland. In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, p. 224. However, there are also authors who state that some courts of *civil law* countries have already started to apply the *stare decisis* principle at least in "*de facto*" sense. E.g., see *Barceló, J. J.* Precedent in European Community Law. In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, p. 433, also stating: "*To our knowledge, stare decisis has not been discussed in any ECJ opinion, but Advocate General Warner has addressed the topic both in one of his opinions and in scholarly writing. Warner's opinion in the Manzoni case, Case 112/76, [1977] ECR at 1657, is one of the clearest statements in support of the role of stare decisis in Community law, at least in Article 177 preliminary rulings on questions referred to the ECJ by a member state court. He stresses uniformity as the major purpose underlying the Article 177 procedure and the stare decisis doctrine: 'to hold that a ruling of the Court under Article 177 had no binding effect at all except in the case in which it was given would be to defeat the very purpose for which Article 177 exists, which is to secure uniformity in the interpretation and application of Community law throughout the Member States.' This, it seems to me, is where the doctrine of stare decisis must come into play.*" Ibid., p. 424: "*But one could say something similar about judgments of the US Supreme Court. They derive their validity from the US Constitution. But that does not prevent them from being sources of law and binding precedents.*"

19 Explanatory report to the Czech Civil Code, § 13, p. 43.

20 Ibid.

21 Ibid.

even though courts are not bound by the case law absolutely (i.e., they can issue a different decision even in similar case), they have to provide reasoning and reasons for this change. Is this only the case of the Czech Republic? Is the development in the Czech Republic different from that of other *civil law* countries? The answer is no. All legal systems of *civil law* at least in some way have accepted the notion of a precedential binding effect.

3. Rule of Law and the Legal State as Principles in the Background

An area of constitutional law sits on the throne of all legal systems of contemporary states. Our current notion of a state consists of two main presumptions. The first one is that the state should be democratic. All the power in the state belongs to the people. The power exercised by the state is therefore derived from the power of the people. The second presumption concerns the *legal state* (in the Anglo-American doctrine it is called the *Rule of Law*, but there are some key differences between legal state and the Rule of Law, which are not the cornerstone of this paper, I will therefore continue with analysing the notion of the legal state, which is a part of the *civil law* system doctrine). Legal state (or, in German, *Rechtsstaat*) is a doctrine in continental European legal thinking originating in German jurisprudence.[22] This doctrine implies the existence of a constitutional state, in which the exercise of governmental power is constrained by law.[23] Since this article is not focused on the analysis of the legal state, I will mention only two of the principles that govern the legal state. The first one is that law must be accessible and, insofar as possible, intelligible, clear and predictable, and that law must afford adequate protection of fundamental human rights. The second principle that must be noted – the laws of the land should apply equally to all, save to the extent that objective differences justify differentiation.[24]

These theoretical notions are manifested even in the positive law. Mainly in the aforementioned constitutional law, but also in the Czech Republic in § 13 of the Civil Code indicated above. One of the constitutional rights is a right to a fair trial, and one conclusion that the European Court of Human Rights,[25] European Court of Justice[26] and the constitutional courts in individual countries of the continental

[22] See *Tiedemann, P.* The Rechsstaat-Principle in Germany: The Development from the Beginning Until Now. In: *Silkenat, J. R., Hickey, J. E., Barenboim, P. D.* The Legal Doctrines of the Rule of Law and the Legal State (Rechtsstaat). New York: Springer, 2014, ISBN 978-3-319-05585-5, p. 172.

[23] See *Sellers, M. N. S.* What Is the Rule of Law and Why Is It So Important? In: *Silkenat, J. R., Hickey, J. E., Barenboim, P. D.* The Legal Doctrines of the Rule of Law and the Legal State (Rechtsstaat). New York: Springer, 2014, ISBN 978-3-319-05585-5, p. 4.

[24] See *Venter, F.* The Rule of Law as a Global Norm for Constitutionalism. In: *Silkenat, J. R., Hickey, J. E., Barenboim, P. D.* The Legal Doctrines of the Rule of Law and the Legal State (Rechtsstaat). New York: Springer, 2014, ISBN 978-3-319-05585-5, p. 96.

[25] See *Albu v. Romania*, No. 34796/09, 10 May 2012. Available: http://hudoc.echr.coe.int/eng?i=001-110805 [last viewed 08.06.2018].

[26] *Barceló, J. J.* Precedent in European Community Law. In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, p. 422: "*In* Da Costa v. Nederland se Belastingadministratie*, Cases 28-30/62, [1963] ECR 31, the court stated member state courts are bound by prior ECJ decisions: they must either apply the previous decision or refer the question for a new ruling. The ECJ seems to regard its decisions as directly applicable sources of law binding on member state courts unless and until the ECJ itself alters the decision*."

legal system have arrived at is a right to the predictability of judicial decisions.[27] But other principles also apply – the principle of legal certainty, equal treatment under the law, uniformity of the legal system. All these principles support the concept of the binding effect of case law. These principles are used while arguing in favor of binding effect of judicial decision, whether in the *common law* jurisdiction, or *civil law* one.

Next to the reasons of the rule of law, stressing the importance of the citizen's ability to rely on the durability of pre-announced decisions in matters of law, formal justice reasons, captured with the slogan "treat like cases alike" it is possible to bring up the reasons of legal expediency. Aspects of this argument are deterring the expense of money and time involved in speculatively re-arguing points already determined by the highest judicial authority.[28] The use of precedent promotes judicial economy and efficiency, and conserves the resources of judges, lawyers and parties. Once an issue has been thoroughly examined by a court and resolved, it becomes "settled" and does not have to be examined anew in subsequent similar cases.[29] The practice of following precedent also "depersonalizes" decisions and thus renders it more likely that losing parties will adhere to the decision without the winning party having to resort to coercive measures (with attendant friction and waste). Losers will see that the decision is not merely "against" them, ad hoc, but "against all others similarly situated".[30]

An interesting point is that the presence of *stare decisis* in English law and its absence in French law derive paradoxically from the same purpose – the desire of a central government to strengthen and consolidate its authority. In England, the doctrine of precedent assisted the royal courts in gaining authority over the decentralized customary courts. Had the royal courts failed to follow their own decisions, they would have created uncertainty as to what the "common law" was and thus undercut the common law's authority. In France, the French kings sought to consolidate power over the local law-giving bodies by claiming exclusive legislative power for themselves. The leaders of the French Revolution apparently followed the same purpose in forbidding judges to lay down the law.[31]

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[27] E.g. the Czech Constitutional Court in its decision III. ÚS 252/04 held: "*In general terms with respect to the binding effect of judicial decisions, the previous interpretation of the law should be a starting point for the judicial decision-making in similar cases, unless there are sufficient reasons backed by rational and persuasive arguments for the change in the case law.* Ibid.: "*(From the thesis of the reasonable expectation) does not follow the categorical impossibility of change on interpretation of the law, but the obligation for this change with regards to the concrete circumstances (e.g. development in the society) to be predictable, or in case of an inpredictable change for it to be accompanied with transparent reasoning with rational and objective arguments. (…) Only following this process rules out, in the possibilities of human cognitive limits, arbitrarity while applying the law.*" Also in a decision I. ÚS 3143/08 the Constitutional Court held that the predictability of judicial decision-making is one of aspects of a right to a fair trial.

[28] *Bankowski, Z., MacCormick, D. N., Marshall, G.* Precedent in the United Kingdom. In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, p. 334.

[29] *Summers, R. S.* Precedent in the United States (New York State). In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, p. 382.

[30] Ibid.

[31] *Barceló, J. J.* Precedent in European Community Law. In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, p. 425.

4. Common Grounds for Case Law in Common Law and Civil Law

In the previous chapters I have shown that a precedential binding effect has its place and is applied even in *civil law* system. Even though the continental legal system does not know precedents from the traditional perspective, the precedential binding effect has found extensive support. And that is how the conflict arose. The traditional legal theory concepts are still based on the 18th century notion of two types of formal sources of law, while the development in the applied law lead to the case law starting to have the same effects as if it was a source of law. The § 13 of Czech Civil Code is not the change itself, it is just a codification of the principle that has been a part of the constitutional law for a few decades now.

I want to provide a short comparison between precedents in *common law* context and the effect, which the principle of predictability and the principle of legal certainty as formulated by the constitutional law have on the case law in the *civil law* context. I tried to identify some point, based on which we can identify the common ground between those two contexts.

4.1 Taking Previous Case Law into Account

The first point is the obligation of the court to take into account previous case law. And this is definitely true for both *common law* and *civil law* systems. There can be an interesting perspective of the France and its legal order. French courts are known for providing only a very brief reasoning, in which they do not cite case law.[32] On the other hand, it is also known that Cour de cassation is very thorough while examining the previous case law. The fact that it is not cited directly in the reasoning of the decision does not change anything regarding the fact that the Cour de cassation holds a steady interpretative line of decisions. We can, therefore, state that even the countries with a practice of very concise judicial reasoning that does not involve directly quoting a previous case, do not necessarily disrespect the previous case law in their courts.

Even though French legal system is based on statutes, if one looks at the material that is in fact used, one realizes that the precedents are the most important here. The Civil Code itself only plays its role through interpretation that has been yielded by a precedent. One famous example is that of Article 1384 of the Civil Code, stating that one is liable for damages caused by "things that one has to guard". This provision was very rarely used by the courts until the Cour de cassation decided that these "things" meant machines, which caused injuries to factory workers, thus making the proprietor, the "guardian" of the machine, liable for these injuries. Hence, Article 1384 became one of the main bases of the law of torts.[33] Without the change of the statute itself, its application changed just because of the case law development.

4.2 Possibility to Change the Case Law

The second point is whether the case law can be changed. And again, we must conclude that it is possible in both legal systems. It may be more difficult with

[32] See *Troper, M., Grzegorczyk, Ch.* Precedent in France. In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, p. 112.

[33] Ibid., p. 113.

precedents in the *common law* system,[34] but both systems know a procedure to change the case law that has become outdated or is simply considered wrong.[35] There is no problem with overruling in the common law system despite the principle *stare decisis*. A superior court with the power to overrule can do so and does explicitly. The ratio of the overruled case then ceases to have any authority.[36]

However, there is a very interesting and significant difference between *common law* and *civil law* system. In *civil law*, when a judge is deciding a case, he has a possibility to follow a previous decision that was similar and decide in the same way. Or he may distinguish, which is a term known from *common law* system meaning that the judge provides reasons why he believes that the case is not similar and, therefore, it is possible to decide differently. Furthermore, he has the third option – to state that the previous decision was wrong (the statutory rule was not interpreted correctly, the judge failed to apply the rule that he was supposed to apply, the application of the accepted rule would lead to absurd outcomes, etc.) and decide differently, while arguing his position. Whichever of these three options the judge chooses, it is still in accordance with the principle of predictability.

It is, therefore, considerably easier for a judge to change the previous case law than for a judge in *common law* system to change a precedent, because in *common law* a court is bound to follow a precedent, unless the need for a new legal rule far outweighs the need for stability, predictability, and uniform application of the settled rules.[37] It is, therefore, a matter of weighing whether the benefit of changing a long-standing rule and interpretation is greater than brought by respecting an old rule, which is beneficial for stability and predictability of the law. Admittedly, legal certainty is a part of formal justice, and legal certainty is generally beneficial; but one aspect of justice or utility can sometimes outweigh another, and when it does, surely, the precedent should not be followed.[38]

I believe that the main difference between continental and Anglo-American system is the degree of stability that these systems strive to obtain from the court system. In the *civil law* system, the stability is derived mainly from codifications in the form of statutes. Therefore, it is possible to allow courts and judges to look for the most optimal rule and to abandon legal opinions that are less then optimal. No weighing is done for the protection of legal certainty and predictability of law, because the leading idea is that a court has to decide a case that is here right now and should not focus on other cases. The fact that its decision will in some way

[34] Concerning the possibility of changing the precedents, see *Bankowski, Z., MacCormick, D. N., Marshall, G.* Precedent in the United Kingdom. In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, pp. 325–326.

[35] See e.g. for the United Kingdom *Bankowski, Z., MacCormick, D. N., Marshall, G.* Precedent in the United Kingdom. In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, p. 335: "*Precedent is an 'indispensable foundation' for law giving 'at least some degree of certainty' and a 'basis for orderly development of legal rules'. But precedent, if taken too rigidly, 'may lead to injustice ... and also unduly restrict the proper development of the law'.*"

[36] *Bankowski, Z., MacCormick, D. N., Marshall, G.* Precedent in the United Kingdom. In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, p. 342.

[37] *Summers, R. S.* Precedent in the United States (New York State). In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, p. 380.

[38] *Bankowski, Z., MacCormick, D. N., Marshall, G.* Precedent in the United Kingdom. In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, p. 335.

influence future decisions is not taken into account in the moment of making a decision, as the primary goal of a *civil law* court system is to decide a case between two parties. On the other hand, in *common law* system, codification is not as extensive and vast as in the continental system. The importance of the stability of court decisions is, therefore, significantly greater. The primary guarantors of the stability of the law are the courts and not the legislator. Therefore, the courts have a higher standard regarding change of the previous case law, even though the new rule might provide a more optimal outcome. But unless the benefit from the outcome is of such significance that it outweighs deserting the *stare decisis* principle, the change will not be made.

Points of this chapter, however, do not in any way alter the fact that the case law is binding even in the continental system. The possibility of the change does not exclude the binding effect. Even in case of efforts to change the case law, courts must provide reasoning behind this change.

4.3 What is the Position of Case Law in Relation to Legislation?

The third point is whether the case law has the same power as legislation does. It will not be surprising that in the *civil law* system the answer is no. Yet, the same answer applies to the *common law* system. Precedents in the *common law*, even though they are a source of law, do not have the same power as legislation. A precedent has to be viewed as a subordinate source of law,[39] since the legislator (a parliament) can revise statute law in the light of current judicial (mis) interpretations, if it sees fit to do so.[40]

When the legislation changes, it is one of the reasons to alter the case law, as the legislation is usually one of arguments used in the judicial reasoning. As this underlying argument changes, it is not only possible but also necessary to change the case law that has been based on this legislation. In the *civil law* system, the position of case law in terms of its binding effect is explicitly derived from the validity of the legislation. However, this is true even regarding the *common law* system![41] We must remind ourselves that the sources of law have a hierarchy, both in *civil law* and *common law* systems. Legislation has a higher normative power than case law and (some of) normative treaties. The hierarchy of sources of law ordered by their normative power in the Czech legal system:

- the Constitution and constitutional statutes (legislation),
- international treaties (normative treaty),
- "regular" statutes (legislation),
- orders and regulations of the government and of state departments (legislation),
- collective treaties between employer and employees (normative treaty).

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[39] *Bankowski, Z., MacCormick, D. N., Marshall, G.* Precedent in the United Kingdom. In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, p. 331.

[40] Ibid., p. 329.

[41] *Summers, R. S.* Precedent in the United States (New York State). In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, p. 365 argues that in other areas the existence of relevant statutory text requires that the language of the statute in question is the primary point of analytical departure and, of course, statute law prevails over any conflicting precedent. So, too, the constitution prevails over statute and case law. Also, a precedent interpreting a statute becomes a binding interpretation for future cases.

Therefore, even now the sources of law have a hierarchy. They are not all on the same level. Therefore, I do not think that this is a barrier to stating that case law is a source of law, as follows from the reason of having a lower normative power. The only thing we would be doing is adding one more bullet to this list at the very bottom – case law.

Right now, the case law is in the same category as legal literature (i.e. *communis opinion doctorum*). We call this category secondary sources of law. There is no need to explain why legal literature is not binding to a judge. A judge may or may not use arguments from the literature and may or may not decide in accordance with it. Maybe instead of arguing what case law has in common with legislation and normative treaties, the argumentation might possibly be as to how it differs from a legal literature – because if we do not state that case law is a source of law, it will still belong to the category of secondary sources of law, which generally have no binding effect.

There is a difference in the degree of decision's deficiency, if a judge fails to apply a piece of legislation in comparison with a situation when he fails to follow the previous case law. If he rules against an explicit provision of a statute, his decision is flawed, and we perceive the degree to which it is flawed as very high, because legislation is an important cornerstone of the *civil law* system. On the other hand, if a judge fails to follow the uniform case law of his appellate court, his appellate court will annul his decision in the same way as if he did not apply a statutory provision. Even though the deficiency of the decision is not perceived as high as in a case of the conflict with legislation.

The result will be, therefore, the same in both scenarios. The decision will be abolished and returned for obtaining a new decision, or decided directly by the higher court (depending on the procedural provisions). But again, let me once again remind of the wording in § 13 of Czech Civil Code. There is a right to a reasonable expectation that the case will be decided in the same way as the previous cases. However, it is not stated that the decision must always be same as the previous decisions. The second sentence of this provision specifies that if the case is decided otherwise then there is a right to an explanation of the reason for this deviation.

I believe this is interesting even in the context of the aforementioned right to a fair trial, because the next of its aspects is a right to a proper reasoning and argumentation. If the decision does not contain substantiation, it is also flawed.[42] Therefore, I believe that § 13 of Czech Civil Code just specifies and concretizes an aspect of a right to a fair trial – the part concerning proper reasoning and argumentation.

4.4 Recognition by the State

The legal theory doctrine provides that the legal norm is only such a rule of behavior that has the form of the source of law **recognized by the state**.[43] What does it mean that the source of law is recognized by the state? I believe it is not necessary to discuss legislation and normative treaties, because it is unequivocal that states recognize those two entities as sources of law.

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[42] See e.g. *H. v. Belgium*, No. 8950/80, 30 November 1987. Available: http://hudoc.echr.coe.int/eng?i=001-57501 [last viewed 08.06.2018]. Also *Suominen v. Finland*, No. 37801/97, 1 July 2003. Available: http://hudoc.echr.coe.int/eng?i=001-61178 [last viewed 08.06.2018].

[43] *Harvánek, J.* Teorie práva. Brno: Masarykova Univerzita, 1998, ISBN 80-210-1791-0, p. 144. Likewise, *Gerloch, A.* Teorie práva. 6th edition. Plzeň: Aleš Čeněk, 2013, ISBN 978-80-7380-454-1, p. 71.

We might argue that from the historical perspective the status quo is that case law is not a source of law. We might dispute the wording of ABGB, of French Civil Code and texts of historical legal theorist. However, can we assume that the state recognized the case law as a source of law, if highest courts of this state in accordance with international obligations recognize the precedential binding effect of the case law? Can we assume a state recognized it, if executive and legislative branch does not react to the decades' long development in the case law? Can such a consideration as what is a source of law be recognized conclusively without any explicit provision? And does accepting a wording of the § 13 of Czech Civil Code by a legislator mean that the state recognizes the case law as a source of law?

The problem is that from the historical perspective, the traditional view of formal sources of law has been based on the explicit wording of statutory provisions. We might assume that the formal sources of law are only statutes and normative treaties, because the ABGB provided so and because it is stipulated by Code Civil in France. We might, therefore, conclude that with regard to Austria and France the situation is clear. But what about the countries that do not have these explicit provisions? The Czech Republic is one of them, but it definitely is not alone. The concept of formal sources of law is a concept of legal theory, and we cannot assume that every country will explicitly incorporate it into its positive law. Should we then state that the Czech Republic recognizes only legislation and normative treaties as sources of law based on the fact that it is a part of *civil law* system family? Because the only provision in the Czech Republic concerning this issue is the newly accepted § 13 of the Czech Civil Code and, also, the Article 89(2) of Czech Constitution stating: "*Decisions of the Constitutional Court are binding for all authorities and persons*." This provision is controversial in a sense of determining its exact meaning. I stated previously that in the Czech Republic only Constitutional Court decisions that abolish a provision of legislation are recognized as a source of law. This provision, therefore, is not interpreted as implying that Constitutional Court case law is a source of law, at least among legal theorists. Judges of Constitutional Court might be of a different opinion, and they base the existence of a *precedential binding effect* on this particular provision.

However, we still have not found, what should be a basis for determining the sources of law recognized by the Czech Republic. This problem shows that the criterion of recognition by the state is the next criterion of formal sources of law that is unclear and poorly defined.

4.5 Ability of Sources of Law to Provide Rights and Obligations

The next objection could be based on the fact that no right and obligation to any subject in the *civil law* system can be established by the case law. The typical foundation for rights and obligations is legislation. However, legal rights and obligations can be based even on normative treaties, at least nowadays. We considered normative treaties as sources of law even in times when in an international law it was not accepted that individuals as subjects could invoke their rights and obligations based on international treaties. International treaties were at that time providing rights and obligations only to negotiating states. The so-called "classical" international law only recognized states as subjects of international law and exclusively governed state's rights and duties.[44] States were the sole subjects

[44] *Orakhelashvili, A.* The Position of the Individual in International Law. *California Western International Law Journal*, Vol. 31, No. 2, 2000, p. 243.

of international law, whereas no direct relation between that law and individuals existed.[45] Therefore, I do not believe that we can use this criterion to argue that normative treaties are, and in history have been, sources of law. Because if we used this criterion, it would mean that the criterion of providing rights and obligations to individuals was not met in the era of classical international law. The international subjectivity of individuals is a fairly new phenomenon that developed in recent decades, i.e., at the same time as the development of a precedential binding effect of court decisions. Nevertheless, we consider international treaties as a source of law, but we do not do so regarding the case law.

Concerning the collective treaties, i.e. the normative treaties entered into by an employer and employees' unions, their status is also problematic. Their scope is very limited by the fact that they are a source of law of under-statutory level. This could lead into argument that they are only a specification of what a statute provides. Their normativity is, therefore, significantly limited and to a great extent derived from the statute itself, as a situation of entering into a contract can impact rights and obligations of third parties uninvolved in the contracting process is not usual in the law.

4.6 Autonomy of Source of Law

Probably the strongest argument against perceiving the case law as a source of law is the autonomous status of legislation in contrast with the character of case law, which is in one sense derived from the legislation. One of the key differences between the *civil* and *common law* system is that in the *common law* system it is possible to base a court decision solely and exclusively on the precedents. That is what (at least theoretically) could not happen in *civil law* system.[46] Legislation is a cornerstone on which the *civil law* legal system is based upon. The courts, therefore, always use at least some legislative provisions. If a court were not to use any provision of legislation, it would be a departure from the usual practice. Even if a judge would have to solve a case in the area that is new and with regard to which the law failed to react, the judge would still use legislation. E.g., if it is a case about biogenetics (a lot of *civil law* countries still lack regulation concerning this topic, or it is not exhaustive) or virtual property, a judge will always use at least some provision of legislation. If the concrete legislation concerning this topic does not exist, the judge will use arguments *per analogiam* and will use the legislation that is closest to the topic, he will use the principles of the legal field, he will also provide arguments with the abstract constitutional rights (a right to property in case of virtual property, a right to life in case of biogenetics).

We could, therefore, argue that this is the reason why the case law is not a source of law in *civil law* system, because court decision cannot be based solely on them. The definition of formal sources of law yielded by the doctrine usually stipulates

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[45] *Orakhelashvili, A.* The Position of the Individual in International Law. *California Western International Law Journal*, Vol. 31, No. 2, 2000, p. 243.

[46] See *Taruffo, M., La Torre, M.* Precedent in Italy. In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, p. 158. But there are even authors who believe the opposite is also true. See e.g. *MacCormick, D. N., Summers, R. S.* Further General Reflections and Conclusion. In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, p. 533: "*It is no longer true that a well-justified judicial decision in a civil law country must always include a citation to the nearest applicable statute or code provision, no matter how remote or otherwise problematic the citation (again, France aside)*."

that it is a form that contains individual legal norms and which provides those rules with a character of law.[47] We could call this argument an autonomous applicability of the formal sources of law. Unfortunately, it is not an argument that would be used and defined by the legal theory doctrine. It is time to stop differentiating between formal sources of law and secondary entities, which can influence a court and which court can but does not have to use. Because from the above reasoning, the case law is not among those entities that a court can ignore. Moreover, there is a debate in Spain whether a jurisprudence should be a source of law.[48] In Sweden, legislative preparatory materials are a formal source of law.[49] In Norway, legal theorists came up with a conclusion that case law did not have a normative binding effect, but at the same time claimed that it was a formal source of law.[50] In other words, the current notion and definition of formal sources law is vague and the criteria for including some entity between sources of law are not applied uniformly among individual legal systems, even among those who are a part of the *civil law* system family. It is not a failure of those legal theorists to interpret the concept of formal sources of law correctly. There are different types of binding effects of case law that developed in jurisdictions of individual countries that were formulated only within the last decades, while the traditional concept of formal sources of law just failed to incorporate them into its framework.

If I propose to forsake the traditional division on formal and material source of law, what should I suggest regarding our view upon the sources of law? The criterion that I believe is more important to qualify an exact nature of sources of law, and that tells us more about the legal system, is a criterion of autonomy. Any norm or rule, which may constitute an independent basis of a judge's decision, shall be called an autonomous source of law, that is, such a norm or rule, which may be an independent source of our rights and duties. Such norms and rules, in turn, which cannot constitute an independent basis of judicial decisions, and from which we cannot directly derive our rights and duties, shall be called a non-autonomous source of law.[51] We would, therefore, categorize legislation (Constitution, constitutional statutes, "regular" statutes and understatutory legislation) and normative treaties as autonomous sources of law in the *civil law* system. In *common law* system, the precedents would also join the autonomous sources of law. Therefore, we would have three types of autonomous sources of law in *common law* countries (legislation, precedents, normative treaties) and two types of autonomous sources of law in *civil law* countries (legislation, normative treaties).

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[47] *Gerloch, A.* Teorie práva. 6th edition. Plzeň: Aleš Čeněk, 2013, ISBN 978-80-7380-454-1, p. 71.

[48] See *Miguel, A. R., Laporta, F. J.* Precedent in Spain. In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, pp. 278–279.

[49] See *Bergholtz, G., Peczenik, A.* Precedent in Sweden. In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, p. 298.

[50] See *Eng, S.* Precedent in Norway. In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, p. 199: "*The Supreme Court treats its own previous decisions as arguments that must be taken into consideration, without, however, determining the result in the case at hand; that is, the previous decisions can be outweighed by reasons pulling in the direction of another result. This practice corresponds to not being formally binding, yet having (outweighable) force.*" Ibid, p. 202: "*During the twentieth century Norwegian lawyers have come to see precedent as a source of law independent of statute or custom. Before that a different view held sway: case law was seen as evidence of custom, that is, not as in itself constitutive of the law.*"

[51] See *Morawski, L., Zirk-Sadowski, M.* Precedent in Poland. In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, p. 233.

All the remaining rules and principles, which are specified as the reasons for the judicial decision should be included among the non-autonomous sources of law. Besides the case law in *civil law* system, even doctrine and jurisprudence would be a non-autonomous source of law. That would apply to both *civil law* and *common law* system.

The lack of autonomy of case law as a source of law is expressed in the fact that it is the main function of case law in the *civil law* countries to ensure uniform application and interpretation of the existing law and not to create new rules or correct the existing ones.[52] However, case law plays the leading role among non-autonomous sources of law. Case law functions in the strictest connection with statute law, since in practice these are judicial decisions, which determine the interpretation of the law.[53]

What exactly have we done here? Did we leave the notion of formal sources of law, which had three representatives in *common law* system and two representatives in *civil law* system just to make a new division, just named differently, but with exactly the same representatives? Did we just change the name? No, the goal here is not to make a new division just for the very fact of making a new division. The proposed change needs to happen because the traditional formal sources of law division fails to grasp the changes in the development of the law. On the other hand, the problems of this concept are not only a question of recent development. I believe, that the inner inconsistency is the problem of this theory from the beginning.

5. Problem of General Rules

What inconsistency do I have in mind? There are two main problems with the formal sources of law definition and what we expect from it. The most usual argument used against case law being a source of law in the *civil law* countries is the argument that case law cannot create general rules in *civil law* context. This is an argument that seems obvious. However, actually, is not true. The above discussion of the binding effect of case law makes it evident that case law creates some form of rules even in the *civil law* context. Doubtlessly, those rules are of different nature than precedents in *common law*. But still – if a court states that the annual interest of 30 % is not an 'usury' and, therefore, does not violate the principles of morality, while in other case it states that annual interest of 70 % is an 'usury' and it does violate the principles of morality and hence, the provision of contract specifying this amount of interest rate is null and void – what else is it than creating a general rule? As discussed above, courts are bound by previous case law and must decide in line with the previous case law or provide reasons for different decision.

This example is a simplification, e.g., the Supreme Court in the Czech Republic does not base its interpretation of the term 'usury' solely on the annual interest rate, there are also other criteria that come into play. However, the term 'usury' is provided by the legislator. It is a term used in the Czech Civil Code – but like many other statutory terms, it is quite vague and needs a further interpretation: "*If a person exploits distress, inexperience, mental weakness, agitation or carelessness of the other party when concluding a contract and causes the other party to promise*

[52] See *Morawski, L., Zirk-Sadowski, M.* Precedent in Poland. In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, p. 234.

[53] Ibid.

or provide to him or another person performance whose property value is in gross disproportion to the mutual performance, such a contract is invalid."[54] It is, therefore, up to courts to determine, whether a specific contract fulfills these conditions. The legal state and the rule of law should require and respect a requirement that this practice of interpretation must be consistent and predictable to people.

In the above example, the court defined a rule that 30 % was not sufficient to qualify as a gross disproportion with regard to the mutual performance, while stating that 70 % is enough. Therefore, the court in those two subsequent decision created two general rules: 1) 30 % annual interest is not a usury, 2) 70 % annual interest is a usury. We still have a range of 30 % to 70 % annual interest, in which the courts will still have to balance and interpret the statutory provision. The next decision might be that 35 % is not yet considered usury, however, in the next case the court could come to a conclusion that 50 % annual interest qualifies as usury. Therefore, the borderline between what is considered usury will come down from 70 % to 50 %, and the field of "uncertainty" will reign between 35 % and 50 %. Nevertheless, none of this states that a court might not change its view and change the case law. It is still possible to decide differently, and state that the previous case law was not correct – and decide differently. It is still in accordance with the principle of legal certainty, if there is a sufficientsubstantiation.

This is an easy example, as it presents only one variable, plus this variable is easily quantifiable, as it is a number. Yet the same approach of creating general rules is observed in case law interpreting any other legal term, or even balancing two human rights (e.g. freedom of speech and a right to privacy).

To conclude, it is not true that courts in the *civil law* system do not create general rules. Of course, they do. They decide individual cases, but as we want their decision-making to be consistent, they have to look at the previous decisions and compare their case to them. Here, the general rules created by courts come into play. Of course, they are of different nature than legislative rules. Yet, what the traditional definition of formal source of law fails to grasp is that it is still a general rule. It is possible to quote Hans Kelsen here, as he stated that "*Judicial decision-making is not in any case just usage of the law. It is also a continuation of the process of the creation of the law. It is an act of individualization of the general legal norm*".[55] There are many cases, in which the change of the case law meant the change of the statute, even though the wording of the statute did not change at all.[56] This is not to say that courts have an unlimited power to create new law. Rather, it should be acknowledged that, even in the *civil law* system, the interpretation of codes and statutes is now based largely upon case law already interpreting these codes and statutes. Case law has become unavoidable means for the 'concretization' of legal

[54] § 1796 of Czech statute No. 89/2012, Civil Code.

[55] *Harvánek, J.* Poznámka k soudcovské tvorbě práva. In: *Večera, M., Hapla, M*. Weyrovy dny právní teorie 2017. Brno: Masarykovy univerzita, 2017, ISBN 978-80-210-8752-1, p. 298 quoting *Kelsen, H.* Všeobecná teorie norem. Brno: Masarykova univerzita, 2000, ISBN 80-210-2325-2, p. 297.

[56] *Harvánek, J.* Poznámka k soudcovské tvorbě práva. In: *Večera, M., Hapla, M.*. Weyrovy dny právní teorie 2017. Brno: Masarykovy univerzita, 2017, ISBN 978-80-210-8752-1, p. 305, reference No. 16. The example of France concerning the interpretation of the term 'things that one has to guard' referred to above in chapter 4.1 is relevant here. The change of interpretation of the liability for damages to include machines, which caused injuries to factory workers, which happened without the explicit change in the wording of the statute can also be an example of this issue (see chapter 4.1).

rules and principles.[57] In this context – is it possible that § 12 of ABGB is just a theoretical construction and pipe dreams of legal theorists?

It is often argued that if courts had the power to create general rules, it would be a violation of division of powers. It would mean interfering with the role ascribed to the legislator. I partially agree with this argument. I disagree with it in the context of case law as of "regular" interpretation of the law. Hierarchical court systems with regard for the uniformity of the case law will always be convergent as to the binding effect of case law. The precedent operates predominantly as a procedural device. It creates a burden of proof in favor of the solution laid down by the precedent case.[58]

There are, of course, rules and rules. The fear of allowing judges to create the rules is understandable in a sense of autonomous rules similar to those created by the legislator. This type of judicial activity does not, from historical perspective, have a place in the *civil law* system. If courts were to start creating legal norms in this way, it would be a reason for overruling these types of cases. Creation of general rules permissible in the *civil law* context means only the general rules created in the process of interpretation of autonomous sources of law. The judicial lawmaking outside the context of a concrete dispute is, however, a problem not just in the *civil law* system. It is not possible even in the *common law* system.[59]

I agree with the apprehension that courts might trespass upon their typical role of interpreting the law and deciding cases between individual parties, and this time really threaten the division of powers by interfering with the exclusive right of a legislator to create law. I do not see this type of threat in the precedential binding effect. On the other hand, we should perceive the types of consolidating and unifying opinions drawn up by high courts not in individual cases, but as their way of generally influencing the case law in their jurisdiction, with much greater fears than the precedential binding effect. Many high courts in European countries, especially in Central and Eastern Europe, have this competence. On the one hand, it is a positive way to unify the interpretation of statutes and promote predictability of the law, on the other hand, this is a power that should not belong to a court, but instead to a committee of Parliament or any other body associated with legislative power.

6. Consequence of the Violation of the Binding Effect

There are theories that attempt to differentiate between the types of binding effect and thereby support the traditional concept of formal sources of law. Under those theories, *precedents de iure* and *precedents de facto* can be separated.[60] We can

[57] *Taruffo, M.* Institutional Factors Influencing Precedents. In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, p. 459.

[58] *Bell, J.* Comparing Precedent. Cornell Law Review, Vol. 82, issue 5, 1997, p. 1246.

[59] See *Summers, R. S.* Precedent in the United States (New York State). In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, p. 386.

[60] See *MacCormick, D. N., Summers, R. S.* Further General Reflections and Conclusion. In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, pp. 532–533. From the French legal doctrine it is also possible to accentuate the term of 'relative binding force' (*autorite relative de la chose jugee*), which has the same meaning. See *Troper, M., Grzegorczyk, Ch.* Precedent in France. In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, p. 111.

differentiate between *precedents of solution* and *precedents of interpretation*.[61] And we can also set apart a *normative binding effect* and a *discursive binding effect*.

Without grinding heavily upon those theories, I do not believe that they can change anything. E.g., regarding the division between precedents *de facto* and *de iure* – what does it really mean? If we state that there is a normative binding effect in precedents *de iure* and in precedents of solution, what difference does it make in comparison with the precedents *de facto* and precedents of interpretation – if the result remains the same? The decision that does not respect a decision of a higher court, even though it is in the system, where court decisions are understood only as precedents *de facto* and therefore without a normative binding effect, will still be abolished. What is the difference between a normative binding effect and a discursive binding effect? A normative binding effect would mean that a lower court has to respect a higher court's decision, unless there is a reason not to follow the decision, for example, to overrule it. A discursive binding effect means that there is no normative rule that would be binding for the court in making a decision, but the court has to discursively argue with a higher court and the previous case law to decide differently. Which has, in the end, the same consequences.

The next possible objection is that in *civil law* countries there is no punishment for a judge who does not follow the previous case law. This is also a weak argument. First of all, the situation of not having a sanction for following the statutes is also numerous. E.g. in the Czech Republic, the ignorance of the law is not a disciplinary offense of a judge. The current state of debate in the Czech Republic is that the disciplinary sanction to a judge for not deciding in accordance with the law is a violation of the judicial independence. Hence, even when a judge is not applying a statute, he is not committing an offense! Here, I would like to caution that in defense of the traditional concepts of legal theory we should not define conditions for the entities that should not belong to those traditional concepts in a way that would in the end be impossible to fulfill even to those entities that usually adhere to these concepts.

The Czech Republic is not an exception in not ascribing a disciplinary offense to a judge for failure to follow the law. A similar lack of a sanction against a judge for not following the law is also the case in other countries of both *civil law* and *common law* system. E.g., Denmark also does not incur a disciplinary sanction for not following the statute.[62] Does it mean that statutes, therefore, are not sources of law in Denmark? On the other hand, in the United Kingdom, a typical domain of *common law*, a jurisdiction, where precedents are unquestionably binding *de iure*, the prevailing conception of judicial independence precludes any possibility of civil or criminal sanctions being imposed on a judge on account of errors, however gross, committed in a judicial capacity.[63] An interesting comment can be made about Sweden and Finland, where a judge who ignores a binding statute can be prosecuted. This is not true of a judge who ignores a precedent. Sweden and Finland therefore,

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[61] See *Troper, M., Grzegorczyk, Ch.* Precedent in France. In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, p. 126. Also see *Bankowski, Z. MacCormick, D. N., Morawski, L., Miguel, A. R.* Rationales for Precedent. In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, p. 484.

[62] See *Peczenik, A.* The Binding Force of Precedent. In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, p. 468.

[63] See *Peczenik, A.* The Binding Force of Precedent. In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, p. 469.

have a system which recognizes formal bindingness that is bindingness *de iure*, and yet does not contain any sanctions brought about by the breach of such a norm.[64]

The conclusion of this chapter is that the criterion of sanction for violating the binding effect of judicial decision is not a correct criterion that would enable to determine whether a case law is a source of law in a given jurisdiction or not. I believe that the only way how legal theory may catch up with the development of the law in the last decades is to adapt to the conclusions of comparative studies made between legal orders of individual states.

The second reason why the above argument is weak calls to explore, what exactly are the differences between the *common law* system and the *civil law* system? If a lower court's decision does not respect a higher court's decision, it is abolished. What is, therefore, the distinction? I believe that **the difference between case law in *civil law* system and precedents in *common law* system is of a quantitative, not qualitative nature.** The reasoning often goes that *civil law* courts are not normatively bound by the case law. Consequently, if the higher court does not agree with the fact that the lower court failed to follow the previous case law, it will abolish the decision. It is not clear how exactly this differs from the situation in *common law* system. Someone could see the difference in the fact that the precedent in the *common law* system is overruled at the level of a higher court, not at the level of the court bound by the precedent. The argument could be that in *civil law* countries, the courts can overrule the precedent themselves, without a need for the higher court, who has previously issued the decision with the binding effect.

I must again state that I do not see any other than quantitative difference here. It is only a matter of stricter procedure for overruling precedents in *common law* countries. It is also not true that the lower court is the one implementing overruling in the *civil law* system. Technically speaking, yes, this court issues the decision that is different from the previous case law, but is it possible to state that the previous case law has been overruled until the higher court has confirmed or disproved the arguments of the court trying to change the case law? The civil law system is more flexible and adaptable, as it proposes a very easy procedure for lower courts to "offer" higher courts their arguments for a change of case law. They do so by simply issuing their decision while presenting reasoning for the desired change. However, we must still perceive it only as a proposal for a change – would we really call it an overruling, if the higher court dismissed the arguments of lower court, abolished lower court's decision and held to its previous case law? The body making the ultimate decision,is (the same as in the *common law* system) the higher court, the author of the case law.

Therefore, I must conclude that these comparative arguments at the level of bindingness of case law are not sound. I think that the distinction between discursive and normative binding effect is interesting, but it is again building of theoretical sand castles with no effect on the practice whatsoever, and it even fails to be descriptive about the actual decision-making.

Conclusions

It is sometimes mentioned in comparative legal studies that the systems of *common law* and *civil law* gradually become more convergent. The growing role

[64] See *Peczenik, A.* The Binding Force of Precedent. In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, p. 468.

of statute law in Anglo-American countries and of 'case law' in the countries of continental Europe is one of the symptoms of this tendency.[65] The caricature of *civil law* systems free from the shackles of precedent in contrast to the *common law* enslaved to its own past (or 'preserving the good old order') is certainly no longer even remotely accurate, if it ever was.[66]

One of examples of this convergence is a precedential binding effect. We do not have to look at it from the perspective of mixing up the aspects that are alien to the system. I believe the better perspective to look at it is from the point of view of inspiration. We are not forced to take into our legal system the aspects that we do not want to implement. The globalization only gives us an opportunity to see the functioning of legal systems of specific countries more easily than ever before. We can see what is working and what is not, and it may inspire us to do some changes in our own legal system.

Yet on the other hand – would we not arrive to the same conclusion even without taking inspiration from the *common law* system? Is it not just and right to ensure that judges decide similar cases in a similar way? That is the only meaning of the precedential binding effect. It does not mean that a judge has to follow the previous case law in any case. The precedential binding effect means that if the court wants to decide differently from the previous case law, it must provide a substantiation why it did so. If it fails to do so, its decision is defective in the same manner in *civil law* and *common law* systems.

None of comments made by this paper should be, however, interpreted in a way that would imply that case law in the continental legal system is the same as precedents in Anglo-American legal system. There are differences connected to the different historical development. At the same time, it should be noted that the factual strength of the precedential binding effect, the factual application of the law and the hierarchy of formal sources of law differ significantly even between individual countries of *civil law* among themselves but also between individual countries of *common law* countries among themselves. And it is a challenge for the field of legal theory not to remain solely on the level of the distinction between continental legal system and Anglo-American legal system, but to actually provide the theoretical background that would correspond to all of the "shades of gray" of individual legal orders.

I believe that we should classify case law among other formal sources of law even in continental legal system, and that differences between precedents in *common law* system and case law in *civil law* system are of quantitative and not qualitative level. The changes and the development made in recent decades concerning the application of a right to a fair trial or a right to equal treatment under the law altered the perception of the binding effect of case law in historical context. With the courts developing the doctrine of precedential binding effect and its practical application, the status of case law changed, and legal theory should react to this.

Application of the precedential binding effect is a fact. If a court system does not remedy or otherwise take account of inappropriate departures from precedent,

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[65] *Morawski, L., Zirk-Sadowski, M.* Precedent in Poland. In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, p. 252.

[66] See *MacCormick, D. N., Summers, R. S.* Further General Reflections and Conclusion. In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, p. 532.

the judges will not interpret and apply codes, statutes and precedents in rule-like fashion, and will thereby sacrifice such formal 'rule of law' values as legitimacy, objectivity, certainty, equality before the law, dispute avoidance and private dispute settlement.[67] The binding effect of case law is accepted by the European Court of Human Rights, Court of Justice of European Union, to the same conclusion came even highest courts of different European states. It is also a fact that is accepted as correct in the field of constitutional law, as it is compliant with the principles of constitutional law, human rights and also with the theoretical notion of legal state (*Rechtsstaat*). Furthermore, I believe there is nothing to criticize from the perspective of legal theory, since the application of this doctrine leads to outcomes that are just. It is not possible to ignore decisions that have been made in other cases when deciding similar cases, if the principles of legal states are being adhered to. This thesis is true for both the *common law* and *civil law* system. We do not have to have any provision § 13 of the Czech Civil Code for this rule to apply. This would be relevant even based on the constitutional principles and philosophical foundations of the legal state in the *civil law* system and rule of law in the *common law* system.

The debate whether a case law should be classified as one of the formal sources of law is only theoretical. That should not be interpreted as irrelevant and useless. However, it does not change anything regarding the fact that the precedential binding effect is applied. The final answer to the question of whether a case law is or is not a source of law in *civil law* system depends solely on the degree to which we are strict about our requirements to classify an entity as a source of law. I have, however, proposed a different way to classify sources of law – autonomous sources of law and unautonomous sources of law. The criterion of autonomy is a criterion that more convincingly and precisely speaks about the nature of a source of law in each jurisdiction.

The legal certainty is an important value and the law should do its best to uphold it. On the other hand, just the legal certainty and predictability of the law are not enough when other legal values are not present. The uniformity of the application of law should not be a fetish, because uniform decision-making does not necessarily mean correct decision-making.[68] Even though the law in Nazi Germany was predictable, it did not generate the right outcome. The rules were strict and clear, the outcome for the person involved, was predictable but ultimately it did not mean justice. A jurisdiction, where the law is not predictable, cannot be deemed to bring justice and to be fair, at the same time, only predictability and certainty without any regard to substantive respect toward people and their rights is just the same, maybe even graver denial of justice.

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[67] See *Summers, R. S., Eng, S.* Departures from Precedent. In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, p. 520.

[68] *Morawski, L., Zirk-Sadowski, M.* Precedent in Poland. In: *MacCormick, D. N., Summers, R. S.* Interpreting Precedents: A Comparative Study. New York: Routledge, 2016, ISBN 978-1-85521-686-0, p. 244.

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https://doi.org/10.22364/jull.11.05

Case Law of the Supreme Courts in Post-Soviet Legal Systems

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The article is dedicated to introduction of case law of the supreme courts in post-Soviet legal systems and the issues thereof. The author analyzes the means of unifying judicial practice by regulatory explanations of the supreme courts in Soviet legal systems. The thesis that such practices negatively affected the independence of the judiciary and generated formalism and passivity of the judiciary was justified. The author clarifies, which post-Soviet countries still have such regulatory explanations, and which ones have refused them and how that was done. The legal provisions, which introduced case law in such post-Soviet legal systems as Azerbaijan, Armenia, Estonia, Georgia, Latvia, Lithuania, Moldova and Ukraine are analyzed. The author states the necessity of further research of mechanisms for ensuring case law practice in post-Soviet legal systems.

Keywords: case law, judicial precedent, unification of judicial practice, separation of state power, Soviet law, post-Soviet law.

Content

Introduction

In Soviet legal systems, unification and development of judicial practice were carried out by means of regulatory explanations of the supreme courts on the basis of summarizing the judicial practice. Such regulatory explanations not only unified the judicial practice, but also realized the control and supervision under the judiciary of the Soviet Union. Such practices negatively affected the independence of the judiciary and generated formalism and passivity of the judiciary.

The practice of regulatory explanations of the supreme courts on the basis of summarizing the judicial practice is not known for common and civil law systems. In these systems, the unification of judicial practice is carried out by giving decisions of the supreme courts in specific cases the value of an example, a model for resolving similar and analogous cases, which have the nature of case law.

In this regard, preparatory materials[1] and the last Opinion No. 20[2] of the Consultative Council of European Judges (CCJE) entitled "On the role of courts with respect to uniform application of the law" are significant and interesting.

All post-Soviet legal systems proclaimed the principle of separation of the state power and thus the independence of the judiciary. In this regard, several questions arise – which post-Soviet countries still retain regulatory explanations on the basis of summarizing of judicial practice; which post-Soviet countries have refused from such regulatory explanations; in what post-Soviet countries was the case law of the supreme courts introduced; what are the peculiarities and differences in the case law of the supreme courts in post-Soviet legal systems? The current article is dedicated to answering these questions.

1. Regulatory Explanations of Supreme Courts and Judicial Precedents in Soviet Period

As it is known, in Soviet period the judicial precedent and case law were challenged and not recognized. It was justified by the fact that they contradicted the principle of socialist legality and was caused by the need for ideological opposition to bourgeois legal systems.

As it is noted in the textbook "Marxist-Leninist General Theory of State and Law", "...socialist states do not recognize such a source of law as a judicial precedent, which leads to a departure from the principle of legality and undermines the role of representative bodies of the state in legislative activity. Socialist judicial bodies administer justice as one of the forms of application of the law, which is not related to the law-making authority of the court in resolving specific cases"[3].

Hence, in Soviet times the unifying judicial practice was carried out by means of regulatory explanations of plenum of the supreme courts on the basis of summarizing the judicial practice. Such regulatory explanations based on summarizing the judicial practice were an invention of Soviet legal systems and were not used in civil and common law systems.

Therefore, immediately after the formation of the USSR in 1923, the Regulation on the Supreme Court of the USSR was adopted. Its competence in the field of general supervision and supervision of the legality anticipated "the provision

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1 See: Compilation of replies to the questionnaire for the preparation of the CCJE Opinion No. 20 (2017) entitled "The role of courts with respect to uniform application of the law". Available: https://rm.coe.int/compilation-of-replies-to-opinion-no-20/1680764112 [last viewed 16.12.2017].

2 See: Opinion No. 20 "On the role of courts with respect to uniform application of the law". Available: https://rm.coe.int/opinion-no-20-2017-on-the-role-of-courts-with-respect-to-the-uniform-a/16807661e3 [last viewed 16.12.2017].

3 Marksystsko-lenynskaya obshchaya teoryya hosudarstva y prava. Sotsyalystycheskoe pravo [Marxist-Leninist General Theory of State and Law. Socialist law] / Redkol.: *Lukasheva E. A.* (Otv. red.), *Mytskevych A. V.*, *Samoshchenko Y. S.*, *Farberov N. P.*, *Shebanov A. F.* M.: Yuryd. lyt., 1973, p. 325

to the supreme courts of the Union republics of regulatory explanations and interpretations of the all-Union legislation"[4].

The Soviet legal doctrine engendered discussions about the nature of such regulatory explanations of the supreme courts – whether they were sources of law, whether they were concretization, detailing or interpretation of laws, whether they had normative nature, and if that was a form of judicial practice.

For instance, in some literary sources the regulatory explanations were considered as subordinate normative acts, by which the Supreme Court of the USSR managed the activities of all judicial bodies in the country, and interpretation of legal norms that contained in them was recognized as official normative interpretation.[5]

Other literary sources noted that "the regulatory explanations contain provisions concretizing and detailing the legal norms within the law," and "the value of regulatory explanations was assessed as a form of judicial practice," it was called "generalized judicial practice", "secondary judicial practice".[6]

Instead, S. L. Zivs considered that "the resolutions of the Plenum are not "judicial practice" or "part of judicial practice". Decisions are made on the basis of generalization and analysis of judicial practice. Thus, the regulatory explanations of the plenum are a certain generalized conclusions from a set of similar decisions in homogeneous court cases"[7].

However, despite the doctrinal discussions concerning nature, the role and importance of regulatory explanations and their mandatory nature were established at the constitutional and legislative levels of the Soviet Union and the Union's republics. The Constitution of the USSR of 1924 reproduced the provisions of the Regulation on the Supreme Court of the USSR of 1923 that "the Supreme Court of the USSR, with the aim of asserting revolutionary legality, provides the supreme courts of the Union republics with regulatory explanations on issues of the all-Union legislation" (p. 41),[8] and in accordance with the Constitution of the USSR of 1936[9] and the Constitution of the USSR of 1977[10], the Supreme Court of the USSR continued to oversee the judicial activity of all judicial bodies of the USSR and the Union republics.

The Law on the Supreme Court of the USSR of 1979 also envisaged that he "has to study and generalize judicial practice, analyze judicial statistics, and provide

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[4] Postanovlenye Prezydyuma TsYK SSSR [decree of the presidium CEK USSR] "Polozhenye o Verkhovnom Sude Soyuza Sovetskykh Sotsyalystycheskykh Respublyk" [Regulation on the Supreme Court of the USSR] ot 23.11.1923. Available: http://www.consultant.ru/cons/cgi/online.cgi?req=doc&base=ESU&n=16293#0 [last viewed 16.12.2017].

[5] O yurydycheskoy pryrode rukovodyashchykh ukazanyy Plenuma Verkhovnoho Suda SSSR [On the legal nature of the regulatory explanations of the Plenum of the Supreme Court of the USSR]. Sovetskoe hosudarstvo y pravo [Soviet state and law]. M.: Nauka, No. 8, 1956, pp. 13–15.

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[7] *Zyvs S. L.* Ystochnyky prava [Sources of Law] / Otv. red.: *Kazymyrchuk V. P.* M.: Nauka, 1981, p. 184 .

[8] Konstytutsyya (Osnovnoy Zakon) Soyuza Sovetskykh Sotsyalystycheskykh Respublyk [Constitution (Basic Law) of the Union of Soviet Socialist Republics] (31.01.1924). Available: http://constitution.garant.ru/history/ussr-rsfsr/1924/red_1924/5508661/chapter/7/#block_700 [last viewed 16.12.2017].

[9] Konstytutsyya (Osnovnoy Zakon) Soyuza Sovetskykh Sotsyalystycheskykh Respublyk [Constitution (Basic Law) of the Union of Soviet Socialist Republics] (05.12.1936). Available: http://constitution.garant.ru/history/ussr-rsfsr/1936/red_1936/3958676/chapter/9/#block_1900 [last viewed 16.12.2017].

[10] Konstytutsyya (Osnovnoy Zakon) Soyuza Sovetskykh Sotsyalystycheskykh Respublyk [Constitution (Basic Law) of the Union of Soviet Socialist Republics] (07.10.1977). Available: http://constitution.garant.ru/history/ussr-rsfsr/1977/red_1977/5478732/chapter/20/#block_2000 [last viewed 16.12.2017].

regulatory explanations to courts on the application of legislation arising in the course of judicial proceedings. The regulatory explanations given by Plenum of the USSR Supreme Court are mandatory for the courts, other bodies and officials who apply the law of which the interpretation is given. The Supreme Court of the USSR exercises control over the implementation by the courts of regulatory explanations of the Plenum of the USSR Supreme Court".[11]

It should be noted that these provisions were reproduced in the legislation of the Union republics.

And although in Soviet legal systems the supreme courts largely had been unifying the judicial practice by means of regulatory explanations, they were insufficient and often did not resolve problematic issues of judicial practice in a timely and effective manner. Problematic issues of judicial practice very often appeared during the resolution of a specific case and required timely and subsequently similar resolution in similar and analogous cases. The regulatory explanations were adopted on the basis of study and summary of the judicial practice, and it often required a long time. Therefore, timely solutions of problematic issues of judicial practice in such cases required an increase in the role and importance for similar and analogous cases of the decisions of the Supreme Courts in specific cases, which resolved such issues. In this regard, Soviet legal systems inevitably needed a case law nature pertaining to the decisions of the supreme courts in specific cases.

Thus, a judicial decision well-known in Soviet times, which was essential for resolving similar cases and development of judicial practice, was the decision of the Supreme Court of the USSR in the case of Martsyniuc (1940).[12]

In Soviet times, there were also other confirmations of the need to take into account the decisions of the supreme courts in similar cases, and their factual nature of case law. Thus, the Supreme Court of the USSR itself, in the Resolution of the Plenum of June 30, 1964, "On Measures for the Improvement of the Systematization of Legislation and Judicial Practices in the Judiciary", proposed to systematize and take into account in the judicial activity not only the regulatory explanations but also the decisions of the courts on issues having a principled nature.[13] Also, the Supreme Court of the USSR in specific cases provided its decisions with legal force of regulatory explanations and expressly stated this legal force in such specific decisions. For example, on November 13, 1962, the Supreme

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[11] Zakon Soyuza Sovetskykh Sotsyalystycheskykh Respublyk o Verkhovnom Sude SSSR [Law of the Union of Soviet Socialist Republics on Supreme Court of USSR] (30.11.1979). Available: http://pravo.levonevsky.org/bazazru/texts25/txt25726.htm [last viewed 16.12.2017].

[12] "Martsyniuc suffered a personal injury, saving, on his own initiative, state property from the fire in one of the railway stations on the route of the train in which Martsyniuc was traveling. The victim claimed a compensation for property damage occasioned by causing injury to him. The lower courts dismissed Martsyniuc's claim on the grounds that the law provided the liability for causing harm by another person, but did not know the cases of liability for the harm that the victim himself had caused by taking certain actions. In the Martsyniuc case, the Supreme Court pointed out that although the Civil Code did not provide for "direct liability of the enterprises in such cases, however, the denial of Martsyniuc's suit on this formal basis is incorrect. ... Therefore, the court had to impose the obligation on the railway, whose property Martsyniuc acted to protect, to reimburse Martsyniuc for personal property damage suffered by him."

[Se]e more: *Yoffe, O. S.* Yzbrannye trudy [Selected Works]. Tom II [Volume II]. Yurydycheskyy tsentr Press; Sankt-Peterburh; 2004, p. 45.

[13] Sudebnaya praktyka v sovetskoy pravovoy systeme [Judicial practice in the Soviet legal system]. Otv. red.: *Bratus', S. N.* M.: Yuryd. lyt., 1975, p. 59.

Court of the USSR granted the force of regulatory explanations to the ruling in the specific case of Talanov, as explicitly noted in this ruling.[14]

The Soviet legal doctrine began to react to the needs and demands of the judicial practice in increasing the value of the decisions of the supreme courts in specific cases. Thus, already in 1975 in the collective monographic work "Judicial Practice in the Soviet Legal System", the authors noted that "in order to ensure the unity and legality of judicial practice, fundamental rulings and decisions of the highest judicial bodies in specific cases are of a great importance. Separate judicial clarifications of the law issued by the Supreme Court of the USSR and the supreme courts of the Union republics and published in the journals have a serious impact on the application of the law by other courts in the resolving of other cases".[15]

In connection with the questions of judicial practice in the Soviet legal doctrine, new theoretical terms and constructions began to be introduced into scientific circulation, in particular the "precedent of the interpretation" and "legal provisions".

S. M. Bratus and O. V. Vengerov, paying attention to the role of the fundamental decisions of the highest judicial bodies in specific cases, suggested to mark them as "peculiar precedents of the interpretation of legal norms". At the same time, as noted by the scientists, "the difference between such a precedent from the judicial precedent was that the judicial precedent leads to the formation of a new legal norm by the courts, at the same time the precedent of interpretation is related to the interpretation of the existing legal norm, is connected with the development of a already established, "stable" application of the norm in similar cases".[16]

However, at the same time, the scientists were forced to return to the postulates of the denial of the judicial precedent in Soviet law and to repeat that "Of course, this perception does not occur because the precedent of judicial interpretation is mandatory. Then it would be a judicial precedent – a phenomenon that is not typical of the Soviet legal system. The perception of the precedent of interpretation is carried out in other basis, because of the persuasiveness, argumentation of the fundamental decision". [17]

Therefore, despite the doctrinal denial of the judicial precedent and extension of the scope of application of the regulatory explanations of the supreme courts in judicial practice, decisions of the supreme courts in specific cases were, in fact, binding in similar cases. The Soviet legal doctrine was forced to react to such an actual state and request of the court practice in increasing the significance of the decisions of the supreme courts for similar cases.

However, the judicial practice in the Soviet legal systems was unified by means of regulatory explanations, and, above all, the control and supervision were carried out under the judicial bodies of the Soviet Union and the Union republics. And this, in the absence of recognition of the principle of power division, significantly and negatively influenced the independence of the judiciary and the fairness of justice.

Such regulatory explanations under conditions of the principle of strict observance of socialist legality, gave rise to passivity and formalism of judicial

[14] Sudebnaya praktyka v sovetskoy pravovoy systeme [Judicial practice in the Soviet legal system]. Otv. red.: *Bratus', S. N.* M.: Yuryd. lyt., 1975, p. 57.

[15] Sudebnaya praktyka v sovetskoy pravovoy systeme [Judicial practice in the Soviet legal system]. Otv. red.: *Bratus', S. N.* M.: Yuryd. lyt., 1975, p. 58.

[16] Sudebnaya praktyka v sovetskoy pravovoy systeme [Judicial practice in the Soviet legal system]. Otv. red.: *Bratus', S. N.* M.: Yuryd. lyt., 1975, p. 58.

[17] Sudebnaya praktyka v sovetskoy pravovoy systeme [Judicial practice in the Soviet legal system]. Otv. red.: *Bratus', S. N.* M.: Yuryd. lyt., 1975, pp. 64–65.

activity. Courts, while resolving complicated trials, expected prescriptions from above, and without a proper guidance could not depart from the letter of the socialist law, hence, judicial activism was inadmissible and restricted.

Such a long Soviet practice of formalism and passivity of the judiciary also has implications in post-Soviet times – many older judges are accustomed to the previous order, and passively awaiting explanations from the supreme courts to resolve complicated cases, rather than actively and effectively serve justice. It manifests in conserving institute of explanations.

2. Conserving and Abandonment of Explanations Based on Summarizing of Judicial Practice in Post-Soviet Legal Systems

After collapse of the Soviet Union and proclamation and restoration of the independence, all post-Soviet states declared the principle of separation of the state power and recognized the independence of the judiciary.

In this regard, the following questions arise: 1) which post-Soviet countries still retain the explanations based on summarizing the judicial practice; 2) which ones have abandoned them and in what way?

The answers to these questions will be better demonstrated in the relevant table.

Table 1. Explanations of supreme courts based on summarizing judicial practice

No.	Post-soviet legal systems	Conserving		Abandonment
		Regulatory (mandatory, binding)	Recommendatory (not binding)	
1.1	Azerbaijan	-	+	-
1.2	Armenia	-	-	+ 2007
1.3	Belarus	+	-	-
1.4	Estonia	-	-	+
1.5	Georgia	-	-	+ 2009
1.6	Kazakhstan	+	-	-
1.7	Kyrgyzstan	+	-	-
1.8	Latvia	-	-	+ 2003
1.9	Lithuania	-	-	+ 2006
1.10	Moldova	-	+	-
1.11	Russia	-	+	-
1.12	Tajikistan	+	-	-
1.13	Turkmenistan	+	-	-
1.14	Uzbekistan	+	-	-
1.15	Ukraine	-	+ 2017	+ 2010, 2015

What follows from the above data?

Out of 15 post-Soviet states, the explanations based on summarizing the judicial practice still exist in 10 countries, in 6 – Belarus, Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, Uzbekistan – such explanations are mandatory, in 4 – Azerbaijan, Moldova, Russia, Ukraine – recommendatory.

It is noteworthy, that in Azerbaijan[18], Kazakhstan[19], Kyrgyzstan[20] and in the Russian Federation[21] such explanations are set at the constitutional level. In Belarus[22], such explanations according to the Law on normative legal acts are classified as an independent kind of normative legal acts. In Kazakhstan, the nature of explanations is clarified in decision of the constitutional court.[23] An interesting provision on such explanations is held in Moldova – according to the Law on the Supreme Court of Justice, they "do not have the character of the interpretation of laws and are not binding on judges".[24] The draft of the constitution of the Russian Federation originally contained the wording "regulatory explanations", however, the current constitution of the Russian Federation simply says "explanations". Therefore, the discussions continue in the Russian legal doctrine – are such explanations mandatory or recommendatory?

Concerning the cancellation of such explanations, 6 out of 15 post-Soviet statesrenounced them – Armenia, Georgia, Estonia, Latvia, Lithuania and Ukraine. Such refusal and cancellation took place at different times and in different ways.

Latvia is one of the first legal systems in the post-Soviet space, which abolished such explanations. In February 4, 2003, the Constitutional Court of Latvia passed the decision, in which it noted, "not denying the importance of a uniform court practice in ensuring legal stability, it is not admissible that the Plenum of the Supreme Court becomes similar to the legislator and determines generally binding (mandatory) instructions from which the judge, who is reviewing the case, is not allowed to deviate".[25] "Thus, the challenged norm, which authorizes the Plenum of the Supreme Court to pass binding on the courts decisions on application of laws, is at variance with the principle of separation of power and limits the independence

[18] See part 1 of the Article 131: Konstytutsyya Azerbaydzhanskoy Respublyky [Constitution of the Republic of Azerbaijan] (12.11.1995). Available: http://ru.president.az/azerbaijan/constitution [last viewed 16.12.2017].

[19] See Article 4: Konstytutsyya Respublyky Kazakhstan [Constitution of the Republic of Kazakhstan] (30.08.1995). Available: http://www.constitution.kz/ [last viewed 16.12.2017].

[20] See part 2 of Article 96: Konstytutsyya Kyrhyzskoy Respublyky [Constitution of the Kyrgyz Republic] (27.06.2010). Available: http://www.gov.kg/?page_id=263&lang=ru [last viewed 16.12.2017].

[21] See Article 126: Konstytutsyya Rossyyskoy Federatsyy [Constitution of the Russian Federation] (12.12.1993). Available: http://www.constitution.ru/10003000/10003000-9.htm [last viewed 16.12.2017].

[22] See Article 2: Zakon Respublyky Belarus' O normatyvnykh pravovykh aktakh Respublyky Belarus' [Law of the Republic of Belarus on normative legal acts of the Republic of Belarus] (10.01.2000) http://pravo.by/document/?guid=3871&p0=h10000361 [last viewed 16.12.2017].

[23] See: Postanovlenye Konstytutsyonnoho Soveta Respublyky Kazakhstan [Regulatory decision of the Constitutional Council of the Republic of Kazakhstan] (06.03.1997). Available: http://www.ksrk.gov.kz/rus/resheniya?cid=11&rid=166 [last viewed 16.12.2017].

[24] See p. d) of the Article 2: Zakon Respublyka Moldova o Vysshey sudebnoy palate [Law of the Republic of Moldova on Supreme Court of Justice] (26.03.1996). Available: http://lex.justice.md/viewdoc.php?action=view&view=doc&id=346405&lang=2 [last viewed 16.12.2017].

[25] See p. 2.3.: Reshenye Konstytutsyonnoho Suda Latvyyskoy Respublyky № 2002-06-01 [Judgment of the Constitutional Court of the Republic of Latvia No. 2002-06-01] (04.02.2003). Available: http://www.satv.tiesa.gov.lv/wp-content/uploads/2002/06/2002-06-01_Spriedums_RU.pdf [last viewed 16.12.2017].

of judges (courts)".[26] "Court decisions, which are reached by observing only the interpretations of legal norms presented in Plenum decisions, may turn out to be unjust, especially in cases when multiform and constantly changing living conditions are not taken into consideration or when the judge experiences no right of deviating from the provisions of the Plenum decisions".[27] "Thus, court decisions, which have been passed by applying binding to courts interpretations by the Supreme Court may come into collision with the principle of fairness (justice), which is incorporated into Article 1 of the *Satversme*".[28]

In other post-Soviet countries (Armenia, Georgia, Estonia, Lithuania and Ukraine), revoking of explanations of the supreme courts on the basis of summarizing the judicial practice took place through adoption of new laws on judiciary and abolition of the corresponding authority of the supreme courts.

In Ukraine, in 2010, at first the Supreme Court of Ukraine was deprived of the authority to accept explanations in the form of Plenum resolutions, and in 2015 higher specialized courts were also deprived of such an authority. However, on 03.10.2017, inconsistently and unfoundedly, the Plenum of the Supreme Court was returned the authority to provide recommendatory explanations on the basis of summarizing judicial practice.[29]

3. Introduction of Case Law of Supreme Courts in Post-Soviet Legal Systems

In those post-Soviet legal systems, where such explanations were abolished or became recommendatory, the need for unifying the judicial practice became acute. This need for unifying the judicial practice began to be addressed by introducing case law of the supreme courts.

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[26] See p. 2.4.: Reshenye Konstytutsyonnoho Suda Latvyyskoy Respublyky № 2002-06-01 [Judgment of the Constitutional Court of the Republic of Latvia No. 2002-06-01] (04.02.2003). Available: http://www.satv.tiesa.gov.lv/wp-content/uploads/2002/06/2002-06-01_Spriedums_RU.pdf [last viewed 16.12.2017].

[27] See p. 3.: Reshenye Konstytutsyonnoho Suda Latvyyskoy Respublyky № 2002-06-01 [Judgment of the Constitutional Court of the Republic of Latvia No. 2002-06-01] (04.02.2003). Available: http://www.satv.tiesa.gov.lv/wp-content/uploads/2002/06/2002-06-01_Spriedums_RU.pdf [last viewed 16.12.2017].

[28] See p. 3: Reshenye Konstytutsyonnoho Suda Latvyyskoy Respublyky № 2002-06-01 [Judgment of the Constitutional Court of the Republic of Latvia No. 2002-06-01] (04.02.2003). Available: http://www.satv.tiesa.gov.lv/wp-content/uploads/2002/06/2002-06-01_Spriedums_RU.pdf [last viewed 16.12.2017].

[29] See 10^2: Law of Ukraine On the Judiciary and Status of Judges N.1402-VIII (02.06.2016) with amendments and supplements by Law of Ukraine On Amendments to the Commercial Procedural Code of Ukraine, the Civil Procedural Code of Ukraine, the Code of Administrative Legal Proceedings of Ukraine and other legislative acts No. 2147-VIII (03.10.2017) Available: http://zakon2.rada.gov.ua/laws/show/1402-19/print1509617263889479 [last viewed 16.12.2017].

Table 2. Introducing case law of the supreme courts

No.	Post-Soviet legal systems	In legislation	In judicial decisions	Aareas case law use	
				In all categories of cases	In some categories of cases
2.1	Azerbaijan	+ 2009	-	-	admin.
2.2	Armenia	+ 2007	-	+	-
2.3	Estonia	+ 2003, 2005	+	+	crimin. civil.
2.4	Georgia	+ 2010	-	+	-
2.5	Latvia	+ 1999	+	+	civil. admin.
2.6	Lithuania	+ 2002, 2008, 2016	+	+	-
2.7	Moldova	+ 2012	-	-	crimin.
2.8	Ukraine	+ 2010, 2011, 2015	-	+	-

What follows from the above data?

Case law is observed in 8 post-Soviet countries: Azerbaijan, Armenia, Estonia, Georgia, Latvia, Lithuania, Moldova and Ukraine. The binding nature of the decisions of the supreme courts in similar cases has been established in these countries either through the provisions of legislative acts, or decisions of the constitutional or supreme courts.

The binding nature of the Supreme Court decisions in similar cases is directly enshrined in the legislative acts of Azerbaijan, Armenia, Estonia, Georgia, Latvia, Lithuania, Moldova and Ukraine.

This recognition of case law in these post-Soviet legal systems is coming about gradually, at different times. The Baltic States (Estonia, Latvia and Lithuania) were the first in the post-Soviet legal space to recognize the binding nature of the decisions of the supreme courts in similar cases at the legislative level.

In 1998, the Civil Procedure Law in Latvia established that "in applying legal norms, the court shall take into account the case law". [30]

In Lithuania, a new version of the Law on Courts (24.01.2002) indicated that "interpretation in respect of the application of statutes and other legal acts in the rulings published in the Supreme Court Bulletin shall be taken into consideration by courts, state and other institutions, as well as by other persons, when applying these statutes and other legislation",[31] in accordance with the amendments adopted on July 03, 2008, "the courts of lower instance, when taking decisions in cases of

[30] See section 5, Civil Procedure Law of Republic of Latvia (03.11.1998). Available: http://vvc.gov.lv/image/catalog/dokumenti/Civil%20Procedure%20Law.docx [last viewed 16.12.2017].

[31] See part 2 of the Article 23, New Version of the Law of the Republic of Lithuania on Courts (31.05.1994). Available: https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.338141?jfwid=-wd7z8ezyc [last viewed 16.12.2017].

appropriate categories, shall be bound by the rules of interpretation formulated in analogous or conceptually similar cases",[32] and in accordance with the amendments adopted on June 02, 2016, "the interpretations of the laws and other legal acts contained in the Supreme Court rulings shall be taken into account by the state and other institutions, as well as other persons, by applying the same laws and regulations".[33]

In Estonia, according to the provisions of a new Code of Criminal Procedure (12.02.2003), "the sources of criminal procedural law are decisions of the Supreme Court in the issues, which are not regulated by other sources of criminal procedural law but which arise in the application of law". [34]

The case law of the supreme courts was introduced in new codes and laws on judiciary in Armenia in 2007, Azerbaijan – in 2009, Georgia – in 2010, Moldova – in 2012, Ukraine – in 2010 (2011, 2015, 2016).

Hence, in Armenia (21.02.2007) "the reasoning of a judicial act of the Cassation Court … in a case with certain factual circumstances (including the construal of the law) is binding on a court in the examination of a case with identical/similar factual circumstances, unless the latter court, by indicating solid arguments, justifies that such reasoning is not applicable to the factual circumstances at hand".[35]

In Azerbaijan (30.07.2009), "the decision of the Plenum is made in the form of ruling and is binding upon all court composition of the administrative-economic collegium of the Supreme Court".[36]

In Georgia (10.12.2010), "legal interpretations (interpretation of a norm) by the Grand Chamber of the Supreme Court shall be binding upon the common courts of all instances".[37]

In Moldova (05.04.2012), "decisions of the Criminal College of the Supreme Court of Justice issued as a result of hearing a cassation in the interest of the law shall be mandatory for the courts to the extent to which the de facto and de jure situation in the case remains the one existing at the moment of examining the cassation".[38]

In Ukraine, firstly, there were amendments brought by the Law On the Judiciary and Status of Judges (07.07.2010) in all procedural codes of such content: "the decision of the Supreme Court of Ukraine, adopted on the basis of the results of consideration of the application for review of the court decision on grounds of unequal use by the court (courts) of the cassation instance of the same substantive legal norm in similar legal relations, is binding for all subjects of authority that apply in their activities normative legal act that contains the specified legal norm,

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[32] See part 4 of the Article 33, Law on Courts of Lithuania (31.05.1994). Available: https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.338141?jfwid=-wd7z8ezyc [last viewed 16.12.2017].

[33] See part 3 of the Article 23, Law on Courts of Lithuania (31.05.1994). Available: https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/TAIS.338141?jfwid=-wd7z8ezyc [last viewed 16.12.2017].

[34] See part 4 of the Article 2, Code of Criminal Procedure of Estonia RT I 2003, 27, 166 (12.02.2003). Available: https://www.riigiteataja.ee/en/eli/ee/Riigikogu/act/513072017002/consolide [last viewed 16.12.2017].

[35] See part 4 of Article 15, Judicial code of Republic of Armenia (21.02.2007). Available: http://www.parliament.am/legislation.php?sel=show&ID=2966&lang=eng [last viewed 16.12.2017].

[36] See part 4 of Article 98, Administrative Procedural Code of the Republic of Azerbaijan (30.07.2009). Available: http://www.legislationline.org/documents/id/17124 [last viewed 16.12.2017].

[37] See part 5 of Article 17, Organic Law of Georgia on Common Courts No. 2257-IIS (04.12.2009). Available: https://matsne.gov.ge/en/document/download/90676/13/en/pdf [last viewed 16.12.2017].

[38] See p. 9 of the Article 7, Criminal Procedure Code of the Republic of Moldova No. 122-XV (14.03.2003) http://www.legislationline.org/documents/section/criminal-codes/country/14 [last viewed 16.12.2017].

and for all courts of Ukraine. Courts are obliged to bring their judicial practice in line with the decision of the Supreme Court of Ukraine".[39]

Then (20.10.2011) there were amendments to all procedural codes of such content "to decide what legal norm should be applied in regard to particular legal matters, court is obliged to take into the consideration the conclusions of the Supreme Court of Ukraine, set in the decisions, issued as the result of the judicial review of statements requesting the review of the court decision …".[40]

And finally, a new Law of Ukraine On the Judiciary and Status of Judges (21.02.2015, 02.06.2016) enshrined that "conclusions regarding the application of legal provisions specified in resolutions of the Supreme Court shall be mandatory for all government entities that use in their activity the normative legal act containing the respective legal provision", "Conclusions regarding application of the legal provisions specified in resolutions of the Supreme Court shall be taken into account by other courts in the application of such legal provisions".[41]

It is also worth to consider the fact that among the post-Soviet countries, which recognized the case law of the supreme courts, the Baltic states occupy a special place. In these countries, the binding nature of the decisions of the supreme courts in similar cases is established not only in laws but it is also justified in the decisions of the constitutional and supreme courts.

For instance, in a well-known decision of the Constitutional Court of Lithuania dated March 23, 2006, it is indicated that "the courts of general jurisdiction of lower instance, which adopt decisions in cases of corresponding categories are bound by decisions of the courts of general jurisdiction of higher instance (precedents in cases of such categories) inevitably imply that the said courts have to follow such a concept of the content of corresponding provisions (norms, principles) of law, as well as the application of these provisions of law which were formed and followed when applying these provisions (norms, principles) in the previous cases, *inter alia,* when previously deciding on analogous cases. Disregarding the maxim that the same (analogous) cases have to be decided in the same way what arises from the Constitution would also mean disregarding the provisions of the Constitution on administration of justice as well as the constitutional principles of a state under the rule of law, justice, equality of people before the court and other constitutional principles".[42]

At the same time, there are differences in introducing the case law of the supreme courts in the post-Soviet legal systems: in the areas, where case law is used; in the wording of the character of bindingness; in the wording on the subject of bindingness; in the addressees of case law.

In Armenia, Georgia, Lithuania and Ukraine, the case law of the supreme courts was introduced at once in all categories of court cases – civil, criminal, administrative, etc. On the other hand, in Azerbaijan, Estonia, Latvia, and Moldova

[39] See Transitional provisions, Law of Ukraine On the Judiciary and Status of Judges No. 2453-VI (07.07.2010). Available: http://zakon3.rada.gov.ua/laws/show/2453-17/ed20100707/parao2751#o2751 [last viewed 16.12.2017].

[40] See: Law of Ukraine On Amendments to Certain Legislative Acts of Ukraine on the consideration of cases by the Supreme Court of Ukraine No. 3932-VI (20.10.2011). Available: http://zakon2.rada.gov.ua/laws/show/3932-17/ed20120115 [last viewed 16.12.2017].

[41] See pp. 5–6 of the Article 13, Law of Ukraine On the Judiciary and Status of Judges N.1402-VIII (02.06.2016). Available: http://vkksu.gov.ua/userfiles/doc/Law_on_Judiciary_and_Status_of_Judges_16%2007%202016_ENG.pdf [last viewed 16.12.2017].

[42] See p. 3.3.: Ruling of the Constitutional Court of the Republic of Lithuania in Case No. 33/03 (28.03.2006). Available: http://lrkt.lt/en/court-acts/search/170/ta925/content [last viewed 16.12.2017].

the introduction and application of case law of the supreme courts began in separate categories of court cases and subsequently spread onto other cases.

Thus, in Azerbaijan, case law is applied only in administrative matters, in Estonia, the recognition and formation of case law began in criminal cases and was extended to civil and administrative cases, in Latvia – first in civilian cases, and later in administrative ones, in Moldova – only in criminal cases. Such a difference in the use of the case law practice of the supreme courts in some countries – in all categories of court cases, and in others – only in some categories of cases, can be explained by the fact that in the first group of countries the judicial practice experienced a request for it in all the categories of cases, and the legislator resolutely and promptly institutionalized the case law, in contrast to others, where its introduction took place in those areas, where the need of the judicial practice was felt most acutely, and the legislator approached the introduction and formation of the case law practice with caution and prudence.

It is also necessary to draw attention to the fact that in various legislative acts of the post-Soviet countries the wording of the character and subject of bindingness of case law differ. For instance, in some legal systems (Azerbaijan, Armenia, Georgia, Moldova) the mandatory nature is formulated by direct reference to binding, in others (Latvia, Lithuania) – by means of such wording as "shall take into account", "shall take into consideration", "shall be bound", in Estonia – by referring to the sources of law, in Ukraine – the wording "shall be mandatory" and "shall be taken into account" is simultaneously used.

The subject of bindingness of case law in post-Soviet legal systems is different. For example, in Armenia "the reasoning of a judicial act of the Cassation Court (including the construal of the law)" is binding, in Georgia – "legal interpretations (interpretation of a norm) by the Grand Chamber of the Supreme Court", in Estonia – "decisions of the Supreme Court in the issues which are not regulated by other sources of criminal procedural law but which arise in the application of law", in Latvia – "judicature (case law)", in Lithuania – "interpretation in respect of the application of statutes and other legal acts", "rules of interpretation", in Moldova – "decisions of the Criminal College of the Supreme Court of Justice", in Ukraine – "conclusions regarding the application of legal provisions specified in resolutions of the Supreme Court".

Besides, in post-Soviet legal systems the addressees of case law vary, as well. In Azerbaijan only "all court compositions of the administrative-economic collegium of the Supreme Court" are addressed; in Armenia – the "court" is addressed; in Georgia – "the common courts of all instances"; in Estonia – "other persons applying the law"; in Latvia – the "court", in Lithuania – the "courts", "the state and other institutions, as well as other persons", in Moldova – "the courts", in Ukraine – "all subjects of authority", "other courts of general jurisdiction".

Particular attention should be paid to the fact that in the legal systems of Armenia and Lithuania the bindingness of decisions in similar cases is mandatory for lower courts not only by the supreme courts, but also by lower courts' own decisions in similar cases. The Law on Courts of Lithuania anticipates that "the courts of lower instance, when taking decisions in cases of appropriate categories, shall be bound by their own rules of interpretation formulated in analogous or conceptually similar cases", and in the Ruling of the Constitutional Court of the Republic of Lithuania it is set down that "the courts of general jurisdiction, when adopting decisions in cases of corresponding categories, are bound by their own

created precedents – decisions in the analogous cases". Thus, in Armenia and Lithuania, the vertical case law is supplemented by the horizontal case law.

Conclusions

1. In Soviet period, the case law was rejected and not recognized. This was justified by the fact that it contradicted the principle of socialist legality, and was brought about by the need for ideological opposition to bourgeois legal systems. However, it was due to the fact that case law allows for the activity and independence of the judiciary.
   Courts in the Soviet legal system were under control and supervision of the supreme courts. One of the means for control and supervision was the regulatory explanations of the supreme courts based on summarizing the judicial practice. Such regulatory explanations were the invention of the Soviet legal system and also carried out the function of unification of judicial practice. At the same time, they diminished and reduced the role and significance of the decisions of the supreme courts in specific cases.
   However, in judicial practice, the decisions of the supreme courts in complex and problematic cases were actually used as examples, samples and models for resolving similar and analogous cases. Consequently, in judicial practice, the need was felt for a greater importance of the decisions of the supreme courts for similar and analogous cases, that is, in nature of case law. Attention was also paid to the role and significance of the decisions of the supreme courts in complicated and problematic cases, but their case law was officially denied and not recognized.
2. After the proclamation and restoration of independence, all post-Soviet countries proclaimed the principle of the separation of power and thus the independence of the judiciary. Accordingly, the unification of judicial practice should be carried out not by the regulatory explanations of the supreme courts, which violate the independence of the judiciary but by other means, in particular, granting the decision of the supreme courts the value of an example, a model for resolving similar and analogous cases.
   However, in part of the post-Soviet legal systems, the explanations based on the generalization of judicial practice remain. They are mandatory and binding in Belarus, Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, Uzbekistan, and recommendatory – in Azerbaijan, Moldova, Russia, Ukraine.
   In those post-Soviet legal systems, which abolished the regulatory explanations of the supreme courts on the basis of summarizing the judicial practice, the decisions of the supreme courts in specific cases were given the value of an example, of a model for the resolving similar and analogous cases, that is, case law practice was introduced.
3. Case law is observed in Azerbaijan, Armenia, Estonia, Georgia, Latvia, Lithuania, Moldova and Ukraine. In different legislative acts, in particular in special laws on courts (Armenia, Georgia, Latvia, Lithuania, Ukraine), code of administrative procedure (Azerbaijan), codes of civil procedure (Estonia, Latvia, Lithuania, Ukraine), codes of criminal procedure (Georgia, Estonia, Moldova, Ukraine), provisions and mechanisms for direct or indirect ensuring of the binding force of the supreme court decisions in analogous cases are provided.

Such a recognition of case law in these post-Soviet legal systems came about gradually and at different times.

Among the post-Soviet countries which recognized the case law of the supreme courts, the Baltic states occupy a special place. In these countries, the binding nature of the decisions of the supreme courts in similar cases is established not only in laws but also justified in the decisions of the constitutional and supreme courts.

At the same time, there are differences in the introducing the case law of the supreme courts in the post-Soviet legal systems: in the areas, where the case law is used; in the wording of the character of bindingness; in the wording of the subject of bindingness; regarding the addressees of case law.

In those post-Soviet legal systems, which introduced the case law of the supreme courts, the mechanisms are also being formed for ensuring it, including the means of creation, ensuring bindingness and unity of the case law of the supreme courts, and the change and development of case law. The scope of this article does not permit to consider these issues, therefore a further discussion is required.

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https://doi.org/10.22364/jull.11.06

Why Have Constitutional Courts Been so Important for Democracy in Central Europe (…And So Hated by Those in Power)?[1]

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The contribution reacts to various thoughts about the present state of constitutionalism in the V4 countries. The author argues that the constitutional court, an institutional check on majoritarian decision-making, has been an indispensable component of constitutional-building in the Central European area. However, the model of a highly esteemed constitutional court, with its justices, nominated in a bipartisan manner, has been regularly contested, especially by those who were supposed to be constrained thereby. To outlive current and future populist waves, a result of vibrant discourse between political branches of government and a self-restrained constitutional court has a strong potential to stabilize democracy in the region, marked by authoritarian governments of the second half of the 20th century. Thus, the article will reason that we, the Central Europeans, need "more", rather than "less" constitutionalism to protect the legacy of the last democratic revolution.

Keywords: constituent power, constitutional democracy, political constitutionalism, central European constitutionalism.

Content

[1] This article is a result of the research project "The Role of Judiciary in Establishing of the Common European Constitutional Heritage and Identity", financially supported by the Scientific Grant Agency of the Ministry of Education, Science, Research and Sports of the Slovak Republic and the Slovak Academy of Sciences (project No. 1/0884/17).

A polity that has reached the point of making a democracy-destroying choice is highly unlikely to respect a judicial decision purporting to preclude it from doing so.

Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it.

Learned Hand; The Spirit of Liberty (1953)

Introduction – Democracy and Liberty

The model of governance that during the several past decades demonstrated its viability and was explicitly implemented in Western Europe, and after 1989 also in Central Europe, was constitutional democracy. This model characteristically guarantees free elections that provide legitimacy to the decisions of representatives of citizenry, and at the same time protects individual liberties through the constitutionally entrenched bill of rights. This model is, therefore, a symbiosis between democracy, a procedural part, and constitutionalism, a substantive part. It guarantees everyone's right to participate in governance through the election process, as well as protects fundamental principles of the respective society *erga omnes*, such as the rule of law, separation of powers, human rights and liberties.[2] The substantive part of this mechanism creates multiple constrains on elected representatives and thereby limits the exercise of majoritarian will. In other words, this constellation guarantees that the majority will be able to turn its voice into a policymaking agenda, while protecting fundamental rights of minorities, as well as their possibly dissenting opinions.

The constitutional power-limitation has various internal checks that prevent encroachments of one power into the domain of another. Most importantly, it creates numerous dispersions of power, so that one individual, one party, or even the entire branch of government would not be able to hijack the entire constitutional system. Instead, the multiple political actors are forced to cooperate. On the other hand, however, this complicated organisation produces several side effects that lead to ineffectiveness, dysfunctionality, or even paralysis.

The main tenet of this constitutional constellation is compromise-building, which has affected Western democracies and their politics for decades. Constitutional democracy attempts to find a healthy balance between legitimacy and efficiency of decision-making, resulting in criticism sometimes from one side of the political spectrum, sometimes from another.[3] It allowed minorities to peacefully coexist with majorities and meant that despite their mutual disagreements, various opinions were taken into consideration, and these were subsequently reflected in negotiated solutions and policy-making. The tensions between the branches of government have become a part of day-to-day politics. Thus, "in stable liberal democracies, government will by convention usually lead to consensual outcomes even if it means accepting interpretations that one or the other branch was originally in disagreement."[4]

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2 *Zakaria, F.* The Future of Freedom, 2007, p. 17.

3 *Van Reybrouck, D.* Against elections, 2016, p. 6.

4 *Minkkinen, P.* Political constitutionalism versus political constitutional theory: Law, power and politics. *International Journal of Constitutional Law*, No. 3, 2013, p. 609.

Moreover, the independent judiciary created an effective system of human rights' protection. The constitutional courts, special institutions that became widely popular in most of democratic countries in Europe after World War II, have gone even further. These bodies were designed specifically to protect basic principles of constitutionalism against politically driven decisions. The substantive part of constitutional democracy, thus, gained a huge institutional boost against the popular will of majorities. During the last decades, many serious doubts about the legitimacy of constitutional judiciary and judicial review were articulated. Nevertheless, the strong constitutional court today is the dominant institution of modern constitutionalism. The usefulness of judicial review and its role in the individual's protection, especially in Europe, has not been as forcefully challenged as in the US[5]. According to Fareed Zakaria, "the western model of government is best symbolized not by the mass plebiscite but the impartial judge".[6] The constitutionalism, or the substantive part of constitutional democracy, entrenched in the fundamental constitutional principles, created a rock-solid backbone of modern democratic countries. In that logic, in most western democracies the constitutional judge has become the ultimate guardian of constitutional system and its principles. The normative theory of legal constitutionalism became dominant in most European democracies immediately after World War II, and in Central and Eastern Europe after the fall of communism in 1989.

Nevertheless, constitutional democracy has been a contested term. Its content has been evolving and various modifications have emerged throughout history. The key feature of constitutional power-limitation of majorities, however, remains. The following text will outline some fundamental changes that have been severely modifying the general concept of constitutional democracy. The main objective of this article is to explain how this model of governance was implemented after 1989 in Central Europe, and how it later evolved in this region. The special importance in this process has been given to constitutional courts, the chief defenders of constitutional limitations of democratically transferred power. In this regard, the contribution will clarify why these bodies have been indispensable, especially for this region, and how current waves of populism have started to erode the fundaments of constitutional democracy. In conclusion, I will argue for "more", rather than "less" constitutionalism in order to protect the legacy of the last democratic revolution in Central Europe.

1. Two Constitutional Shifts

In the outlined model of constitutional democracy, which is sometimes understood as democracy in a broader sense, two dominant components, the substantive and procedural, have been mixed. During the last years, maybe even decades, however, the world has witnessed two substantial shifts that intentionally or unintentionally moved the equilibrium of this setting. This part will discuss the

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5 For the concept of "counter-majoritarian difficulty" see *Bickel, A.* The Least Dangerous Branch. The Supreme Court at the Bar of the Politics. 2nd edition. New Haven: Yale University Press, 1986; *Bork, R. H.* The Tempting of America: The Political Seduction of Law. New York: Free Press, 1990; *Friedman, B.* The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy. *New York University Law Review*, No. 2, 1998, pp. 333–433; *Tushnet, M.* Taking the Constitution away from the Courts. Princeton, New Jersey: Princeton University Press, 2000; *Waldron, J.* The Core of the Case Against Judicial Review. *Yale Law Journal*, No. 6, 2006, pp. 1346–1407.

6 *Zakaria, F.* The Future of Freedom, 2007, p. 20.

aforementioned two shifts, and will try to clarify the threats of these changes for the stability of constitutional democracy.

The first one, often discussed as undemocratic, and in that sense also undesirable, has been named "juridical shift", or the shift towards the rule by "juristocracy"[7]. According to opponents of this change, the judicial review and therewith the connected strong position of constitutional courts[8] have been equalized with a process that reinforces a given elite, or perpetuates the power of certain social groups fearing that they might lose their ascendancy in the future.[9] In other words, this understanding equals a shift towards constitutionalism with a rule of unelected judges, imposing their own personal preferences on the entire society. It has been branded as a direct threat to constitutional democracy and a danger to the balance between democracy and constitutionalism. According to this critical theory, the elites have been continuously gaining power through the judiciary and thereby cementing their position at the top to the detriment of the rest. This theory has been researched in many places around the world, but perhaps in Europe, with its supranational entities and international courts, it could be observed in the clearest possible way.

This alteration towards a more rigid form of constitutionalism has most likely not been a product of conspiracy, but rather it has been a consequence of historical development in Europe in the first half of the twentieth century. During this period, the parliamentary majorities possessed an unconstrained access to ultimate power in their respective societies. Unfortunately, the blind trust in majoritarian democracy with no meaningful institutional checks against the abuse of power resulted into a limitless majoritarian terror blessed by the then valid law. Perfectly legal majoritarian dictatorship generated an everlasting warning against the abuse of power and reinforced demands for tenable constitutional checks on power.

Therefore, the constitutional court, as the protector of fundamental democratic constitutional principles and individual liberties against the free will of the legislator, came into prominence in most European countries. This special institution, judicial in its core, embodies a neutral apolitical deliberator, deciding according to fundamental principles, entrenched in the constitution. These principles and their effects, cemented into the fabric of a democratic form of governance, were permanently taken from the disposition of parliamentary majorities. The constitutional court, as any other judicial body, in its deliberations and decision-making should not care about the opinions of certain religions, races, nationalities, genders, sexual orientation, etc. It should act in a just, impartial and unbiased manner, even against the popular will. That kind of impartiality cannot be expected from any political institution, bound by fluid and temporal majoritarian blessing. The acts of politicians do not have to be right, wrong, impartial, or neutral. They, however, must be popularly supported. The decisions of a constitutional court should follow another path, a path of constitutional values.

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[7] In French legal environment, the term was popularized by Édouard Lambert in 20th century as «Le gouvernement des juges».

[8] "Over the past few years the world has witnessed an astonishingly rapid transition to what may be called juristocracy. Around the globe, in more than eighty countries and in several supranational entities, constitutional reform has transferred an unprecedented amount of power from representative institutions to judiciaries", see: *Hirschl, R.* Towards Juristocracy: The Origins and Consequences of the New Constitutionalism. Harward University Press, 2007, ISBN 9780674025479, p. 1.

[9] *Hirschl, R.* Towards Juristocracy: The Origins and Consequences of the New Constitutionalism. Harward University Press, 2007, ISBN 9780674025479, p. 10.

Consequently, the constitutional court became a central institution in most countries of Western Europe. In civil law systems, the constitutional courts started to issue decisions endowed with *quasi*-precedential effects. Thereby, the judiciary in civil law world finally began to declare what the law is.[10] The abstract constitutional provisions have gradually provided the constitutional judiciary with a relatively open-ended discretion to proclaim how modern society should look like, what its preferences should be, and what is right and wrong. In the strong model of judicial review,[11] the constitutional courts are bestowed with a power to nullify the acts of parliament. Thus, the constitutional courts can decide specifically against the will of majoritarian politics, but presumably for the benefit of society. Thus, no wonder that politicians, acting on a laboriously won and temporal political mandate from the people, started to question the legitimacy and authority of constitutional courts. They have been routinely accusing constitutional courts of judicial activism and various forms of political shows, since the decision-making activity often involves the cases and controversies with huge political ramifications.

Sometimes judicial activism can be real, but more commonly the constitutional courts, as their brethren, ordinary courts, have been doing what they were created for – deciding cases and interpreting laws. No reasonable person can nowadays think of eradicating the entire judiciary just on the basis that judges are subjectively imposing their personal will on others, or that they have been interpreting statutes assertively. There is no better alternative for deciding cases, nor a better suited institution to do decision-making in modern society.

A similar logic can be applied to the decision-making of constitutional courts, although they have been deciding cases of a different magnitude. Certainly, these courts have been endowed with powerful functions that, however, correspond with the specificity of the role they have been given in democratic society. The constitutional court, as an institution, serves as a vital constitutional check on the legislative activity of parliament. Besides, the powers of constitutional courts were, at least in Europe, voluntarily transferred to them by the people in the constitutions. This entire shift from democratic majoritarian decision-making of directly elected institutions has been distinctive with a highly spirited form of deliberation of professionals – the constitutional judges. They serve as an intellectual double check on the work of legislatures and its majorities. The whim of directly elected politicians was thus constrained by the discretion of indirectly selected arbiters. This symbolises a move from an unbound passion of current majorities towards a more rational and reasonable logic of deliberation.[12]

Nevertheless, there has also been a second important, traditionally rather overlooked type of dynamics in the equilibrium of constitutional democracy. This shift towards a more direct decision-making has not been criticised. Quite on the contrary, it has been celebrated as a victory of the common man, or something that

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[10] Paraphrasing the famous sentence from immortal US Supreme Court decision *Marbury v. Madison*, 5 U.S. 137 (1803) that formally established the judicial review in the US constitutional order. "It is emphatically the province and duty of the Judicial Department [the judicial branch] to say what the law is".

[11] For different forms of judicial review, see: *Tushnet, M.* Alternative Forms of Judicial Review. *Michigan Law Review,* No. 8, 2003, ISSN 0026 2234.

[12] Despite their undemocratic nature, the constitutional and supreme courts in many societies retain higher approval ratings than political branches of the government. For the US example, see electronic resource at http://news.gallup.com/poll/194057/supreme-court-job-approval-rating-ties-record-low.aspx [last viewed 08.06.2018].

everyone should appreciate. It has been a move in the opposite direction to the first wave. There have been many examples that illustrate this worldwide and, according to my opinion, even more consequential trend. These changes are well documented, for instance, by the shift from bicameralism to unicameralism, rather weak unelected, more professional upper chambers of parliaments, shifts from indirect to direct elections of upper chambers (e.g. USA), and head of states (e.g. Slovakia in 1999, the Czech Republic in 2013), direct presidential primaries (e.g. USA), more popular invocation of referenda. Furthermore, less formal, but more dangerous processes are the informal shifts to majoritarian politics through perpetual appeals of politicians to their direct obligation to follow the will of "the people", thereby undermining the other indirectly elected or nominated institutions. Many times, these changes have been denoted as "waves of the future", bringing enhanced legitimacy and a more direct form of decision-making into the complicated system of constitutionally constrained government. The equilibrium of constitutional democracy that consists of both democracy and constitutionalism has been seriously eroded.

The main problem with popularly elected leaders and institutions has been their instantaneous responsiveness to public opinion. According to the public choice theory, the main intent of politicians is to survive in a political arena for as long as possible (i.e., to get re-elected) and, thereby, remain in power. Thus, these actors have become quite obsessive with public opinion polls and pressures of interest groups. This trend has subsequently produced a tendency to polarization of politics, various forms of gridlocks and non-compromising ideological political standpoints. The above polarisations and perpetual disappointment of voters resulting from compromising aspects of day-to-day politics contributed to generating a toxic political environment, in which it has become virtually impossible to dispense with even petty disagreements by traditional ways of negotiation, concession, or cooperation. A greater appeal to a direct form of democracy then, quite paradoxically, also created a less tolerant and more ideological political setting.[13] With fewer indirectly nominated institutions that traditionally had served as vital checks on social equilibrium, prevented tyranny of majority, and produced long-term policy-making goals, the entire public sector became much more impulsive to any, even radical, public preferences.

This second shift, towards decreasing participation of indirectly nominated institutions in decision-making, has been characterised by a tremendous appeal to the "passion" of public-at-large. These passions, however, have been prone to exploitation by various political manipulators and interest groups, as we could see in many recent elections (USA, UK, France, etc.) and popular referenda (Hungary, Turkey, etc.). It is, thus, possible to express serious doubts engendered by a model according to which "democratization" should always be the leading tenet of decision-making. Historically, this tendency has been misleading and proved to be wildly abusive. This change, as well as any other limitations of indirectly nominated institutions have been very easy to promote and "to sell" to the electorate. We live in a democratic age and many other aspects of our daily life except politics have also been democratized.[14] Therefore, the shift towards the decision-making of "we the people" has become politically advantageous and almost no one dares to criticise it.

[13] *Zakaria, F.* The Future of Freedom: Illiberal Democracy at Home and Abroad. W. W. Norton & Company, 2007, p. 106.

[14] Ibid., pp. 11–17.

With those two outlined shifts, one towards the reason [of judges, professionals and other indirectly nominated institutions] and one towards the passion [of "the people"], it is possible to see that the middle ground, or the compromise between the majority and minorities in constitutional democracy, erected around political compromises and checks on powers, has been rapidly losing its ground. The basic mechanism of constitutional democracy, created to enable political discourse and deliberations with its vital background checks against abuse of power, has started to appear dysfunctional in many countries. Any check on the majority is, of course, undemocratic at the first sight, but these checks have proven to be indispensable for tolerant political systems, providing a platform for reasonable debate. The shift towards "we the people", to the more legitimate and less restricted rule of majority, has further threatened the aforementioned equilibrium and produced more attacks on other constitutional safeguards.

The ultimate end of those two shifts is something we would not like to end up with. With no checks, we cannot blindly rely solely on judges, nor can we trust the decisions of majorities, as they can be quite easily manipulated and exploited. Historically, it has been far easier to invoke the passions and fears of the people than to invoke their reasons and thoughtful decisions. Impulsive and emotional reactions are much more natural to human beings than a deliberative approach and calm decision-making. People tend to react spontaneously on imminent threats. That is why the populism and popularly elected leaders have a much easier job of gaining attention and spreading their simple solutions, grounded in emotions, prejudices and biases. That comes as a clear contrast to the much harder job of justification of the role of judges, or other indirectly nominated institutions and their inevitability in the equilibrium of constitutional democracy. It is far more appealing to point toward direct threats posed by anything unknown than to convince the public with a reference to reason, noble principles, or lofty goals of constitutionalism. It is, therefore, much easier to win the attention and thereby gain political capital by oversimplified, passionate invocations than by a "legalistic tango" that comes in often vague judicial reasoning.

The world of unrestrained majoritarian democracy has always been a natural habitat for populism and a terrible place for minorities and their opinions. This is nothing new and this trend has been clearly spotted and pointed out by many philosophers throughout history.[15] Europe learned its lesson not that long ago, although it does not seem that this message still resonates nowadays. Consequently, it seems that we have been slowly heading towards that "democratic trap" again.[16] Simple and easy solutions have proven incapable of protecting individuals, or even majorities themselves in the long term. The unrestrained will of the people has been far more dangerous than judicial deliberative processes. The judges have never truly ruled any country, only produced more assertive decisions and expressed certain

[15] E.g. Aristotle in his major work *Politics* regarded democracy, or the mob rule, as a bad form of government, alongside with tyranny and oligarchy; Thucydides associated popular rule with aggressiveness; Kant distrusted unfettered democratic majoritarianism and believed that democracies with no separation of powers, checks and balances, the rule of law, protection of individual rights were tyrannical; Carl Schmitt, in a strict reading of his work, considered democracy and dictatorship to be two sides of the same coin.

[16] *Van Reybrouck, D.* Against elections, 2016, p. 31: "*Nowadays it is often forgotten, but fascism and communism were originally attempts to make democracy more vital, based on the idea that if parliament was abolished, the people and their leader would be better able to converge (fascism) or the people could govern directly (communism)* ".

legal and moral preferences. In my opinion, it is the majoritarian politics that is far more dangerous for the future than *le gouvernement des juges*. Although, as I already pointed out, we do not want to end up blown away by any of those two shifts and it is in our best interest to protect the equilibrium of constitutional democracy that was created as a composition of both directly and indirectly elected bodies.

2. The Case of Central Europe – V4 Countries17

After a brief overview of possible threats to the concept of constitutional democracy, the attention will turn to the Central European region, known as the V4 region. This part will be elaborated on the previous findings, applying them to this part of Europe.

Firstly, we will start with the main constitutional commonalities of V4 countries. Perhaps most importantly, these countries share many characteristics because of their common history, quite recent communist past, and a clear break with it in l989, during the so called "the Autumn of Nations" (later also as "the 1989 revolution"). The nuances of changes were, however, a bit different – in Poland and Hungary they occurred after roundtable settlements and talks, while in the then Czechoslovakia the democratic transformation happened after the Velvet revolution. In all these countries, the first free elections were held in 1990, and brought about the era of democracy commenced. These countries have become the examples of a quick and successful transition from authoritarianism to democratic form of governance. Later, they were all accepted into the European integration clubs (NATO in 1999 and 2004; and EU in 2004).

The V4 countries adopted new democratic constitutions: Slovakia in 1992, The Czech Republic in 1993, Poland in 1997, and finally also Hungary, at first with a major constitutional amendment in 1989, and later with a new constitution in 2011. These constitutions recognize sovereignty of people, separation of powers and protection of human rights as their core foundational tenets. Therefore, it is possible to say that these constitutional systems all have followed the model of constitutional democracy, in which the will of majority is balanced by the system of constitutional safeguards. Democratic elements in these countries were embodied in their national parliaments that with one small exception were also endowed with the constitution-making authority.[18] To counterbalance powerful political parliaments, similarly

[17] The countries of so called "Visegrád four" – the Czech Republic, Slovakia, Poland and Hungary.

[18] The constitution-making body in all V4 countries is the parliament. There is one exception. In Poland, when the constitution is being replaced, confirmation by constitutional referendum is required (Art. 235 § 6). In Hungary, constitution-making through referenda has been explicitly forbidden (Art. 8 § 3). In Hungary: "*For the adoption of a new Fundamental Law or the amendment of the Fundamental Law, the votes of two-thirds of the Members of the National Assembly shall be required.*" (Art. 5 § 2). In Poland: "*A bill to amend the Constitution shall be adopted by the Sejm by a majority of at least two-thirds of votes in the presence of at least half of the statutory number of Deputies, and by the Senate by an absolute majority of votes in the presence of at least half of the statutory number of Senators.*" *(Art. 234 § 4)*. In the Czech Republic*: "The concurrence of three-fifths of all Deputies and three-fifths of all Senators present is required for the adoption of a constitutional act...*" *(Art. 39 § 4)*. In Slovakia*: "For the purpose of adopting or amending the Constitution, a constitutional law, in approving an international treaty according to Art. 7, para. 2, for the adoption of a resolution on plebiscite on the recall of the President of the Slovak Republic, for bringing a prosecution of the President and for the declaration of war on another state, the consent of a three-fifths majority of all Members of Parliament shall be required.*"(Art. 84, para. 4).

strong constitutional courts,[19] as the supreme judicial bodies with constitution-interpretative powers, were established.[20] The development of relationship between these two principal bodies and therewith associated connection between political and constitutional components of constitutional democracy, however, followed quite diverse paths.

In Hungary, from the very beginning of its existence the constitutional court under the leadership of its first president László Sólyom became the central institution of the national constitutional realm.[21] The situation changed gradually and with the ascent of Viktor Orban, the political branch of government gained momentum. The Orban led Fidesz-coalition has won 4 out of 5 elections since 2002. The parliamentary majority changed the "rules of the game" by a new electoral law to cement its position in power (2012), and in 2011 even adopted a brand-new constitution. The constitutional court was later packed with pro-Orban judges, as it had become the biggest target of political branches. Nowadays, the constitutional court is paralyzed and does not play a role of serious contender of parliament or government.

In Poland, the Constitutional Tribunal played a very active constitutional role from the moment of its democratic inception. It effectively blocked several attempts of constitutional take-over and decided many contentious disputes. The situation changed rapidly, when a very thin single-parliamentary-majority of 2015 election[22] "hijacked" the entire constitutional system. Professor Sadurski termed the situation as *constitutional coup d'état*, in which "the factual change of the constitution is being reached through sub-constitutional measures"[23]. On the other hand, the political leader of the present governing Law and Justice (PiS) majority, Jaroslaw Kaczyński, proclaimed that "in a democracy, the sovereign is the people, their representative parliament and, in the Polish case, the elected president. If we are to have a democratic state of law, no state authority, including the constitutional tribunal, can disregard legislation." The situation in Poland became even more serious with a so-called judicial reform that *de facto* put courts and judges into subservience of the executive branch.[24]

In the Czech Republic, the constitutional court grew more incrementally than in the previous two examples, but subsequently gained respect and prominence.

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[19] "*Those who end up in a minority must be able to trust that they will not be raped and robbed by the majority if they cede power to them. How could they be reasonably expected to do that? The best way to inspire the minority with this trust was to install a strong, impartial constitutional court that will check those in political power without exerting power itself.*" *Steinbeis, M*. Constitutional Courts in Decline. Available: http://verfassungsblog.de/constitutional-courts-in-decline/ [last viewed 08.06.2018].

[20] *Arato, A*. Post Sovereign Constitutional Making: Learning and Legitimacy. Oxford University Press, 2016, p. 207.

[21] Ibid., pp. 195–204.

[22] 235 / 460 in the Sejm (37.6%) and 61/100 in the Senate.

[23] *Sadurski, W., Steinbeis, M.* What is Going on in Poland is an Attack Against Democracy. Available: http://verfassungsblog.de/what-is-going-on-in-poland-is-an-attack-against-democracy/ [last viewed 08.06.2018].

[24] *Bojarski, Ł.* A Polish legal road roller: Can the political sentence be stopped? Available: http://www.constitutionnet.org/news/polish-legal-road-roller-can-political-sentence-be-stopped [last viewed 08.06.2018]; *Sledzinska-Simon, A*. The Polish Revolution: 2015–2017. *International Journal of Constitutional Law*, blog. Available: http://www.iconnectblog.com/2017/07/the-polish-revolution-2015-2017 [last viewed 08.06.2018]; *Koncewicz, T., T.* Farewell to the Separation of Powers – On the Judicial Purge and the Capture in the Heart of Europe. Available: http://verfassungsblog.de/farewell-to-the-separation-of-powers-on-the-judicial-purge-and-the-capture-in-the-heart-of-europe/ [last viewed 08.06.2018].

Despite several very contentious decisions[25], the court is now an undisputed intellectual guardian of the constitution. After the last general election, the situation became more turbulent, as some radical political parties were elected into the parliament. Furthermore, the leader of the strongest political party, former minister of finance, an oligarch, and the current prime minister has been criminally investigated. The very same person had previously gained power in many influential media. Despite this development, the well-respected constitutional court has not yet been attacked.

In Slovakia, during the very tumultuous foundational period, the quasi-authoritarian regime under the leadership of prime minister Vladimír Mečiar, diminished and paralysed all the other constitutional institutions. The prime minister then ruled the country with an iron fist. Many suspicious links between the government and the Slovak criminal scene were investigated in the subsequent periods. After this unstable interval, finally, in 1998 Slovakia took a pro-EU direction and reformed its constitutional system to conform with the criteria of European democracy. A relatively modest constitutional court, which in its beginnings approached most of cases in a very formal way, gradually established a place at the epicentre of constitutional system. Nowadays, the constitutional court epitomises an important veto player that reviews the constitutionality of parliament's activity. Recently, however, the constitutional development was shaken by the constitutional amendment that enabled the parliament to annul the amnesties granted in the foundational era. The parliament abolished these amnesties, in the name of the people and subsequently, in a highly political decision, the constitutional court approved the annulment of amnesties.[26] This decision, however, possibly opened the Pandora box of unexpected consequences for the entire constitutional equilibrium. Undoubtedly, this decision tilted the constitutional pendulum further to political branches.

The very last note of this part is dedicated to something that all aforementioned countries have in common. Something that has proven extremely relevant during the evolution of constitutional systems in the V4 region. Based on the communist past, only relatively weak civil societies were formed in Central Europe. That remains a valid statement even today. Similarly, only a limited support exists for a strong and independent system of constitutional institutions that would monitor the exercise of state power. The realm of political power and the authoritarian leadership still has a staunch support among people. That is most likely a relic from the authoritarian past that did not create any sentiment for strong counterbalance of the ruling class. Most people had lived their entire lives in authoritarian regimes, when unexpectedly and quite swiftly the 1989 revolution brought them a democratic change. The expectations and hopes for better lives, comparable with those in Western Europe, have not been fulfilled yet. Thus, even after 25 years of full-fledged democratic forms of government, many people of Central Europe still have sentiments about the pre-1989 era. Therefore, strong and sometimes even semi-authoritarian leaders invoking shortages of constitutional democracy that have been exacerbated further by local problems of corruption, nepotism and other frauds,

[25] Such as decision PL. ÚS 27/09 (21.09.2009), nicknamed *Melčák*, in which the Court declared constitutional statute unconstitutional; decision PL. ÚS 5/12 (31.01.2012), nicknamed *Holubec*, in which the Court declared decision C-399/09 of the Court of Justice of the EU *ultra vires* for the first time in history of European Union.

[26] Decision PL. ÚS 7/2017.

have been quite successful in gaining popularity in this region. Recent examples of widely popular leaders Kaczyński, Orban, Fico and Babiš that were using similar patterns of populism are quite telling.

3. Normative Point of View

In this part, the article will address the theoretical background of politicians' frequent appeal to the general will of the people as an ultimate source of all state power. The politicians have been often justifying their decisions by invoking the will of people. The Central European constitutions were designed specifically to limit politicians and their representations *vis-à-vis* other institutions. The institutions that have been very frequently denounced by this populist appeal were constitutional courts. According to many politicians nowadays, as well as in the past, however, the undemocratically nominated constitutional judges should not constrain the free will of the people exercised through their directly elected representatives. In a similar vein, they further argue that the judges cannot unilaterally impose their own views on society and must mainly take into consideration the will of majority. The contentious questions should be decided in the political arena, not in the courtrooms. In other words, the politicians have been trying to use "the shift to the people" to enhance their position *vis-à-vis* other checks on the exercise of power and to get rid of them.

The above-mentioned types of reasoning strongly resemble basic principles of political constitutionalism, the normative theory that accentuates the perils of a strong form of judicial review to protect individual rights at the national and transnational level.[27] Rather than relying on the judiciary and its definitions of constitutional rights, political constitutionalism values the permanent disagreement about fundamental values of each society. This stream of thinking prefers a "nothing-is-set-in-stone" approach, in which every question is up for a debate in a fair political arena. As much as any other political question, even the content of rights must be open for a contestation, and not for judges to decide.[28] In this concept, the constitutional courts do not respect political agreements, in which the people have equal participation. Therefore, judicial decisions cannot be considered legitimate.

The intellectual counterpart of political constitutionalism is legal constitutionalism. This concept is characterised by judicially determined fundamental values (human rights, rule of law, etc.). These values are constitutionally entrenched by an ultimate sovereign power, the people, and thereby placed beyond the reach of political determination. It argues that human rights are so important for the functioning of democracy that they cannot be sufficiently protected by the parliamentary majorities, nor can they be taken hostage by any kind of parliamentarian majority.[29] Legal constitutionalism endorses a strong role for the judiciary that is capable to protect fundamental values, sometimes even against the constitution-making body. This robust version of legal constitutionalism has been, however, seriously contested, since the constitutional definition of democracy by

[27] *Goldoni, M.* Two internal critiques of political constitutionalism. *International Journal of Constitutional Law*, Vol. 10, issue 4, 2012, p. 926.

[28] Ibid., p. 930.

[29] *Alexy, R.* Theory of Constitutional Rights. Oxford University Press, 2002, p. 297.

a court is always quite dangerous business[30]. That kind of judicial review is also doubted as an elitist way to wield political power without legitimacy[31]. On the other hand, the constitutional court can be understood as an elitist institution that exists to confront another elitist institution, the parliament[32].

I believe that political constitutionalism, determining the content of fundamental rights through the political process, is not a viable justification of what has happened in Central Europe, nor a model for the future of this region.[33] The V4 constitutions, founded on historical inexperience with human rights' protection, established a persuasive rationale for strong constitutional courts capable of protecting fundamental values. Moreover, the entire Europe with its concept of internationally recognized, non-negotiable, absolute rights is historically the world's most successful model of human rights' protection. After World War II, Europe clearly rejected the idea of political constitutionalism. Nowadays, it remains a peculiarity mostly characteristic to common law professors.[34]

The current situation in Central Europe, in which populist majorities have been claiming the adherence to the "will of the people", as well as the popular mandate to change the equilibrium of constitutional democracy, has been only cloaked as a shift to political constitutionalism. The ambition of populist leaders has certainly not been to create a political arena for a just deliberation,[35] but to usurp the power for themselves. In political constitutionalism, a disagreement is considered "as a creative force bringing many positive effects to the deliberation-table, such as plurality of opinions, epistemological benefits, mutual learning, and political accountability through constant challenges to political power".[36]

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[30] *Möllers, Ch.* The Three Branches: A Comparative Model of Separation of Powers. Oxford University Press, 2015, p. 130.

[31] *Hirschl, R.* Towards Juristocracy: The Origins and Consequences of the New Constitutionalism. Harward University Press, 2007, ISBN 9780674025479, p. 10.

[32] The principle very well-known from the Federalist Papers, No. 51: "ambition must be made to counteract ambition".

[33] As suggested by Adam Czarnota (available: http://verfassungsblog.de/the-constitutional-tribunal/ [last viewed 08.06.2018]). A similar diagnosis is also given by Paul Blokker (available: http://verfassungsblog.de/from-legal-to-political-constitutionalism/ [last viewed 08.06.2018]), although I do not concur with his solutions (Civic constitution? – an idealistic version of something that is impossible to achieve).

[34] Although Mark Tushnet argues that "the popular "acceptance" of judicial review is perhaps rather a sign of resignation to the fact that democratic majorities have been unable to eliminate a practice favoured by political elites than of positive support for the practice" – *Tushnet, M.* Against Judicial Review. *Harvard Law School Public Law & Legal Theory Working Paper Series*, 2009, p. 16.

[35] Several important constitutional warnings for Hungary have been stated from the European Commission for Democracy Through Law (Venice Commission) Opinion on the new Constitution of Hungary, adopted by the Venice Commission at its 87th Plenary Session (Venice, 17–18 June 2011). Available: http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2011)016-e [last viewed 08.06.2018]; as well as from the Opinion on Act CLI of 2011 on the Constitutional Court of Hungary Adopted by the Venice Commission at its 91st Plenary Session (Venice, 15–16 June, 2012); Available: http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2012)009-e [last viewed 08.06.2018]. Regarding the current situation in Poland, see *Sadurski, W., Steinbeis, M.* What is Going on in Poland is an Attack against Democracy. Available: http://verfassungsblog.de/what-is-going-on-in-poland-is-an-attack-against-democracy/ [last viewed 08.06.2018], or *Mazzini, M.* For Central Europe's Illiberal Democracies, the Worst is yet to Come. Available: http://verfassungsblog.de/for-central-europes-illiberal-democracies-the-worst-is-yet-to-come/ [last viewed 08.06.2018].

[36] *Goldoni, M.* Two internal critiques of political constitutionalism. *International Journal of Constitutional Law*, Vol. 10, issue 4, 2012, p. 930.

What has been happening in Central Europe, especially in Hungary, Poland and may very soon also arise in the Czech Republic, however, has not been an invocation of political constitutionalism, but rather a dangerous appeal to the Schmittian concept of political constitutional theory[37]. In this realm, "the nation is the ultimate factual source of a constituent power that cannot logically be constrained by what it may have constituted"[38]. This power, as an outcome of a sovereign act of constitution-making power cannot be subjected to normative constraints that could define or rule over its validity or legitimacy.[39] In other words, the constituent power can do everything, even to resign from the human rights' protection.[40] This historically discredited vision of ultimate power, in which the popular will is unrestrained, is far more dangerous than the concept of political constitutionalism. Tendencies, in which the will of majority shall prevail over any restrictions, is another invocation of the second shift from the constitutional democracy's equilibrium – the shift towards an unrestrained "we the people".

Therefore, the constitutional courts, the guardians of constitutionally entrenched fundamental values, have been the first targets of majoritarian purges. The judiciary, as the non-political branch of government, has historically been the main obstacle of unrestrained dominance of the majority.[41] Because the constitutional court is undemocratic in its nature, it can take different, non-political standpoints and thereby observes the tenets of constitutional democracy, even if they are unpopular. This institution, unaccountable to the popular majority and its perpetual volatility, represents a protecting layer against the passionate reaction of public opinion. Thus, the constitutional court as an institution has attained the most prominent position in those countries, which had experienced a strong totalitarian, or authoritarian past.[42] In some of those examples, the judiciary has even dared to step into the constitution-making process (e.g. Germany, Austria, South Africa, the Czech Republic). Since then, the constitution-making body was bound not only by the prescribed constitution-making procedure, but also by substantive rules, promulgated by the constitutional court.[43]

The communist past has very likely been one of the main reasons why constitutional courts have gained such an importance in Central Europe. The anti-majoritarian features, protecting the system of constitutional democracy, have been intentionally sown deep into the constitutional fabric by decisions of first democratic majorities after the fall of communism. It was conducted to prevent

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[37] Political theory is not a "real" normative theory, more a practical one (see *Minkkinen, P.* Political constitutionalism versus political constitutional theory: Law, power and politics. *International Journal of Constitutional Law*, Vol. 11, issue 3, 2013, p. 592).

[38] *Minkkinen, P.* Political constitutionalism versus political constitutional theory: Law, power and politics. *International Journal of Constitutional Law*, Vol. 11, No. 3, 2013, p. 592.

[39] Ibid., p. 595.

[40] Although Stacey argues that this might not be the case. According to his reading of Schmitt's theories, even Schmitt was a proponent of a "*Rechtstaat*" constraint on the constituent power (*Stacey, R.* Constituent power and Carl Schmitt's theory of constitution in Kenya's constitution-making process. *International Journal of Constitutional Law*, No. 3–4, 2011, pp. 606–614).

[41] *Acemoglu, D., Robinson, J., A.* Why Nations Fail: The Origins of Power, Prosperity, and Poverty, 2013, pp. 325–330.

[42] These institutions are either virtually non-existent, or highly contested in countries with no previous authoritarian experience, such as the UK, Norway, Sweden, USA, New Zealand, or the Netherlands.

[43] For a comparative analysis of unconstitutional constitutional amendments and various approaches of constitutional courts towards this issue see *Roznai, Y.* Unconstitutional Constitutional Amendments – The Migration and Success of a Constitutional Idea. *American Journal of Comparative Law*, 2013, pp. 657–720.

authoritarian tendencies, and to protect the constitutional system against populist majorities. Therefore, each attack against the V4 constitutional court is an assault on the post-communist constitutional legacy.

The V4 constitutional courts, designed as apolitical bodies, were endowed with powers to decide issues of the highest constitutional degrees. Obviously, some of these issues were also of high political relevance. Consequently, in those cases, the constitutional courts have been accused of judicial activism, or blamed for exercise of political power. Since the court has never been constructed to defend itself in public, it became a relatively easy target for politicians. The shift towards "we the people", in which politicians claim exercise of the will of the people, without any restrictions, the constitutional courts became sometimes politically undesirable. The constitutional court as an institution has thus become the supreme target of politicians. In Hungary[44] and Poland, the constitutional courts became "packed" and later completely paralyzed.

Nowadays, in Central Europe, a visible and very dangerous populist shift towards the unrestrained rule of majority, masked behind "the ultimate will of the people", has become increasingly popular. This trend reminds us of the situation of not that distant a past, in which these countries slipped into authoritarian regimes. Current majorities have already started to deconstruct checks that had been intentionally placed to protect constitutional democracy against the tyranny of majority. The problem has been exacerbated by the lack of social and political inclusion and by an increasing number of attacks on the independent judiciary and free media.

Conclusions

After World War II, Western Europe deliberately opted for constitutional democracy as a blueprint for its constitutional setting. This concept of constitutionally entrenched fundamental values has proven highly successful. Thus, after the fall of communism in 1989, the countries of Central European region decided to follow the pattern.

One of the most notable features of this scheme is the principle of checks and balances, in which no institution can gain dominance over the others. This institutional design was not created to make the process of decision-making less effective, but to make it more inclusive and less prone to hijack by majorities. It has been crafted as a compromise between two competing tenets – efficiency and legitimacy.[45] The decreased level of effectiveness of decision-making has been balanced by a requirement of broader coalition and compromise-building. The patience with deliberation and compromises, however, was not central in the politics of Central Europe, heavily influenced by a lengthy period of authoritarian forms of government. One of the most central preconditions for functioning of constitutional democracy has been public trust and inter-institutional respect. After 1989, in the V4 countries, however, political institutions in several instances severely diminished the reputation of indirectly nominated bodies that served as critical checks on the exercise of state power. Institutional respect takes more than one generation to develop but it is indispensable for the survival of constitutional democracy.

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[44] *Arato, A.* Post Sovereign Constitutional Making: Learning and Legitimacy, 2016, pp. 216–218.

[45] *Van Reybrouck, D.* Against elections, 2016, p. 5.

In that regard, the introduction of strong constitutional courts with numerous important competences in Central Europe provided a shortcut for a vital check against abuse of power from parliamentary majorities. The constitutional courts protect fundamental principles of this system, as well as dissenting minorities and those who can never be directly represented in the parliaments.[46] Therefore, it is in the paramount interest of all people, to protect the constitutional court as an institution against political ill-treatment. The selection process of constitutional judges is, therefore, of an utmost importance and must be conducted either in a non-partisan, or a bipartisan manner, otherwise the court will lose its revered neutrality and can be easily targeted as even further politically biased. The constitutional court cannot be pushed into the world of politics, which would completely discredit its reputation. In Poland and Slovakia, the selection of constitutional judges so far has been clearly partisan. In Hungary, the 2011 constitutional overhaul was a factor contributing to the entire process of nominations becoming much more political.[47] Additionally, the 2011 constitution diminished the significance of previously adopted decisions, so that the current politically blessed composition of court does not have to deal with previously formulated constitutional principles.[48] The only country that has at least tried to make the nomination process more inclusive, has been the Czech Republic. That produced the least politically affected constitutional court in the region. Despite its apolitical prerequisites, the court became quite activist and rendered several very controversial decisions.

In light of the previous statements, I strongly believe that the V4 constitutional courts must remain faithful to the basic principles of the 1989 revolution. The break with their authoritarian past was not only about the elections and majorities, i.e. about procedural aspect of democracy. It was also about fundamental values and rights and their subsequent real, not just formal protection. The 1989 revolution was also about the principle of limited government, which cannot be concentrated in one's hands, one body, or one institution.[49] Another milestone that could claim a common fundamental constitutional value in V4 countries was the principle of

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[46] *Ely, J., H.* Democracy and Distrust: A Theory of Judicial Review. Harvard University Press, 1980, pp. 77–80.

[47] *Arato, A*. Post Sovereign Constitutional Making: Learning and Legitimacy, 2016, p. 209.

[48] The 2013 constitutional amendment eliminated all decisions of the constitutional court prior to 2011 as precedents.

[49] Recently, I have argued elsewhere that the people of the Slovak Republic have truly spoken only three times in post-communist history. Firstly, and most significantly, during the Velvet revolution. It was a clear and definite break with the communist past. That expression of sovereign created a framework in which people still live in Slovakia today. This framework established a democratic state based on the rule of law principle. These new qualities included, most importantly, free elections and protection of fundamental rights. All subsequent constitutional changes elaborated on these tenets. These were gradually enhanced, but never compromised. The second time when the Slovak people spoke was during the foundation of the independent Slovak Republic in 1993. Finally, the third time they spoke was during the constitutional change that opened the Slovak legal system to international legal influences. According to this concept, the constitution-making body in Slovakia (the parliament) can even adopt a brand-new constitution. This, however, must remain within the framework of the 1989 revolution. I do not argue that the fundamental change can only come with another revolution, but the break with the past must be clear and obvious, and it only remains in the purview of the sovereign people. Thus, no constitutional body, i.e. any kind of parliamentary majority, can turn completely its back on the fundamental principles formed during the last democratic revolution (*Baraník, K.* Ústavodarná moc a Politika. In: *Večeřa, M., Hapla, M.* (eds.) Weyrovy Dny Právní Teorie 2017 – Sborník z konference, Masarykova Univerzita 2017, pp. 31–55).

international openness, demonstrated by accessions to EU and NATO. Additionally, these legal systems agreed to follow internationally recognized standards of human rights, as well as common European tenets of limited government. I believe that the break with their dualistic past not only opened the aforementioned legal orders to international influences, but also reformulated their fundaments in the pan-European manner. These virtues are no longer in the disposition of parliamentary majority and only another clear break with the past will be able to disrupt them. No legislative majority can abandon them just by all-encompassing invocation of the "will of the people".[50]

Another important constitutional deficiency of the V4 region is the lack of a developed civil society that would constitute another important check against usurpation of power by the majorities. In case of that kind of assault, organised civil society should stand up and defend the constitutional institutions. That is a decisive warning for each potential usurper. In such instances, the people not only protect the institutions themselves but first and foremost defend the democratic form of government. The lack of organised civil society only strengthens the demand for impartial constitutional courts in this region.

The institutional framework is the key to preserving the constitutional equilibrium created by the 1989 revolution. The institutional balance is not a zero-sum game but instead should be perceived as a win-win scenario for all the participants and in everyone's interest. The constitutional judiciary as the guardian of individual rights and liberties plays a critical role in this task, because one day anyone could end up in a position of minority. This placement should, however, not equal discrimination, repression, or irrelevance. The minorities, their opinion and wellbeing must always be taken into consideration and be guaranteed by the constitutional system itself. Society and its institutions should provide a place in which the participation in an ongoing debate is essential for decision-making. That is the main lesson that history teaches us, and we should learn from it, if we do not want to repeat the same "democratic" mistakes again.

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[50] Even Schmitt, the main proponent of unrestrained constituent power, claimed that the decision of the Reichstag, even unilateral, cannot turn German Reich into the absolute monarchy, nor into the communistic regime. Therefore, he distinguished between the parliament (constituted power) that is bound by the framework created by the sovereign (constituent power) that is clearly unrestrained and unlimited in exercise of its power (In: *Schmitt, C.* Constitutional Theory. Duke University Press, 2008, pp. 151–152).

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https://doi.org/10.22364/jull.11.07

Constitutional Principles in Bosnia and Herzegovina: Legal Theory and Judicial Deciding

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The basic thesis of this essay is that constitutional principles and legal rules can have a meaning in judicial decision, when legal order imparts significance to judicial practice. Research and analysis of implementation of constitutional principles in the practice of courts in Bosnia and Herzegovina, especially in the practice of three constitutional courts, so far has not proved sufficient. To what amount the constitutional principles are used in direct implementation of constitutional principles, is just one of the questions that come up regarding this topic.

It is also interesting and important to explore in what way the practice of the Constitutional Court of Bosnia and Herzegovina in deciding on the abstract constitutionality of laws and in appellate jurisdiction shows the application of legal principles in the decisions of the supreme courts of entities and Appellate court of Brčko district of Bosnia and Herzegovina. That is because some general principles are a part of the human rights and fundamental freedoms mentioned in the Constitution of Bosnia and Herzegovina. It should also be added that the practice of the European Court of Human Rights through its decisions in applying the Convention for the Protection of Human Rights and Fundamental Freedoms affects the practice of the supreme courts of entities and the application of the legal principles that are part of the Convention.

Keywords: constitutional principle, constitutional court, legal doctrine, adjudication, judicial interpretation.

Contents

Introduction

Legal principles have long been used by the law, not only within legal doctrine, but also often stated in the normative solutions of specific country. It is really

difficult to provide a definition of legal principles, because legal principles are sometimes identified as legal norms, at other times – as general legal norms, or as legal values... Firstly, we should define the concept "principle", its linguistic meaning. People's Dictionary defines it as *"A fundamental truth; a comprehensive law or doctrine, from which others are derived, or on which others are founded; a general truth; an elementary proposition; a maxim; an axiom; a postulate; The collectivity of moral or ethical standards or judgments; A basic truth, law, or assumption; A settled rule of action; a governing law of conduct; The collectivity of moral or ethical standards or judgments."*[1]

In the hierarchy of the scientific system of law, legal values (peace, tolerance, equality, solidarity...) are the highest.[2] Legal principles are the lower units in the scientific legal system, and legal norms are below them.[3] Legal values are the most abstract set of rules that does not have to be included in the written law. There is a consensus in a society about their supremacy. They exist before the law was written. Legal principles can sometimes crosscut the legal values (and mostly – legal norms). However, legal principles are more general than legal norms, because they always have a society in totality as the recipient of its cause. No matter how confusing it seems, legal values, legal principles and legal norms coexist in shared space.

Some authors, for example, Ronald Dworkin, write about legal principles with a deviation from conventional attitudes of legal theory, omitting the use of generality as a criteria of differentiation of legal principles and legal rules. He calls a "policy" "that kind of standard that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community (though some goals are negative, in that they stipulate that some present feature is to be protected from adverse change)". He calls a "principle" a "standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality".[4]

According to Radomir Lukić (one the most influential legal theorists in the former Yugoslavia; he was a professor at the Faculty of Law, the University of Belgrade), the general legal principles are *"abstract norms, that are derived from the series of less abstract norms, and which apply to whole series of cases covered by legal standards"*.[5] Lukić, offered the examples of these principles – the principle of responsibility, principle of equality, principle of righteousness, principle of exploring of material truth. The good side of the legal principle is that it *"shows the meaning of a whole set of norms in a shorter and clearer way, thus enabling us to understand the norms deeper and more accurately."*[6] As with legal constructions, something is added to the principle, it draws more than what the concrete norms contain. If

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1 Available: http://www.dictionary.co.uk/browse.aspx?word=principle [last viewed 08.06.2018].

2 There are other views. For example, Joseph Raz classifies different rules of behaviour based on different understanding in angloamerican legal literature. The most general term, according to Raz, is "standard of behaviour", that can be "legal standards of behaviour" and "non-legal standards of behaviour". According to Raz, legal standards are: "legal norms" and "laws that are not norms", while legal norms can be general and individual. General legal norms, according to this author are legal rules and legal principles. See: *Raz, J.* Legal Principles and the Limits of Law. *The Yale Law Journal*, 81(5), 1972, p. 824.

3 Other view claims that there are "legal principles" and "legal rules", two basic types of legal norms. See, for example: *Ávila, H.* Theory of Legal Principles. Dordrecht, 2007.

4 *Dworkin, R.* The Model of Rules. *The University of Chicago Law Review*, 35(1), 1967, p. 23.

5 *Lukić, R.* Teorija države i prava – II. Teorija prava. Beograd: Naučna knjiga,1995, p. 281.

6 Ibid., p. 281.

this "addition" corresponds to the essence of the norms covered, it is useful; if that boundary is crossed, it becomes harmful and inadmissible. Lukić warns that *"borders are difficult to establish, and that's why it's easy to cross them."*[7]

Legal doctrine and judicial practice are found in the face of great challenges, whenever they determine the content and meaning of legal principles, as well as the relationship between them. Defining a legal principle does not mean just identifying the legal standards that confirm it and determine their common denominator. When the principle is on a higher level of generality and abstraction, the freedom to determine its content is greater. Therefore, it is not surprising that many principles during the multi-year evolution of the modern state and rights have gained the status of legal civilization, but the interpreters differ greatly when determining the essential elements of these principles. In this respect, the fact that the principle has a status of a general legal principle and a universal character (e.g., the principle of equality, the principle of legality, the principle of responsibility) does not mean that its content is determined forever. With the evolution of society, rights and politics, in a certain amount, the content of the principle is changed or it is interpreted differently in accordance with significantly changed circumstances.

The relationship between law and politics makes the nature of these principles a complex one. The question is whether, for example, the principle of democracy is a political or legal principle or a combination of both. The question is not purely doctrinal. Thus, in relation to the principle of supremacy of constitution, as a legal one, and the principles of democracy, as a predominantly political principle, the essence of the constitutional equilibrium is reflected, which must be rediscovered in order to make constitutional democracy effective. The answer that the legal state must take the lead over democracy or *vice versa*, when they are confronted with conflict, is too simplified to understand things. The role of the Constitutional Court would be much simpler than it is today, too.

The legal principles are "unreachable" creations. Some of them are only proclaimed in positively legal regulations, including the constitution; others, in a certain sense, are defined positively and legally; some of them are generally well-known, and they are assumed. Law is a living organism that is constantly evolving. New principles emerge from the existing principles, from the new social relations that regulate the new norms, new principles are derived – although there is no doubt that all the "great" principles, on which the construction of a modern constitutional state is based, have long been established.

It is not surprising that many principles during the multi-year evolution of the modern state and law have gained the status of legal civilization, but the interpreters differ greatly when they determine the essentials of elements of these principles. With the evolution of society, rights and politics, to a certain extent, the content of the principle is changed or is interpreted differently in accordance with the significantly changed circumstances.

1. Relationship Between Legal and Constitutional Principles and Categorization of Constitutional Principles

When it comes to the relationship between legal and constitutional principles, we need to highlight several elements. Firstly, legal principles are broader than

[7] *Lukić, R.* Teorija države i prava – II. Teorija prava. Beograd: Naučna knjiga,1995, p. 280 abd further, p. 281.

constitutional. Not all legal principles are constitutional, because they are not subject to the highest legal values that form the basis of constitutional law. Also, there are legal principles that apply in all branches of the law (for example, the principle of liability) and those, which apply only in constitutional law (the principle of political [legal] responsibility of the government). On the other hand, there are constitutional principles that are not purely legal, but rather more political by far. Therefore, the question is whether constitutional principles should be defined as a special category, not qualifying them as legal or political, but simply using the term "constitutional principles" (for example, the principle of division of power, the principle of national (civil) sovereignty).

Secondly, the highest legal principles are undoubtedly constitutional, regardless of whether they are proclaimed in the constitution or not (for example, the principle of equality, which is defined in the constitutions as a principle of legal equality or equality before the law – which is a narrow term). Constitutional principles can be categorized into two basic groups: (1) the principles proclaimed in the constitution (usually the principle of the rule of law, the principle of division of power, the principle of national – civil sovereignty, the principle of decentralization, the principle of judicial independence, etc.); (2) the principles that are not proclaimed in the constitution. Within the first group of principles, two subgroups can be distinguished: a) the principles that the constitution onlyproclaims; b) the principles that the constitution proclaims and defines, either directly or through higher constitutional norms.

Within the second group of principles, it is possible to distinguish between: a) the principles derived from several constitutional norms (for example, there is a constitution that does not proclaim the principle of division of power but can easily be derived from norms governing the system of government); b) the principles that the constitutional court "creates", "establishes", not with reference to concrete constitutional norms, but "in the whole Constitution", "the spirit of Constitution", "the continuity of constitutional law".

The very special constitutional principle – the nearest to category (2) a) – firstly and mostly developed in Germany. It is about the principle of supremacy, which is based on the content of the distinction between "basic", "fundamental" constitutional norms, which cannot be altered due to protection granted by Constitution, hence they are made (legally) fully protected (federal regulation, participation of countries in legislation and basic rights proclaimed in Art. 1–20), on the one hand, and other constitutional norms, which can be changed according to the revision procedure. This principle, based on the distinction between the two types of constitutional norms, created in practice by the Federal Constitutional Court, is realized as supreme fundamental constitutional norms in relation to other norms and is interpreted restrictively.

Constitutional principles can be of different levels of generality. For example, the principle of (representative) democracy is more general than the electoral principle or majority principle. There are also principles that are an integral part of general and abstract principles, but have, to a significant extent, independent autonomy. Such an example is the principle of a division of powers which, although independently, is an integral part of the principle of the rule of law.

Modern constitutionality has not only brought pluralism into the source of the constitutional law of the internal and international character, but also the pluralism of the interpretation of the constitution. Still, the ability to be different the

subjects interpret the constitution, this kind of "democratization" of constitutional interpretation did not put the constitutional court in a different plan. On the contrary, it emphasized its role as the first and authoritative interpreter of the constitution, the one whose interpretation legally binds all the subjects of the legal order. If constitutional court is made of "legal aristocracy", this body will, sooner or later, embark on "creation" and do without any stubborn interpretation of constitutional principles.

In the above division of constitutional principles, the most room for "creating" the constitutional court is vested in the category of principle (2) b), then (2) a) and (1) a), and finally in the category (1) b) (which does not mean that in the case of constitutional principles defined by the constitution there is no room for their more profound development).

We can conclude that constitutional principles form the basis for the entire system of legal principles in a specific country. Constitutional principles define the content of all the other legal principles and legal norms, including constitutional norms. Other constitutional norms can be interpreted only in the light of constitutional principles.

2. Bosnian-Herzegovinian Constitutional Legal Doctrine and Constitutional Principles

The doctrine of the BiH constitutional law has not yet occasioned a more extensive interest in studying the constitutional principles, especially in the relation of the Constitutional Court[8] to these principles.

According to professor Kasim Trnka, these are the key principles of constitutional system of Bosnia and Herzegovina: 1) Commitment to the sovereignty, territorial integrity, and political independence of Bosnia and Herzegovina; 2) International – legal continuity of Bosnia and Herzegovina; 3) Internal legal continuity of Bosnia and Herzegovina; 4) Supremacy of Constitution of Bosnia and Herzegovina and unity of legal system of Bosnia and Herzegovina; 5) Obligation of implementation of democratic principles; 6) Complex state organization; 7) Implementation of principle of sharing of authority; 8) Sharing of competencies between state institutions and entities; 9) Existence of system of institutions on the level of state and entities 10) Unitary economic system; 11) State symbols of Bosnia and Herzegovina; 12) Citizenship.[9]

Most of these principles can be found in the normative part of the Constitution of BiH (only the first principle is the part of preamble), but they are not marked as principles. Professor Trnka does not give his definition of constitutional principles, and he also writes about "constitutional principles and values".[10] It is important to mention that this professor was a member of the Bosnian-Herzegovinian team in peace negotiations, concluded in Dayton (Ohio), and he took an active part of the

[8] As a result of a complex state administrative system of Bosnia and Herzegovina, there are three constitutional courts in Bosnia and Herzegovina – Constitutional Court of Bosnia and Herzegovina and two entity constitutional courts. Constitutional Court of Bosnia and Herzegovina is the one that obtained the abstract review of constitutionality, protection of human rights and fundamental freedoms, incidental review of constitutionality, etc. This court also interprets and creates the constitutional principles of constitutional system of Bosnia and Herzegovina.

[9] *Trnka, K.* Ustavno pravo. Sarajevo: Fakultet za javnu upravu, 2006, pp. 246–261.

[10] Ibid., p. 246.

constitution-making process (Annex 4 of the General Peace Agreement in Dayton is actually a Constitution of Bosnia and Herzegovina).

Professor Nedim Ademović, on the other hand, writes about: 1) principle of democracy; 2) principle of legal state; 3) principle of separation of powers (although the Constitution does not mention it), 4) principle of protection of human rights; 5) principle of constitutionality of peoples; 6) principle of complex state; 7) principle of unitary market.[11] This professor connects the constitutional principles with case law of Constitutional Court of BiH. Contrary to professor Trnka, professor Ademović finds some of these constitutional principles in the practice of Constitutional Court of BiH. This can be explained with the fact that this professor has worked in this constitutional institution (however, not as a judge).

Although constitutional law has a role of advising, encouraging and creating justification for such an approach to the issues, constitutional (and legal) principles should be sought in the insufficient "mobility" of the Constitutional Court, its sustainability and readiness to deal with "legal embryos" expressed only in the last few years as the legal (constitutional) principles.

On the other hand, the absence of a doctrinal approach or its presence in "traces" of the explanations of the Constitutional Court's decision is also conditioned by the lack of interest in the constitutional law of these questions. In addition to legal-dogmatic analysis, "borderless criticism", which, as a rule, is not based on a careful reading of decisions, but on the first impression gained from the means of public information, is supported by theoretical considerations of the role of the Constitutional Court from the period of its establishment. Thus, Constitutional Court's activity in Bosnia and Herzegovina is modest, but this can be counted among the achievements of BiH constitutional law, which stood at the "borders" of the 1980s at the collapse of the Yugoslavia.

By contrast, the comparative approach in this topic almost does not exist, because it would be extremely few, quite lonely examples from the jurisdiction of the Constitutional Court of Bosnia and Herzegovina that would be available to compare with the developed practice of Germany, in which the Constitution is parallel to the constitutional text and its constitutional-judicial interpretation of the Constitution.[12]

3. Constitutional Principles in Practice of the Constitutional Court of Bosnia and Herzegovina

There is no hierarchy between constitutional principles and other constitutional norms. "Regular" norms of constitution do not have to be in line with constitutional principles. That is the conclusion of the Constitutional Court of BiH No. U 5/98-I of 28, 29 and 30 January, 2000. The Constitutional Court of BiH went from the

[11] *Ademović, N., Marko, J., Marković, G.* Ustavno pravo. Sarajevo: KAS, 2012, pp. 55–57.

[12] For example, in the German Basic Law, the term "legal state" is referred to in several places of Art. 20, para. 3, Art. 28 st. 1 t. 1. However, "what is astonishing in German constitutional court practice is the number of undefined norms (principles – authors) made by the constitutional judge under these provisions." *Fromont, M.* Justice constitutionnelle comparée. Paris: Dalloz-Sirey, 2013, p. 370.

fact that all norms have the same value.[13] This can be indirectly concluded from the decision in the case No. u 5/04 of 27 January 2006, in which the Constitutional Court rejected a request (made by an authorized proposer) for evaluation of compatibility of Articles IV/1, IV/1.a.), IV/3.b) and V/1 of Constitution of BiH with the Article 14 of the European Convention for Human Rights, and Article 3 of the Protocol 1 of ECHR, as inadmissible. Authorized proposer claimed that ECHR has a higher hierarchy-normative status from other constitutional norms. The Constitutional Court has concluded that provisions of ECHR do not have a superior status in relation to other provisions of the Constitution of BiH. Consequently, the Constitutional Court departed from the position that all the provisions have the same value.

Although the provisions are different in hierarchical-normative sense, some provisions have a higher meaning. Provisions of human rights, pursuant to the Article X/2 of Constitution of BiH are "unchangeable". Hence, there is a difference in the normative effect of some provisions with regard that human rights and freedoms are protected with "clause of unchangeability"/"eternity".

The Constitutional Court found that constitutional principles are not just a proclamation but they also have a normative content. They all produce rights and duties of legal subjects, are directly applicable and condition the proceedings of public authority (No. U 5/98-III).

It is hard to tell precisely, when one of these principles is violated and when it is applicable. Firstly, the normative content of every principle must be determined; it has to be explained what it means. The content of constitutional principles does not arise from the constitutional norm. It has to be interpreted taking into account the whole Constitution, and again is interpreted in accordance with the concrete models of democracy, legal state and other principles, which were the leading constitution-makers in creation of a Constitution of BiH (for example, the case No. U 106/03 – *"ordinary courts are in obligation to control the legality in a state, in a way that they can decide if they will send a matter of legality to a Constitutional Court of BiH"*[14]*).* That is the principle of legal state.

Constitutional principles have an interpretative force – they serve for interpretation of other norms – dilemmas or uncertainties about the linguistic meaning of norm. In decision No. U 5/98-III, the Constitutional Court stated: *"Principles help in interpretation of constitutional text and description of sphere of competencies, scope of rights and duties and role of our political institutions"*.

In the sphere of human rights and fundamental freedoms, the Constitutional Court of Bosnia and Herzegovina decides on appeals on decisions of the Court of Bosnia and Herzegovina, supreme courts of entities, Appellate Court of Brčko district. Since most of human rights and fundamental freedoms, in my opinion, we can equalize with (international) legal principles, Constitutional Court of BiH acts on these regular courts, since they have a duty to respect and implement those principles. It is the same with the decision of European Court of Human Rights,

[13] Many countries, for example, Austria, create a formal difference by assigning a greater meaning to constitutional principles than to other constitutional norms. In Austrian constitutional system, regular constitutional norms have to accord with the constitutional principles. Besides, that difference is expressed in amendments. It is harder to change constitutional principles (for example, to shape Austria as a monarchy, not as a republic), Federal constitutional law (Article 44, para. 3.) considers that kind of change a "total change of constitution", and that kind of change needs to be voted in a referendum.

[14] U 106/03 of 27 October 2004, para. 33.

whose effect is often indirect, since the Constitutional Court of BiH refers to the decisions of this court in its own decisions. Rarely, the Constitutional Court of BiH has an effect on the implementation of legal principles in decisions of supreme courts and their decisions in cases of abstract control of constitutionality.

Also, there is a competence of the Constitutional Court of BiH prescribed by Article VI/3.c) of the Constitution of BiH: *"The Constitutional Court shall have a jurisdiction over issues referred by any court in Bosnia and Herzegovina concerning whether a law, on whose validity its decision depends, is compatible with this Constitution, with the European Convention for Human Rights and Fundamental Freedoms and its Protocols, or with the laws of Bosnia and Herzegovina; or concerning the existence of or the scope of a general rule of public international law pertinent to the court's decision."* When regular courts refer this kind of question to the Constitutional Court of BiH, the Constitutional Court of BiH has an influence on legal certainty (which is also a general legal principle), when it decides that some norms of specific legal act (or a legal act in its totality, which is a rare occasion) are not in accordance with, for example, European Convention for Human Rights and Fundamental Freedoms.

Conclusions

In the first part of this paper, I attempted to present the legal principles as theory, and later discussed how the judicial practice in Bosnia and Herzegovina applies the legal principles, not entering much in normative elaborations and argumentation about certain way of court activity. Although this field is not analyzed in the ex-Yugoslav legal theory, it is certain that judicial practice in some branches of the law, particularly the Constitutional law, is mostly based on legal principles.

The values and principles are an integral part of the landscape of constitutional judgment, although their legal status is subject to significant controversy, and their significance and meaning for courts differ greatly, depending on the national boundaries.[15] In any case, no matter how the status of principles (those regulating the organization of state authority and those that govern compliance with human rights and fundamental freedoms) as a legitimate source of judicial interpretation is debatable, judges consider them "unavoidable and necessary essential element" of dispute settlement.[16] Quite recently, in the late 20th century, the constitutional principles (and legal principles in general) gained a new status and role in constitutional court process. Constitutional courts "find", "discover", "create" these principles, when they are not proclaimed by the constitution. They become a merit for assessing constitutionality alike, as well as positive constitutional norms, but because of its insufficient determination and flexibility they create a space for very creative interpretations of the constitution. In this way, constitutional law is expanding, not only solely regarding the constitutional text and the accompanying legal acts of constitutional character, but at times there is no immediate basis in the constitution – although constitutional courts are trying to create a fiction about their fundamentals in a positive law. Thus, a triangular constitutional text – constitutional court – constitutional principle is established, in which it is not easy to manage, but it is necessary in order to preserve the integrity and consistency of

[15] *Jacobsohn, G. J.* Constitutional Values and Principals. In: *Rosenfeld, M., Sajó, A.* (eds.). The Oxford Handbook of Comparative Constitutional Law, Oxford, 2013, p. 777.

[16] Ibid., p. 779.

the constitutional law. The constitutional courts of stable (Germany) or relatively stable old and new constitutional democracies (France, Italy, Poland, etc.) have been doing so for several decades.

In Bosnia and Herzegovina, the Constitutional Court of BiH has begun to deal with the interpretation of constitutional (legal) principles in the last few years. Access to the Constitutional Court in this area is characterized by: 1) fragmentation; 2) insufficiently developed doctrine; 2) negligence. The Constitutional Court is still, for the most part, reserved to interpret those principles which have already defined by the Constitution or those that have been proclaimed, but the Constitution does not determine the basic content. When it attempts to find a principle that is not formulated in the Constitution, it does so gradually, but from the point of view of the legal argument it provides, insufficiently convincingly. Constitutional principles are used in the explanations of decisions yielded by Constitutional Court of Bosnia and Herzegovina, and thus form an integral part of legal standing and court practice created by this body. Pursuant to the Article III/3.b.) of the Constitution of Bosnia and Herzegovina, and as a part of the reasoning of the Constitutional Court of BiH decisions, the power of arguments and the authority of the Constitutional Court of BiH, which expresses their legal perceptions in their decisions, constitutional principles established in the practice of the Constitutional Court of BiH in turn become accepted by the ordinary courts in their practice.

The application of constitutional principles in the decisions of the Constitutional Court of BiH is present, but it can be concluded that this application is still rather an exception than a rule. I believe that the future application of the constitutional and legal principles in the decisions of the Constitutional Court of BiH will be more frequent due to application of EU law (when the time comes), and under the broader influence of the European Court of Human Rights.

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https://doi.org/10.22364/jull.11.08

Scope of Constitutional Review of Tax Law Provisions

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The article examines practice of the Constitutional Court of the Republic of Latvia in assessing proportionality of restriction upon fundamental rights established in the field of tax law. The article argues that the Constitutional Court exercises self-restraint: the court does not examine, whether the measure chosen by the legislator is economically the most sound, whether the tax is necessary, whether other, alternative solutions that would be less burdensome for an individual exist (insofar as they are not confiscatory).

Keywords: tax law, constitutional review, scope, self-restraint.

Content

Introduction

The Constitutional Court of the Republic of Latvia [hereinafter – the Constitutional Court] is an independent institution of judicial power, which implements constitutional review of the legal norms with norms of higher legal force and Constitution [*Satversme* of the Republic of Latvia]. The Constitutional Court has developed rich jurisprudence in tax and budgetary law questions, examining, whether the tax law is in line with *Satversme*. This article explains

the legal doctrine of the Constitutional Court in assessing legal norms setting the obligation to pay a tax.

The article consists of three sections. The first section outlines the obligation to pay a tax as a restriction upon the right to property. In the second section, the model of assessment of a restriction applied by the Constitutional Court is proved. The third section outlines examination of proportionality of a restriction upon the right to property.

1. The Obligation to Pay a Tax – a Restriction Upon the Right to Property

The Constitutional Court has recognized that the specificity of tax law influences the scope of constitutional review.

The Court has noted that regulation, insofar it envisages a person's obligation to pay a tax, falls within the scope of the first and the third sentence of Article 105 of the *Satversme* [Constitution of the Republic of Latvia]: "Everyone has the right to own property. Property rights may be restricted only in accordance with law".

Usually, the Constitutional Court examines legal norms related to the obligation to pay a tax as a restriction upon property rights rather than expropriation of property.[1] The duty to pay a tax always means restricting the right to property, because as the result of levying a tax the amount of applicant's income decreases.[2]

Likewise, a finding has been enshrined in the case law of the Constitutional Court that the rights that follow from Article 105 of the *Satversme* must be interpreted in interconnection with Article 1 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms.[3] It follows from the case law of the European Court of Human Rights (hereinafter – ECHR) that cases that are linked to establishment of an obligation to pay taxes are, predominantly, examined in the context of control over the use of property.[4] It has also been recognized in the case law of ECHR that a tax, as to its nature, may not be confiscatory.[5]

2. Model of Assessment of a Restriction Upon the Right to Property

In general, the right to property may be restricted, if the restriction is justifiable. To establish, whether a restriction upon property right can be justified, the Constitutional Court applies the following model of assessment (test):

2.1. Whether the Restriction Upon the Right to Property Has Been Established by Law

In examining whether the restriction upon the right to property has been established by law, the Constitutional Court verifies:

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1 Judgment of 8 June 2007 by the Constitutional Court in case No. 2007-01-01, para. 19, and Judgment of 25 March 2015 in case No. 2014-11-0103, para. 15.

2 Judgment of 8 June 2007 by the Constitutional Court in case No. 2007-01-01, para. 19, and Judgment of 25 March 2015 in case No. 2014-11-0103, para. 15.

3 Judgment of 28 May 2009 by the Constitutional Court in case No. 2008-47-01, para. 7.1.

4 *Sermet, L.* The European Convention on Human Rights and property rights. Human rights files, No. 11 rev. Strasbourg: Council of Europe Publishing, 1999, p. 25.

5 ECHR Judgment of 25 July 2013 in case *Khodorkovskiy and Lebedev v. Russia*, Applications No. 11082/06 and 13772/05, para. 870.

1) whether the law has been adopted in accordance with procedure set out in regulatory enactments;

Before assessing whether the restriction upon fundamental rights has been established by law, the subject, which in the area of taxes is to be regarded as the legislator, is specified. Pursuant to Article 64 of the *Satversme*, the right to legislate is vested in two subjects – the *Saeima* and the people, in the procedure and scope defined by the *Satversme*. Article 73 of the *Satversme*, in turn, defines the issues that cannot be put for a national referendum. It follows from the above that the *Satversme* restricts activities of the people as the legislator in the field of taxes, and insofar as the actions by the State with respect to taxes fall within the scope of Article 73 of the *Satversme*, only the *Saeima* is to be recognized as being the legislator in this field.

Stakeholders' involvement in preparing a draft regulatory enactment may facilitate adoption of an objective decision and balancing of various interests; however, an opinion held by a particular group of persons is not binding upon the *Saeima*.[6] Therefore the Constitutional Court has recognized that, although it would be advisable to hear the opinion of the addressees of norms, neither the *Satversme*, nor the *Saeima* Rules of Procedure define such hearing as a mandatory pre-requisite for adoption of legal norms. An opinion held by the addressees of legal norms regarding the draft of these norms may not prohibit the *Saeima* from adopting a decision.

2) whether a law has been promulgated and is publicly accessible in accordance with requirements of regulatory enactments;
3) whether the law has been worded with sufficient clarity, so that a person would be able to understand the content of rights and obligations derived from it and predict consequences of application thereof, as well as whether the law ensures protection against arbitrary application of it.[7]

2.2. Whether the Restriction has a Legitimate Aim

It has been recognized in the case law of the Constitutional Court that a regulation that envisages paying of a tax should be assessed as a restriction, which is established in legal tax relations to ensure formation of the state budget and budgets of local governments.[8] Taxes are introduced to ensure public welfare.[9] Any tax, which ensures state budget revenue, may be further used for the protection of public welfare. The legislator's obligation to cover expenses only in particular fields by revenue from a particular tax does not follow from the *Satversme*.[10] Consequently – the obligation to pay a tax has a legitimate aim – to ensure public welfare.

2.3. Whether the Restriction is Proportionate to Its Legitimate Aim

In examining proportionality of a restriction established in the field of tax law, the Constitutional Court exercises self-restraint. The Court has noted that in the field of tax law the same requirements cannot be set for the legislator as, for example, in the field of protecting and ensuring civic or political rights.[11] In defining

[6] Judgment of 26 November 2009 by the Constitutional Court in case No. 2009-08-01, para. 17.2.
[7] Judgment of 8 April 2015 by the Constitutional Court in case No. 2014-34-01, para. 14.
[8] Judgment of 8 June 2007 by the Constitutional Court in case No. 2007-01-01, para. 22.
[9] Judgment of 6 December 2010 by the Constitutional Court in case No. 2010-25-01, para. 9.
[10] Judgment of 3 February 2012 by the Constitutional Court in case No. 2011-11-01, para. 13.
[11] Judgment of 13 April 2011 by the Constitutional Court in case No. 2010-59-01, para. 9.

and implementing its taxation policy, the State enjoys broad discretion.[12] It includes the right to choose tax rates and categories of persons to whom these are applied, as well as the right to define the details of particular regulation.

In examining the limits of the legislator's discretion with respect to establishing a tax for a particular object, the Constitutional Court has noted that it should be taken into account that the *Satversme* authorizes *expressis verbis* the legislator to adopt the state budget, thus, to determine the state revenue and expenditure. The *Satversme* has authorized the legislator to implement such fiscal policy that would ensure the necessary income to the State.[13]

The State must take care of its sustainable development, *inter alia*, by ensuring that the resources that are necessary for performing the State's functions always are in the state budget. Moreover, the Constitutional Court already has noted that a person's right to property cannot be examined in isolation from the person's constitutional obligation to pay taxes established in due procedure.[14]

Due to the reasons referred to above, the Constitutional Court has recognized that the legislator's decisions on what kind of tax would be proportionate and necessary is an issue of policy and expedience. Therefore, with respect to implementation of tax policy, the scope of constitutional review is narrower,[15] and in this regard the Constitutional Court has exercised self-restraint.

The Constitutional Court has recognized that in reviewing legality of a restriction, it mainly examines, whether the tax payment is not an incommensurate burden for the addressee and whether the legal tax regulation complies with general principles of law.[16] Thus, in assessing whether the tax payment is not an incommensurate burden for the addressee, the Court considers only, whether the applied tax is not confiscatory by nature.

3. Examination of Proportionality of a Restriction Upon the Right to Property

In examining proportionality of a restriction upon fundamental rights, the Constitutional Court verifies:

1) whether the chosen measures are appropriate for reaching the legitimate aim, or whether the legitimate aim can be attained by the chosen measure;

The Constitutional Court has found that the legislator has the right, insofar the *Satversme* and the State's international commitments do not provide otherwise, to decide on establishing priority expenditure for the State and society and channel resources obtained from tax payments for this expenditure. The legislator's obligation to cover expenditure only in particular fields from the particular tax revenue does not follow from the *Satversme*.[17] Thus, the legislator does not have the obligation to channel revenue from particular taxes for reaching particular aims.

Although the Constitutional Court recognizes that norms of tax law should be not only legally impeccable, but also economically sound[18], and that tax regulation

[12] Judgment of 20 May 2011 by the Constitutional Court in case No. 2010-70-01, para. 9.
[13] Judgment of 6 December 2010 by the Constitutional court in case No. 2010-25-01, para. 10.
[14] Judgment of 13 April 2011 by the Constitutional Court in case No. 2010-59-01, para. 9.
[15] Judgment of 30 April 2008 by the Constitutional Court in case No. 2007-23-01, paras. 7 and 11.
[16] Judgment of 8 June 2007 by the Constitutional Court in case No. 2007-01-01, para. 24.
[17] Judgment of 3 February 2012 by the Constitutional Court in case No. 2011-11-01, para. 13.
[18] *Lazdiņš, J.* Ievads nodokļu tiesībās [Introduction to Tax Law]. *Jurista Vārds*, 40(443), 2006, 2. lpp.

should be based upon objective and rational considerations[19], the Court exercises self-restraint and points out that it cannot verify, whether the measures used by the legislator conform with the findings of economics, i.e., whether the measures chosen by the legislator are economically sound.

However, to establish, whether the restriction upon fundamental rights caused by the obligation to pay a tax is appropriate for reaching its legitimate aim, the Court verifies, whether objective and rational considerations are used to substantiate the measures chosen for reaching the legitimate aim of the restriction. Therefore, to conclude, whether the restriction upon fundamental rights caused by the obligation to pay the tax is appropriate for reaching its legitimate aim, the Constitutional Court verifies, whether the tax payers, the taxable object and the principle for calculating the tax have not been set arbitrarily, and whether the procedure for calculating the tax is such that allows calculating the tax mathematically.[20]

2) is this action necessary, or whether the legitimate aim cannot be reached by other measures, less restrictive upon a person's rights;

Also in this respect the Court has noted that it cannot replace the legislator's discretion by its own opinion on the most rational solution.[21] In particular, when analysing, whether more lenient measures for reaching the legitimate aim do not exist, the Constitutional Court must abide by the limits of review that are set by the nature of tax law.[22] In view of the legislator's broad discretion in developing taxation policy, the Court has recognized that the choice between alternative solutions is the legislator's political decision, which cannot be assessed by methods of constitutional review.

If the Constitutional Court has established that the principle for tax calculation, chosen by the legislator, has a rational explanation, based upon objective and rational considerations, and that the legislator has examined alternatives to the contested norms, then the Constitutional Court has no right to provide that the legislator should choose another tax rate, another principle for calculating the tax or should include other elements in the formula for calculating the tax. Likewise, ECHR, in examining cases with regard to restrictions upon human rights that are linked to the obligation to pay a tax, does not assess the States' choices in the field of taxes, unless this choice lacks reasonable grounds.[23]

3) whether the restriction is appropriate, or whether the benefit gained by society outweighs the damage inflicted upon a person's rights.

A tax performs a fiscal function, because it ensures revenue in the state budget. Therefore the society's benefit may be described as the state budget revenue, which further can be used to protect public welfare. I.e., the *Satversme* authorizes *expressis verbis* the legislator to adopt the state budget, thus, also to determine the state budget revenue. Consequently, the legislator must implement such fiscal policy that would ensure the necessary revenue into the state budget.

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[19] Judgment of 20 May 2011 by the Constitutional Court in case No. 2010-70-01, para. 9.

[20] Judgment of 20 May 2011 by the Constitutional Court in case No. 2010-70-01, para. 9, and Judgment of 25 March 2015 in case No. 2014-11-0103, para. 24.1.

[21] Judgment of 19 December 2011 in case No. 2011-03-01, para. 20.

[22] Judgment of 20 May 2011 by the Constitutional Court in case No. 2010-70-01, para. 16, and Judgment of 25 March 2015 in case No. 2014-11-0103, para. 25.2.

[23] ECHR Judgment of 4 July 2013 in case *R. Sz. v. Hungary*, application No. 41838/11, para. 48.

For the purpose of ensuring public welfare, a person has a constitutional obligation to pay taxes established in due procedure.[24]

In examining, whether the tax payment is not an incommensurate burden for the addressee, the Constitutional Court has found that it should be taken into consideration that every tax is an element of the taxation policy implemented by the legislator and that usually every person has the obligation to pay a number of taxes. Each tax has different objectives, objects, and procedure for calculating and applying it. Therefore, the Constitutional Court predominantly examines, whether the applied tax is not confiscatory by its nature.[25]

Conclucions

1. The Constitutional Court usually examines legal norms related to the obligation to pay a tax as a restriction upon the right to property.
2. The specificity of tax law influences the scope of constitutional review.
3. In adoption of a legal norm, the *Saeima* is not required to follow the proposals made by a particular social group.
4. The obligation to pay a tax has a legitimate aim – ensuring public welfare.
5. In assessing proportionality of a restriction upon fundamental rights established in the field of tax law, the Constitutional Court exercises self-restraint: the Court does not examine, whether the measure chosen by the legislator is economically the most sound, whether the tax is necessary, whether other, alternative solutions that would be less burdensome for an individual exist (insofar as they are not confiscatory).

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5. Judgment of 6 December 2010 by the Constitutional Court in Case No. 2010-25-01. Available: http://satv.tiesa.gov.lv [last viewed 08.06.2017].

[24] Judgment of 13 April 2011 by the Constitutional Court in case No. 2010-59-01, paras. 9 and 10.
[25] Judgment of 25 March 2015 by the Constitutional Court in case No. 2014-11-0103, para. 20.

6. Judgment of 13 April 2011 by the Constitutional Court in Case No. 2010-59-01. Available: http://satv.tiesa.gov.lv [last viewed 08.06.2017].
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https://doi.org/10.22364/jull.11.09

Systems Approach Conception of Legal Regulation

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The article is devoted to the problem of the formation of systems approach conception of legal regulation in the context of integrative jurisprudence. Today the mechanistic approach to legal regulation retains its popularity. However, the mechanistic approach fails to take into account all the diversity interlinkages, relations and processes occurring in the legal reality, the socio-psychological and informational aspects of the interaction of subjects. The legal regulation does not completely match the legislative mechanism of purposeful state influence, law making and the application of the law of different government bodies and officials. The article points out that the systems approach conception of legal regulation allows to overcome diagrammatic mechanism design stages of state normative regulation and to consider the legal regulation as a complex system of interrelated norms (legal establishment) and legal relationships, legal consciousness and legal principles during information transmission in jural relations, solve the complicated scientific and practical problems of legal regulation.

Keywords: legal regulation, legal methodology, systems approach, mechanism of legal regulation, legislative regulation, integrative jurisprudence, legal norms, legal relationships.

Content

Introduction

Modern science in general and juridical science in particular pays a lot of attention to the area of regulating social relations and forms and means of regulating the behaviour of legal entities. Specifically, philosophical and practical legal studies have always focused on various issues related to legal regulation of various activities, creating conditions that encourage good behaviour in social

relationships, and applying legal instruments that restrict (do not allow) or repress antisocial behaviour. In modern studies of legal regulation emphasis is put on the formal and dogmatic analysis of current legislation. However, even special legal tools ("legal instrumentarium") for the legal regulation of social relations should form a regulated system in the single legal space – the legal system.

In Russian legal studies, the mechanistic understanding of legal regulation to some extent stemmed from the Marxist-Leninist approach to state and law, which prevailed in science in the 20th century. It was based on such categories as "apparatus" and "machine", and narrowed down legal regulation to the state (legislative) mechanism of the normative regulation of social relations.

According to law enforcement data, effective normative regulation (state-legal, legislative regulation) is problematic. The current concept of legal regulation implies that the legislator's role and powers (limitations on such powers) in regulating social relations and behaviour should be considered in light of the fact that the Internet is the most frequent source of information that exerts real influence on legal entities. The motives, behavioural attitudes, and goals of legally relevant behaviour of legal entities take shape in their legal consciousness in a certain socio-cultural context. This context also encompasses human activity in the industrial (technogenic) sphere and in the area of anthropogenic environmental impact. In terms of philosophy and methodology, one of the problems associated with creating a modern legal regulation concept is the so-called "disappearance" of the subject of law.

From an epistemological point of view, the relevance of a systems approach to legal regulation stems from its methodological importance in modern legal theory. The systems approach serves as a methodological foundation for integrative jurisprudence, within the scope of which a logical and holistic (integrative) theory can be developed of the legal regulation of social relations in a single legal space.

1. Systems Approach in Legal Knowledge

The development of theoretical knowledge in jurisprudence is part of the common processes in the scientific field of human activity. Today, the science of law is a complex multilevel formation. On the one hand, law has become the subject of a wide spectrum of studies: sociological, politological, psychological, anthropological, linguistic, cybernetic, etc. The results of the studies are reflected in legal theory and are of a great importance to legal practice. On the other hand, the phenomena of legal reality occur in a particular socio-cultural context and they can be analytically allocated as an independent (autonomous) subject of scientific cognition. Originating simultaneously with legal activity, the ancient Roman legal knowledge focused on specific practical issues and was of a casuistic nature that made it impossible for legal theory to mould in that period. Nevertheless, to reason their judgments in concrete cases, the Roman jurists used logical techniques of analogy, classification and generalization[1]. These had been formulated by the Greek philosophers, and are the techniques of the systems approach. The concept of "system" is inextricably bound with the notion of wholeness. In fact, it dates back to the times of the antique thesis that the whole is more than the sum of its parts.

[1] See: *Berman, H. J.* The Formation of the Western Legal Tradition (Rus. ed.: Zapadnaya traditsiya prava: epokha formirovaniya. Moscow, 1998, pp. 140–143); *Garcia Garrido, M.* Derecho Privado Romano: casos, acciones, instituciones (Rus. ed.: *Garcia Garrido, M.* Rimskoye tsastnoye pravo: kazusy, iski, instituty, pp. 110–112).

According to the Stoics, a system is the world order[2]. The term "system" is of Greek origin. Eventually, the need formed for the theoretical development of the legal aspects of society, methodological (philosophical-methodological) justification, and systematization of legal knowledge.

Since the time of Plato and Aristotle to Kant, then Schelling and Hegel, the special features of the system of knowledge itself (wholeness, consistency) and cognition consistency have been paid considerable attention. The growth should be noticed in the number of publications on the legal theory methodology issues including the systems approach. In fact, the value of the systems approach to legal theory remains controversial. However, there is a large number of works on: general methodological issues of legal studies; and the systems approach as a method of the theory of legal validity cognition as a whole or its aspects. These aspects are the legal system of society, the system of law, and the legislation system. The reasons are, as follows: different definitions of the term "system" in socio-humanitarian knowledge and natural science; reconsideration of the role of the entity in cognitive activity; and, certainly, the theoretical and methodological issues of law comprehension as well as different models (types) of law comprehension. Nevertheless, in legal studies, the concept of "system" and its interpretations are quite often applied to social studies, law, and legal regulation.[3]

In legal theory, formal logic thinking techniques are considered as the universal methods of scientific cognition. The techniques include abstract thinking techniques: analysis, synthesis, induction, and deduction. The systems approach covers abstract thinking techniques in an expanded form. Therefore, the systems approach is often considered as a universal or general scientific approach (method) which is used in almost all fields of scientific knowledge. The systems approach, in its contemporary meaning, became widespread during the second half of the 20th century. It became an interdisciplinary complex approach (method) of cognition (description, explanation, exploration, designing) of various sophisticated objects (systems). Replacing the mechanistic approach of the 17th–19th centuries, the principles of the systems approach are used in biology, cybernetics, engineering, ecology, economics, management, psychology, jurisprudence and other disciplines. The analysis of the system of law, legislation system involves the terms and concepts of the systems approach.

In legal theory, the systems approach as the methodological basis of building various generalized system models[4] is, in fact, a research conception of presentation (intellectual designing) of law as a system. Additionally, it is not only the law, which is presented as a system, but research activity is also considered as a complex purposive system. This is because scientific research by means of the systems approach must result in merging various models of the studied object into a whole. Moreover, in terms of the systems approach, the systems studied can and, in many cases, do influence the research process. The unilateral approaches, applied to the concepts of law and legal regulation, became insufficient in the early 20th century.

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[2] See: *Frolov I. T.* (ed.). Filosofsky slovar [Dictionary of Philosophy]. Moscow, Politizdat, 1986, p. 427.

[3] See, for example: *Van Hoecke, M.* Law as communication. (Rus. ed.: Pravo kak kommunikatsiya. Izvestiya vysshikh uchebnykh zavedeniy. Pravovedeniye. [Proceedings of higher educational institutions. Jurisprudence]. No. 2, 2006); *Alchuron, K. E., Bulygin, E. V.* Normativnye sistemy [Normative systems]. Rossiyskiy ezhegodnik teorii prava [Russian legal theory annual edition], 2010, No. 2, St. Petersburg, 2011, pp. 309–472.

[4] The concept of "system", which refers to integrity (holistic formation) consisting of interrelated elements, is the central concept in the systems approach.

However, in the holistic concept of law there is the intention to unite (synthesize) "views on the legal and the equitable, the relation between law and morality, the consistency of prevailing theoretical legal views, and the pressing needs of practice".[5] Throughout the period, the existence of legal thought can be traced since the earliest philosophical developments. Despite the fact that "the term "system" itself was not emphasized", it has a long history in science.[6] Today, the concept of "system" is widely used in different areas of human activity, in science and engineering/technology. Most systems are characterized by the processes of information transmission and control within the systems. The elements united into a social system are considered as a whole.[7]

In the science of law, the systems approach is applied in the light of the experience of its use in other areas of scientific knowledge and the information about the methods (ways) and results of systems research. Being an interdisciplinary approach of scientific cognition, the systems approach in legal theory is a methodological principle of systems research dedicated to legal phenomena and legal regulation. One of the principles of this approach is the methodological principle of the systemic relation of the general and special scientific methods (ways) of law cognition and, specifically, the legal method applied by researchers. This ensures the wholeness (integrity) of legal research and the systemic conception of legal regulation. Generally, in terms of the systems approach, the whole world is a systemic formation. In the social world, society is the metasystem (the main system); it is the society that determines the purpose of law, economics, politics, etc. Self-assembling complex systems can change their structure in the process of functioning. A social system appears as a complex system of relations and social entities' activity. It is created in the course of interaction and information sharing among its members. It is difficult to predict the result of the entities' interaction, including the legal sphere, because of its probabilistic nature. Specifically, the relations between legal entities are influenced not only by legal norms, but also by other social norms, functioning in other subsystems of society. Actually, the analysis of functional relations is one of the tasks of cybernetics. Therefore, the systems approach as a comprehensive method of scientific cognition is primarily aimed at identifying the backbone (integrative) relations between the elements of a system rather than its elements or establishing the main element of a system, in particular, a legal system. Herewith, in methodology, the relations take precedence over the elements of the system.

In legal theory, the systems approach characterizes the research conception. It encompasses a number of methodological principles, the use of which is determined by the researchers' law comprehension, particularly their attitude to the role and importance of the legal entity in legal regulation, in the processes of law establishing

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5 *Grafsky, V. G.* Integralnoye pravoponomaniye v istoriko-filosofskoy perspective [Integral law comprehension in historical and philosophical perspective. Philosophy of law in Russia: history and recent times]. Moscow, 2009, p. 220.

6 See: *Von Bertalanffy, L.* General System Theory: Challenges and Results Overview (Rus. ed.: Obshchaya teoriya sistem – obzor problem i rezultatov. Sistemnye issledovaniya. Ezhegodnik [Systems research. Yearbook]. Moscow, 1969, pp. 34–35).

7 See: *Lukovskaya D. I., Kapustina M. A.* Sistemnyi podkhod v teorii prava. Nauka teorii i istorii gosudarstva i prava v poiskakh novykh metodologicheskikh reshenii: kollektivnaya monografiya, otv. red. *A. A. Dorskaya* [System approach to legal theory. Science of theory and history of state and law in search of new methodological solutions: Collective monograph. *A. A. Dorskaya* (ed.)], St. Petersburg, Asterion, 2012, p. 9.

(law-creating). The main principle of the systems approach to legal theory is the principle of a holistic (comprehensive) view of law. That means the representation (modelling) of law and legal regulation as an integrative (holistic, systemic) formation. This kind of research combines, firstly, the legal reality cognition methods, actualized in different types (models) of law comprehension (normativism, natural law theory, and sociological model); and secondly, a means of cognition developed in other (non-legal) areas of scientific knowledge. Interdisciplinary research results in a multiplying holistic concept of law. It ensures the unity of the methods used, and the connection of different models of law comprehension through the systems approach. Herewith, law is conceived as a socio-cultural whole. Its functioning is impossible without legal entities; hence, the research process is influenced by the legal system itself. The researcher of a legal system is a member of society, a citizen or a stateless person. The researcher is a participant of legal relations, i.e., to an extent that the researcher is a part of the system he/she explores (designs, models). Therefore, the result of the research, the model (mental, intellectual) of the legal system, is influenced by the researcher's "attitude" (the prior comprehension or pre-comprehension) towards law, the concept of legal regulation, legal norm.[8] The researcher's law comprehension is a prerequisite for his/her view on the issue of the consistency of legal phenomena.

2. Law as a System: Mechanistic Framework vs. Methodology of the Systems Approach

The terms "system" and "structure" are widely used in jurisprudence, for example: legislation system, public authority system, the system of legal norms, judicial system, the system of legal relations, the structure of a legal norm, the structure of a subjective right, the structure of legal consciousness, the structure of legal relation, and the structure of the legal status of an individual. However, in the examples given, as well as in other cases, the concept of system and its structure is based on the mechanistic approach. This is characteristic of the classical scientific rationality and the corresponding law comprehension. In legal theory, the mechanistic approach leads to a certain kind of schematization (and, in this sense, simplification) of legal concepts and phenomena, although it uses the term "system".

Since the 1960s, in Russian legal science, legal regulation (impact) has been treated on the basis of the principles of the mechanistic approach. In this framework, legal regulation was reduced to normative regulation, and more precisely, to governmental legal (legislative) adjustment of social relations. However, assuming that the state is the central body of law making, the legal system is to be understood as organized by the government system and practically equal to the political system, whose central body is also the government. Thus, the legal system is the result of focused governmental legislative regulation of social relations. Based on this approach, legal regulation aims to ensure that activities of organizations, governmental bodies, civil servants and citizens embody the norms of effective legislation.[9] S. S. Alekseev laid the foundations of Russian legal regulation theory in

[8] For example, see: *Stråth, B.* (ed.), Myth and Memory in the Construction of Community, Historical Patterns in Europe and Beyond, Multiple Europes. No. 9, P.I.E. Peter Lang, Brussels, 2000.

[9] *Kapustina, M. A.* Pravoustanovlenie, zakonotvorchestvo i pravovaya politika: sistemnyj podhod k pravovomu regulirovaniyu. *Eurasian Law Journal*, 1(92), 2016, p. 373.

the 1960s–1980s.[10] In terms of mechanistic framework, he views legal regulation as a certain "arrangement" of legal instruments (legal "instrumentarium"), and legal stimuli and restrictions, by means of which the state exercises purposeful legal (state-legal) regulation of social relations and individual behaviour. Undoubtedly, both Alekseev's legal regulation structuring and his analyses of the interconnection of legal instruments (means, instrumentarium) were a pioneering approach at the time. However, this theoretical and methodological standpoint underwent substantial changes in the 1990s.[11] Despite this, the mechanistic approach to legal regulation and, hence, to law as a social-regulatory instrument is still common in Russian legal studies.

Generally, legal regulation is analyzed as an authoritative form of purposeful legal leverage executed by government and aimed at regulating a certain sphere of social relations. Some aspects of social regulation in general and legal (constitutional) regulation in particular are analyzed in the works by such modern theorists as J. Raz, R. Alexy, J. Rawls, E. Bodenheimer, M. Luts-Sotak, P. Varul, R. Müllerson, W. Krawietz, M. Van Hoecke, N. Rouland, C. Varga, C. Peterson, M. Sandström, M. Lyles, H.-P. Haferkamp, J. Rückert, T. Repgen, P. Szymaniec, and R. Narits.

It should be noted that specialized literature and legal language in both Russian and English interpret regulation, first and foremost, as a form of imperative legal influence (impact). Regulation is defined as an aggregate of obligatory statutory orders issued by an agency of a state power or regulatory body, whose aim is to coordinate a particular domain of social relations. In the documents *regulation* has the meaning of *standard regulation, by-law, governmental regulation*. *Regulation* might stand for by-law; a point in case is Regulation of the European Union[12]. This by-law is obligatory for all members of the European Union. Research articles published in English refer to *regulation* as governmental regulation based on law, which is enforced by means of legal liability. In this sense, *regulation* (as an authoritative form of influencing social relations) is opposed to *liberalization* seen as the process of autonomous regulation (self-regulation). This process is connected with reduction (mitigation) of governmental influence on certain areas of daily life activities. A case in point is the economy (*economic liberalization, price liberalization, trade liberalization, liberalization of imports, etc.*).

The mechanistic approach to legal regulation is unilateral. It does not reflect: the complexity of relationships between the agencies; the imperative and autonomous adjustment of social relations; and the behaviour of the parties to the legal relationship. Schematization of the mechanism (process) of legal regulation, particularly governmental legal regulation, prevents us from analyzing the whole complex of focused (rational) and spontaneous (natural) processes of legal

[10] The first research in this field. *Alekseev, S. S.* Mekhanizm pravovogo regulirovania v sotsialisticheskom gosudarstve [The mechanism of legal regulation in socialist state]. Moscow, 1966.

[11] See, for example, *Alekseev, S. S.* Pravo: azbuka – teoria – filosofia: Opyt kompleksnogo issledovania. [Law: Basics – Theory – Philosophy. The Effort of Complex Research]. Moscow, 1999, p. 47; *Alekseev, A. A.* Gosudarstvo i pravo. Nachalny kurs [State and Law. Introductory course]. Moscow, 1999, p. 300; *Alekseev, S. S.* Voskhozhdenie k pravu. Poiski i reshenia [The Ascent to Law. Study and Solution]. 2nd ed., revised and enlarged. Moscow, 2002, pp. 260–287.

[12] Technical Regulations of the European Commission, or the European Parliament and the Council of Europe establish compulsory requirements to the objects of technical regulation(while in Russia the standards are voluntary), which include manufacturing, exploitation, storage, transportation, realization and utilization of produce, the produce itself, as well as buildings and other constructions.

influence occurring in the legal system. The diversity of complex dynamic links between interacting legal entities is not reflected by an understanding of legal regulation as mathematically precise, built upon a mechanism of rationally predesigned geometrical scheme. An analogy between legal regulation and a technical mechanism excludes from the study pragmatic and cultural aspects of legal influence. It also does not explain the role of legal consciousness in the regulation of social relations and formation of the legal system. In Russian jurisprudence (theoretically and practically oriented), the legal system is still seen as the result of the performance of a purely rational mechanism of governmental legal regulation. Consequently, the legal system that is given to the state is represented by its legislative (norm creating) bodies. Generally, people are seen as objects under legal influence (impact), i.e. they are the target of governmental legal (in effect legislative) regulation, which is realized by means of different prohibitions, permissibility, obligations, incentives (juridical stimuli) and limitations. The individual, seen as the object of influence, is not a party to legal relationships.

Nowadays, the systems approach focuses on legal research in the mode of a dialogue between the legal entity and the object (system) of cognition. Therefore, it helps to overcome reductionism (schematization) of legal concepts and studies in the legal sphere. It introduces (models, designs) the concepts of law, legal regulation, state authority, etc. as open complex systems interacting with the environment and affecting the research process. The results of the legal studies, based on the systems approach, reflect the researcher's position in terms of theoretical and practical questions (issues) of the study. The scientific hypotheses generated by the author in the socio-cultural context is determined ("programmed") by the researchers' law comprehension, by the legal tradition in which they work, and by their surroundings, particularly the scientific school, where they were trained as scientists. The methodology of the systems approach focuses on the legal entity as a party of legal life of society, hence the unreflective and interactive nature of legal research. The methodological principle of ontological and epistemological pluralism is reflected, in particular, in the recognition of the multiplicity of sources of law. It recognizes that positive law gives privileges, although they inherently contradict the law, the legal regulation between different (but equal to each other in the legal sense) legal entities.

The research concept of legal regulation, based on the systems approach, is a complex purposive research system. It is influenced by the studied system of the relations between legal entities and their interaction with each other. Unlike the natural sciences that study nature which is not man-made, the socio-humanitarian disciplines, including legal theory, explore the existing things created by people. Humanity creates legal institutions, changes them, "participates" in them[13] and explores (cognizes) them. The involvement of legal entities in legal and other social institutions, their participation in law-creating, interpretation and application of legal norms (institutions) may cause some scepticism regarding the feasibility of presenting modern social relations as managed. It may also challenge the possibility of purposeful and centralized organization (normalization) of legal entities' conduct (especially in the information space of the Internet), as well as forecasting the effectiveness of legislative norms.

[13] For example, see: *Rulan, N.* Yuridicheskaya antropologiya [Legal anthropology], M.: Norma, 1999, pp. 31–50.

The systems approach obliges researchers to take into account the processes of self-assembling (self-regulation) in the legal sphere. The contemporary research directions in legal theory, such as synergism, semiotics, the theory of legal cultures, actualize the linguistic aspect of law. Language is part of law; the law strives to textual expression and appears as a sign system. In this case, from the perspective of legal hermeneutics, an interpreter of a legal norm, a legal entity, that applies a norm, acts as a co-author of the legislator.

On the one hand, the methodology of the systems approach in relation to the study of legal regulation helps to overcome the scepticism about the possibility of legal regulation under the contemporary conditions, for example, in the Internet. On the other hand, it overcomes a mechanical designing of the stages of legal regulation mechanism (state legislative regulation). The systems approach implies: characterizing and explaining typical relations; constructing generalized models of different kinds of relations between legal entities and their interactions with each other; forecasting the development of interaction and relationship between the legal system and other subsystems of society; and forecasting possible changes in elemental composition of legal regulation. The systems approach to legal theory is aimed at building a scientific integrative model of law as a complex open social system.

3. Formation of Systems Approach Conception of Legal Regulation: Integrative Principle of Research Approaches in Modern Jurisprudence

The systems approach to legal theory enables solving the complex scientific and practical problem of legal regulation system formation. It displays the variety of links, relations and processes in legal reality. It is underpinned by critical analysis and coherent integration of the major known factors in the legal studies models of the legal system proposed by normativism, natural law theory, and sociological law comprehension. The systems approach ensures the scientific and theoretical generalization of the results of system research of law from the point of view of different models of law comprehension. It connects different models of the system of law (law as a system of norms, law as a system of legal relations, etc.) into a single theoretical picture; and designs an integrative jurisprudence and the systemic conception of legal regulation.

In terms of normative law comprehension, the legal system is a mentally built logical structure formed by different groups of norms. The legal system is, in a sense, a result of research activities aimed at systematizing legal norms. In Russia, in jurisprudence and practice of legal regulation, legal groups of norms in private and public law, and in material and procedural law are the main (largest) structural elements of the legal system. In addition, the legal system is represented by a branch and institutional structure. On the one hand, it corresponds with the structure of social relations, which should be legally regulated. On the other hand, the system of branches and institutions of law is reflected in the legislation system, as well as in the systematization of normative acts and the legal regulation mechanism.

Law as a system (network, order) of legal relations is discussed by sociological jurisprudence. Legal norms, as well as other social rules of conduct (norms of morality, religion, canons of fashion or etiquette, etc.) are formed when the

participants of social relations mutually recognize them.[14] The focus on the functions of a legal system has led to a review of the correlation between the norm of statute and legal relation. The legal efficacy of a norm, its actual impact (functioning) determines the legal validity of the norm, i.e. the involvement of the norm into the legal system. A norm is formed in the process of its recognition by legal entities, not by individuals but by society as a whole. Norm validity relates to the legal entities' awareness of the mutual (connecting them) rights and responsibilities in terms of a certain social context. The idea of rights and responsibilities, connecting legal entities, is determined by legal tradition and principles, expected decisions of judges, the reaction of other people, i.e. the socio-psychological context.

The post-classical natural law conceptions of the 20th century did not base the definition of law on the contradiction of natural law and positive law, but instead on the integrated features of law as a system of norms (legislation) and actual legal relations realized in a socio-cultural context in accordance with legal entities' views on values historically emerging in their consciousness. The concept of law, combining its evaluative component and its regulatory and coercive nature, historical variability of the content of legal establishments, the social efficiency of legal regulation, presents law as a system of norms, legal relations and legal consciousness. The validity of a norm of statute cannot only be determined by formal-juridical or sociological criteria. Legal norms are a part of the culture of society and their effectiveness is directly connected with those values that are important to legal entities.[15] The evaluative component of law is expressed in the legal consciousness of legal entities. Therefore, besides norms and actually existing legal relations, a legal system includes legal consciousness of legal entities.

In the 20th century, in jurisprudence, the supporters of different approaches to law comprehension tended to be comprehensive (integrative, multilateral) regarding law as a complex social and humanitarian phenomenon.[16] The contemporary legal studies in Russia discuss a new model for the definition of law, constitutional law comprehension, which should be attributed to the synthetic (integrative) approach.[17] The constitutional law comprehension emerging today, differs (is of priority) from other variants of integrative jurisprudence by actualizing the systems approach to legal regulation to ensure actual implementation of legal principles (properties) in law-making and law application (primarily, judicial) activities. Thus, the valid Constitution is the juridical (constitutional-legal) basis for the formation of the systemic (integrative, holistic) conception of legal regulation in the Russian Federation. The systems approach ensures an integral (holistic) law comprehension and integrative nature of jurisprudence. Integrative jurisprudence allows combining

[14] See more: *Ehrlich, E.* Grundlegung der Soziologie des Rechts (Rus. ed.: Osnovopolozheniye sotsiologii prava. Transl. from German by *Antonova, M. V.*; *Grafsky, V. G., Grevtsov, Y. I.* (eds.)] St. Petersburg, University Publishing Consortium, 2011, pp. 97–100.

[15] See, for example, *Finnis, J.* Natural Law and Natural Rights. 2nd ed., USA: Oxford University Press, 2011.

[16] See: Rättslig integration och pluralism. Nordisk Rättskultur I Omvandling. Stockholm: Institutet för Rättshistorisk Forskning, 2001; *Baker ,J. H.* An Introduction to English legal history. 3rd ed., Butterworths, 1990.

[17] See in particular: *Lazarev, V. V. Nersesyants, V. S.* – predstavitel integratsionnoi (sinteticheskoi) obshchei teorii prava [*Nersesyants, V. S.* as a representative of integrative (synthetic) general legal theory]. Filosofiya prava v Rossii: istoriya i sovremennost [Philosophy of law in Russia: history and present] Moscow, 2009, pp. 263–264.

and linking the individual elements of the legal system and, accordingly, submitting a systemic (single, integrative) conception of legal regulation.

Governmental legal regulation is integrated into the legal regulation produced by different phenomena. Specificity of governmental influence lies in its organized, professional, purposeful and focused character. However, aims, organization (structure), content of governmental legal regulation (in the form of law making and law enforcement) are formed as a result of mutual influence (interaction) of factors of governmental regulation and various rational and irrational, purposeful and spontaneous, regular and occasional, anthropogenic, environmental, cultural and psychological factors of legal significance. Accordingly, even organized functioning of the mechanism of governmental legal regulation is not reduced to normalization of social relations by means of specific juridical instruments (juridical norms, law-enforcement acts, legal responsibility, etc.). It is performed by influencing the person's consciousness, applying state legislative policy and principles that are not fixed in by-laws but in different governmental programs (doctrines, projects, etc.). Governmental legal regulation is a part of the integrated legal impact made on an individual's behaviour by rational (laws, court decisions, contracts) and irrational (legal traditions, ideas, myths) juridical phenomena. Thus, the modern conception of legal regulation is a part of the project of integrative jurisprudence.

Legal principles, legal consciousness, values of legal culture do not directly regulate (control) social relations. However, they determine numerous other aspects: the scope of law making and law enforcement; the character of normative legal regulation and its effectiveness; and the practical realization and implementation of all components of the system (mechanism) of legal regulation in any form (autonomous or authoritative, normative or individual).[18] Consequently, legal regulation integrating different methods of legal influence, combining subordinative (political) and coordinative (self-organizational, social and psychological, economic) interrelations between people, results in formation of a new legal framework and its structure. Integrative links ensure coherence of a legal system under the conditions of interaction (mutual influence) between the subjects of legal regulation and impact of external factors such as political and economic influence.

The norms of law, formed during interaction of the parties to legal relations, constitute the normative element of the system of legal regulation, namely, effective (positive) law and juridical sources for law. Then systems approach the conception of legal regulation should coordinate actionable (dynamic) and informational aspects of legal system's functioning. Performance of the parties to legal relations clarifies the issues concerning application of positive law norms to specific questions of juridical practice, i.e. the role and actual (factual) meaning of legal principles and juridical acts in the mechanism of legal regulation are specified. In fact, the legal principles define juridical content, meaning and aim of legal regulation and sustain its integrity, consistency and cultural-historic continuity. Through their operation, the parties to legal relations perform legal regulation, formation of norms of law, interpretation of these norms, information transfer. Despite the crucial role of the

[18] See: *Zweigert, K., Kötz, H.* An Introduction to Comparative Law, 3rd ed., Oxford University Press, 1998. Translated by *Tony Weir*, p. 400. *Rawls, J.* Teoriya spravedlivosti. [A Theory of Justice]. Novosibirsk: Novosibirsk University Press, 1995, pp. 13–15; *Bodenheimer, E.* Sovremennaya analiticheskaya yurisprudentsiya i granitsy eye poleznosti [Contemporary analytical jurisprudence and the degree of its practicality]. Proceedings of Higher education institutions. Pravovedenie, 4(309), 2013, pp.148–155; *Lazdins, J.* Clashes of Opinion at the Time of Drafting the *Satversme* of the Republic of Latvia. *Journal of the University of Latvia*, No. 10, 2017, pp. 93–103.

parties to legal relations and their contribution to legal regulation, law establishing and law enforcement, subjective "human" measurement of legal regulation is not identical to juridical practice and legal regulation, neither in the aspects of theory and methodology, nor in the aspect of practical realization. The activity and information component of the legal system is built upon the actions of legal people (bearers of rights and responsibilities): performing the actions related to their rights and responsibilities they perceive, create and transmit cultural values in the sphere of law. In this context, actions can be expressed in specific organizational forms, or realized by the parties to legal relations outside the aforementioned forms (accidentally, spontaneously). Operation of the parties to legal relations is mediated by their legal consciousness, and integrated by public legal consciousness.

Legal regulation assumes mutual recognition and respect for freedom by people. Thus, legal regulation relies upon legal consciousness as the psychic fundament of law, for mutual acceptance and respect of freedom by the parties to legal relations. In some cases, this implies the necessity for self-restraint so that the other party could realize their rights. This type of self-limiting and self-restrain, which support legal freedom (not transgression) and following legal principles, should emerge from the legal consciousness of an individual as a party to legal relations.[19] Legal consciousness of an individual combines subjective (individual) and objective (necessary) grounds for legal freedom. Formation of the conception of legal regulation in the context of integrative jurisprudence is timely,[20] because legal regulation is necessary to unite people, and reconcile conflicts and contradictions between the parties to legal relations.[21] Nowadays, legal communication involves representatives of diverse legal cultures. Integrative jurisprudence makes it possible to view legal regulation as: a system of interconnected principles; a system of norms of positive law and the parties of legal relations practice; and factual legal relations in the coherent legal framework. In the context of systems approach, values and norms (standards) acquired by individuals in the process of socialization are included in the structure of legal consciousness and become intrinsic motives of an individuals' behaviour, which determine its character (essence), coordinate actions of the parties to legal relations, and ensure that they fulfil their social roles. However, in the current situation, establishing criteria for commonly accepted standards of conduct is problematic. This problem can be resolved in the context of integrative jurisprudence, which supports the formation of systemic conception of legal regulation. The leading role in integration, happening not only in the legal framework but also in social relations in general, belongs to legal consciousness and legal culture.

Conclusions

The systems approach describes legal regulation as a complex multifaceted dynamic systemic-active integrative formation (system), which evolves in the

[19] See: *Nevolin, K. A.* Enciklopediya zakonovedeniya. Istoriya filosofii zakonodatel'stva [Encyclopedia of legislation]/Vstupitel'naja stat'ya *Lukovskoj, D. I., Grechishkina, S. S., Jachmeneva, Ju. V.* Podgotovka teksta *Grechishkina, S. S.* St. Petersburg: St. Petersburg University Press, 1997, pp. 43–44, 372–373 (in Russian).

[20] See: Rättslig integration och pluralism. Nordisk Rättskultur I Omvandling. Stockholm: Institutet för Rättshistorisk Forskning, 2001; *Baker, J. H.* An Introduction to English legal history. 3rd ed., Butterworths,1990.

[21] See: *Berman, H. J.* Vera i zakon: primirenie prava i religii [Faith and Order: The Reconciliation of Law and Religion] Moscow, 1999, pp. 22–27, 87–90.

process of interaction between legal entities in a single legal space. This approach enables forming a systems concept of legal regulation, to detect and solve relevant systemic problems of law making and applying the law in a single legal space. The purpose is to provide the balanced and stable functioning of a legal system in modern conditions. The legal regulation occurs through interaction of legal entities (legal system entities) mediated by legal consciousness. It cannot be narrowed down only to the state-legal (legislative) mechanism of regulation of social relations. State-legal regulation is integrated into legal leverage exercised by other phenomena, its goals, organization (structure), content are formed as a result of mutual interference (interaction) of state regulation factors and rational and irrational, purposeful and spontaneous, as well as regular and accidental leverage factors that have legal bearing. They include technogenic, natural, cultural, and psychological factors. The systems concept of legal regulation, which develops in the context of integrative jurisprudence, on the one hand, takes into consideration the impact of self-management processes of social relations on the functioning of state legal regulation, and, on the other hand, provides for the unity of the political, economic, territorial and language space (environment) of legal regulation.

1. Legal studies are part of modern scientific knowledge. It is a complex multilayered structure developing under the conditions of mutual dependence and interaction of two scientific groups of disciplines traditionally distinguished as humanities and social sciences on the one hand and natural sciences on the other. Legal regulation has become the subject of scientific enquiry: sociological, cultural, politological, psychological, anthropological, hermeneutical, linguistic, cybernetic, etc. The results of these studies are included into the theoretical legal scope of studies in the area of regulating social relations, and are of importance for law enforcement and the application of the law. At the same, in the future, this tendency can lead to the situation when legal science "will dissolve" in one of the philosophical schools of thought. The conservation of jurisprudence as a separate scientific discipline become possible on the basis of a systems approach that provides the synthesis (integration) of various methods of cognition.
2. The terms "system" and "structure" are widely used in jurisprudence. However, the concept of system and its structure is based on the mechanistic approach, which is unilateral. This is characteristic of the classical scientific rationality and the corresponding law comprehension. In jurisprudence, the mechanistic framework leads to a certain kind of schematization (and, in this sense, simplification) of legal concepts and phenomena, although the term "system" is applied. The diversity of complex dynamic links between the interacting legal entities is not reflected by an understanding of legal regulation as mathematically precise, built upon a rationally pre-designed geometrical scheme mechanism. The individual, seen as the object of influence is not a party to legal relationships. Nowadays, the systems approach helps to overcome schematization of legal concepts and studies in the legal sphere. The methodology of the systems approach focuses on the legal entity as a party of legal life of society, hence the unreflective and interactive nature of legal research; jurisprudence uses a systems approach principle as the methodological principle of systemic interconnection of research methods; it provides unity (integrity) of legal studies in the area of legal regulation under modern conditions.

3. The methodology of the systems approach presupposes the synthesis of methods of obtaining knowledge founded by different concepts (models) of law comprehension: normativism, legal naturalism, social jurisprudence. The modern concept of legal regulation is a part of the project of integrative jurisprudence in general. Legal regulation is determined by the system of norms of positive law, legal consciousness and relations between legal entities interacting in the legal space. The system connections of legal regulation, characterizing its integrative and dynamic properties are a part of legal entities' activity. Legal integration covers a holistic system of legal regulation elements from standardization of legal rules and procedures to unifying of jurisdictional activity. Another manifestation of legal integration is the tendency of harmonizing legal regulation in national legal systems of cooperating states to provide legal equilibrium (balance).

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https://doi.org/10.22364/jull.11.10

Breath of the World in Legal Method Doctrine During Interwar Period in Latvia. Vassily Sinaisky's Scientific Heritage Review

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The article contains the analysis of several aspects of Professor Vassily Sinaisky's scientific, practical and academic work, such as folklore as a legal heritage, the search for the content of justice and legal norm, preparation of the new generation of scientists and, especially, the research dedicated to legal methodology. "Legal methodology technique in relation to the general doctrine about methodology" is based on the practical course of legal science methodology lectured at the University of Latvia over the course of 20 years, which back then was a rarity in West European universities. In this book, he highlights the fact that he has shown the legal methods, their terms of use for a conducting proper research and the achievement of successful outcome. These terms are both simultaneously a technique and an art. In this work, the legal historical methods are analysed with regard to the general aspects of sources, comparison, reconstruction, etc. Besides, the book covers dogmatic rulemaking and legal comprehension methods – court, scientific and pedagogic ones. In the conclusion, the author proposes a new research subject: topics, problematic, systematics as a subject of the general legal method and in relation to the modern age requirements, especially civil rights. The number of the professor's publications during his scientific activity in Latvia is 96, including 16 publications about legal methodology. The professor's conclusions and the revealed content of legal methods can still be used in studies, research and practice.

Keywords: sciences of law, legal culture, legal methods, legal methodology.

Contents

Introduction

Professor Vassily Sinaisky (1876–1949) is a leading legal scholar in Latvia, mainly in the field of civil law. He is the author of the best and the most recent textbook of the Civil Law of the Russian Empire (1915). He was born in a cleric's family in Tambov province. After graduating from the University of Tartu (University of Jurajow) Faculty of Law in 1904, he was called upon to prepare for a professor's position in the Department of Roman Law History and Dogma.[1] The uncle intended his nephew to pursue a clergyman's career. He studied at the theological seminary from 1891 to 1897 when, together with his friend N. Burdenko decided to focus on medical studies and direct service to people. Having studied for a year in the Faculty of Medicine in Montpellier (France), Sinaisky returns and decides to change the faculty, and in 1899 joins the Faculty of Law at the University of Jurajów (Tartu).[2] Hence, the professor had studied theology, medicine and law.

Vassily Sinaisky, at the invitation of the University of Latvia, became a professor at the University of Latvia's Faculty of Economics and Law from 1922, went to exile in 1944, and passed away in Brussels, Belgium on September 2, 1949.[3]

The discovered and unleashed spiritual path in himself, the thought of rights and culture, allowed the professor to create lasting values in form of scientific works, lecturers' contribution to education of students, practical opinions. The professor himself invested extensive work and dedication to develop his God's given talent and blessing.[4]

He revealed himself as a remarkable civilist in his civil law classic's textbook "Russian Civil Rights", in which the material is a further benchmark for textbooks, and whose author's scientific talent and ideas have advanced ahead of time. The monograph "Civil Rights" is also significant and holds the leading position of its time in the field of civil law. In the scientific processing of general civil law in Latvia. I. General Grounds for Civil Law."[5]

There is a certain pattern in revealing his personality: first and foremost – theology, sacred rights (sacred rights are the necessary basis for the understanding of secular rights. In Roman law, this can be made particularly clear, but our general civil law also contains clearer traces of sacred law).[6]

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5 *Sinaisky, V.* Russkoe grazhdanskoe pravo (Klassika rossijskoj civilistiki) [Russian Civil Law. Classics of the Russian Civil Law]. M.: „Statut", 2002, 40.c.See also *Sinaiskis, V.* Civīltiesības. Latvijas vispārējo civiltiesību zinātniskā apstrādājumā. I. Vispārējie civiltiesību pamati (Prolegomena) [Civi law. In the scientific processing of general civil law in Latvia. I. General Grounds for Civil Law]. Rīgā: Valters un Rapa, 1935.

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Then follows the civil law and philosophy and theory of law. The basis of the scientific (sacral-philosophical-psychological) life of the human being and the necessity of the best and most comprehensive study of the purpose of life are discussed in the work "Life and Man", wherein the professor treats human, social life in practice and theory, and the problem of life as a new science of creativity, happiness, marriage, life wisdom and spiritual heritage.[7] In his scholarly writings, attention is also devoted to issues of the theory of law and legal method. He was the first lecturer at the University of Latvia in the interwar period, teaching an optional subject "Legal Methodology" – a course favoured by students, graduate students and assistants.

After regaining of the independence, the legal science of Latvia resumes and continues to solve a lot of issues from the point where the professor once stood – comprehended, understood and analyzed,[8] including the subject of the legal method.

The knowledge of the professor in terms of understanding the law is a part of the historical law school, whose influence has been significant in Latvian jurisprudence.[9]

Professor Vassily Sinaisky's personality, intelligence, social activity, essays and research have made a noticeable impact on the development of the legal thought of Latvia and Europe by mutually enriching and complementing each other as the legal heritage left by Sinaisky is wide-ranging in its content.

Professor Sinaisky's monograph "Legal methodology technique in relation to the general doctrine about methodology" was issued in Riga in year 2000. Prof. Sinaisky also studied the fundamental issues of the theory of law, the understanding of the content of legal norms in relation to the understanding of objective justice, individual aspects of interaction between the theory and practice of law, etc. The aim of this article is to examine some of the core directions in Vassily Sinaisky's research in science of law, particularly the legal methodology by revealing the conceptual, comparative, historical and cultural aspects, and the most important development trends regarding his work "Legal methodology technique in relation to the general doctrine about methodology" and in the teaching dedicated to the sources of law. The methods used in the research include the analytical, inductive, deductive, comparative and historic research methods.

1. Brief Description of the Main Directions of Professor Vassiliy Sinaisky's Scientific Research

Professor Sinaisky studied the large systems. The directions of his scientific work include the research in legal science, issues of the ancient culture, exploration of the ancient calendar systems and the use of his own scientific method for translating and coordination of legal sources in combination with other research methods.

[7] *Sinaiskis, V.* Dzīve un cilvēks [Life and Man]. Grāmatu apgādniecība A. Gulbis, Rīgā, 1937, 190.–192. lpp.

[8] *Rezevska, D.* Vasilijs Sinaiskis un juridiskā metode: vērtības, taisnīgums un interpretācija [Vassily Sinaisky and the Legal Method: Values, Justice and Interpretation]. Latvijas Republikas Satversmei – 95. Latvijas Universitātes 75. zinātniskās konferences rakstu krājums. Rīga: LU Akadēmiskais apgāds, 2017, 156. lpp.

[9] See also *Lazdiņš, J.* Vēsturiskā tiesību skola un Latvija [Historical law school and Latvia]. Latvijas Universitātes Raksti. Juridiskā Zinātne, 703. sēj., 2006, 21.–43. lpp. See also *Sinaiskis, V.* Tiesiskais antropomorfisms sakarā ar mācībām par valdīšanu, juridisko personu un jaunu mācību par civiltiesībām [Legal anthropomorphism in terms of learning about governance, legal person and new teaching on civil law]. TMV, 01.12.1927., Nr. 12.

A key area was the studies of folklore (including the legal folklore). The scholar considered folklore the archive of the ancient legal opinions and legal writing, which had influenced the appearance of national culture, legal culture and law.

He distinguished two levels in the information compiled in folklore: firstly, the universal human wisdom, then national and morality aspects, and the world view reflecting the soul of the people. He worked with comparative legal techniques and interpretation of grammar, analysing the meaning of words in the usage of particular languages (nowadays called discourse analysis). At the same time, besides the stringent legal methods that revealed the social and legal scope of Latvian folk songs (*dainas*), he sought to discover esoteric or cultic content of *dainas*, looking for value and sacral knowledge therein. It coincided with Sinaisky's understanding of rights as norms based on universal and stable values, which "serves the moral force of mankind."[10]

The professor published his works in the Russian, Latvian, French and German languages, and his bibliography was compiled by his assistant, later also a professor, Aleksandrs Pavars.

In 1936, in Riga the professor's 60th anniversary was celebrated along with the 30th anniversary of his scientific work. The professor's disciples had compiled the bibliography of his works entitled "Vassilii Sinaiski opera" (*Professoris atque juris doctoris Basilii Sinaiski Opera*).[11] The author of this article has identified 128 published researches written by him until 1938.

Vassily Sinaisky's scientific work until year 1922 (the period of Latvia) was more focused on his scientific interest in the history of Roman and civil law.

The examination of the Professor's work over the whole period of his scientific activity (1907–1949) – the approach to research, range of areas, the wide scale and depth of research by the legal subject suggests that **civil law** was prevalent in his work: its existence in the society governed by the norms of the civil law. It was followed by **Roman law**, its historic evolution from the interaction between the positive norms of public and private law under the significant impact of the sacred law. These two were succeeded by the **history of law**. Then came the research into the scientific **concepts of the legal method** when delivering the course "Methodology of Sciences of Law", the research into the concepts of the **philosophy of law** and **politics of law** as the vision about the future sciences of law. The professor also delivered lectures and studied the **sociology of law**.

The following fundamental and general branches of law were represented in the professor's scientific activity in **Latvia** (1922–1944): civil law – 41, history of law/history of culture – 18, legal methods – 16, Roman law – 7, philosophy of law – 6, sociology – 5, politics of law – 3. We must consider that although the

[10] *Osipova, S.* Vasilija Sinaiska ieguldījums latviešu juridiskās kultūras mantojuma izpētē [Contribution of Vassily Sinaisky to research in the field of Latvian legal cultural heritage]. Latvijas Republikas Satversmei – 95. Latvijas Universitātes 75. zinātniskās konferences rakstu krājums. Rīga: LU Akadēmiskais apgāds, 2017, 154.–155. lpp. See more: *Sinaiskis, V*. Par tiesību īsto sapratni [About the real understanding of law]. Rīga: sabiedrība Zinātņu Veicināšanai biedrība „Aeqitas", 1928, 25. lpp.

[11] *Sinaisky, V.* Tehnika juridicheskoj metodologii v svjazi s obschim ucheniem o metodologii. Riga: N. V. Sinaiskaya, RGSO, pri sodejstvii Rizhskoj Grebenwikovskoj staroobrjadcheskoj obschiny, 2000, c. 263. See also *Pavars, A. Professoris atque juris doctoris Basilii Sinaiski Opera* (1907–1938), Latvijas universitātes akadēmiskās sabiedrisko zinātņu biedrības rakstu krājums. Rīga, a/s Valters un Rapa, 1939, II sējums; *Cf. Malishev, O.* Spisok opublikovanih prach profesora Vassiliya Sinaiskogo. Zbirnik naukovih prach. VII Mizhnarodna naukovo-praktichna konferencija Efetivnistch norm prava. Do 140-richchja profesora Vassiliya Sinaiskogo (1876–1949), 17 listopada 2016, R. s. 131–139.

publications were dominated by one branch of law, other aforementioned branches of fundamental and general law were also represented therein.[12]

The professor's scientific activity in Latvia was far-reaching and versatile, encompassing 96 publications. The legal method ranks the third among the areas of the professor's research (16 publications).

The revolution in Russia and the restless events of World War II had a negative effect on the professor's scientific creativity. There were only three publications in 1917 and 1918, followed by three more in 1940, and then none until 1944.

Sinaisky's scientific activity increased again toward the end of his life. This is suggested by five publications issued after his death: the research on the terminology in the Psalms and Apostolic Letters (in particular the Letters of Paul), summary on the problematic issues of the real and obligations law of Latvia, poetry, summary of the civil law of Russia (Classics of the civics of Russia), and the book "Legal methodology technique in relation to the general doctrine about methodology"[13] were compiled for publishing.

2. Some of Professor Sinaisky's Opinions Regarding Legal Methodology and Teaching of the Sources of Law

In his work "Legal methodology technique in relation to the general doctrine about methodology", Sinaisky analysed the historical legal methods in general as well as their source, comparative and reconstruction aspects etc. The examined methods also include dogmatic rulemaking and dogmatic understanding of law in the judicial, scientific and pedagogical aspects. In the book, Professor Sinaisky put forward the task for the next research topic, as follows: "Themes, problems and

[12] The proportion of the fundamental and general branches of law represented in the professor's work based on the number of publications (40) over the period of scientific activity in Jurjevo (Tartu), Warsaw and Kiev was, as follows: Kiev: 1907: history of Roman law – 1; 1908: history of Roman law – 1; 1910: civil law – 1; 1911: civil law/ politics of law – 1; Roman law/history of law – 1, history of law – 1; 1912: culture of law/sociology – 1, civil law– 1; 1913: Roman law/ history of law – 2, civil law – 2; 1914: civil law – 5, culture of law/sociology – 1; 1915: civil law – 5, Roman law/ history of law – 4, bibliography review – 1; 1916: civil law – 7, history of law–1; 1917: civil law – 2; 1918: civil law – 1; 1919: civil law – 1.
See also *Apse, D*. Profesora Vasilija Sinaiska zinātniskais mantojums juridisko metožu mācībā [Vassily Sinaisky's scientific heritage of legal method doctrine]. Latvijas Republikas Satversmei – 95. Latvijas Universitātes 75. zinātniskās konferences rakstu krājums. Rīga: LU Akadēmiskais apgāds, 2017, 163.–169. lpp.
1923: Roman (quirite) law – 1; 1924: Roman (quirite) law – 1; 1925: Roman (quirite) law – 1; 1926: Roman (quirite) law – 1, civil law – 1; 1927: history of law/history of culture – 1, legal method – 1; 1928: history of law/history of culture – 2, civil law – 2, legal method –5, Roman law – 1; 1929: history of law/history of culture – 1, legal method – 4, sociology – 5; 1930: civil law – 5, philosophy of law – 2, legal method – 1; 1931: history of law/history of culture – 3, civil law – 3, legal method – 1; 1932: civil law – 3, history of law/history of culture – 2, legal method –1, politics of law – 1; 1933: civil law – 3, history of law/history of culture – 2, Roman law – 1, legal method – 1: 1934: civil law – 4, philosophy of law – 1; 1935: civil law – 7, legal method – 1; 1936: civil law – 6, history of law/history of culture – 1, Roman law – 1; 1937: politics of law – 1, philosophy of law – 1, history of law/history of culture – 1; 1938: civil law – 4, philosophy of law – 2, politics of law – 2, legal method – 1, history of law/history of culture – 1; 1939: civil law – 2, history of law/history of culture – 3; 1940: civil law – 1, history of law/ history of culture – 1.

[13] *Malishev, O.* Spisok opublikovanih prach profesora Vassiliya Sinaiskogo. Zbirnik naukovih prach. VII Mizhnarodna naukovo-praktichna konferencija Efetivnistch norm prava. Do 140-richchja profesora Vassiliya Sinaiskogo (1876–1949), 17 listopada 2016, R. s. 139.

systematics as a subject of the general legal method and regarding the requirements of the modern age, particularly in civil law."

In terms of the legal method, the last chapter of "Legal methodology technique in relation to the general doctrine about methodology", unlike the previous ones, is a research consisting of individual sections devoted, in particular, to the methods of the subject-matter, problematics and systematization. These specific sections focus on a) the methodology for creating and selecting topics in the context of the appearance of new knowledge and modern directions (subject-matter); b) correct selection of problems aimed at identifying new problems related to the modern requirements, and significant changes in the modern legislation as a whole (problematics); c) systematization of law, especially in codes that were there before, exist at the moment and will be effective in the future, particularly in civil law (systematics).

Dogma is not a formally closed system, but instead it rather opens up under the interpretation of the legal norms by court and science. The requirements of life may contradict culture, thus degrading it and hindering development. The dogmatic trend in the judicial and scientific thought inhibits the unethical requirements of life that contradict culture.[14] Already since ancient times a good legislator has used reason as a source for improving the man and society.[15] Nowadays a significant role in making legal matter belongs to the legislator (laws, codes), where lawyers are involved in the preparation stage based on the aim indicated by the legislator.

Professor Vassily Sinaisky's concept of the analysis of the legal norm and studies of interpretation goal correspond to the guidelines of the legal theory from the 1930s about the prevailing significance of objective goals in the interpretation of legal norms by completely excluding the role of the legislator's goals from the interpretation field – the legal norm exists independently from the legislator's will, the legal norm continues to be objective, and only all by itself it is a translation in its own right, only the law has to be translated, but not the legislator's will. However, in the legal system of the modern, democratic and legal state, the mixed interpretation theory is prevalent.[16]

Professor Sinaisky was very conservative with regard to issues of translating the Constitution. He saw the Constitution as a function ensuring the political unity and minimum public consensus.

The object of the translation is the text of the Constitution and *ratio legis,* which is included therein, denying the usual legal auxiliary: preparatory materials, constitutions of other countries and the application of the previous constitutional regulation: application in translating the Constitution.[17]

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[14] *Sinaisky, V.* Tehnika juridicheskoj metodologii v svjazi s obschim ucheniem o metodologii. Riga: N. V. Sinaiskaya, RGSO, pri sodejstvii Rizhskoj Grebenwikovskoj staroobrjadcheskoj obschiny, 2000, s. 72

[15] Ibid., s. 75

[16] *Rezevska, D.* Vasilijs Sinaiskis un juridiskā metode: vērtības, taisnīgums un interpretācija [Vassily Sinaisky and the interpretation of the Constitution]. Latvijas Republikas Satversmei – 95. Latvijas Universitātes 75. zinātniskās konferences rakstu krājums. Rīga: LU Akadēmiskais apgāds, 2017, 162. lpp.

[17] *Pleps, J.* Profesors Vasilijs Sinaiskis un Satversmes iztulkošana [Professor Vassily Sinaisky and the interpretation of the Constitution]. Latvijas Republikas Satversmei – 95. Latvijas Universitātes 75. zinātniskās konferences rakstu krājums. Rīga: LU Akadēmiskais apgāds, 2017, 177. lpp.

The prevailing opinion (some kind of scientific truth) must always be checked, disregarding the authority and scientific unanimity.[18] In settling disputes, the key role belongs to the legal matter (that comprises legal thinking and legal feeling). The recognition of the accuracy of the decision is hidden not only in the decision itself, but also in the legal awareness, legal behaviour of the population and legal feeling that determines the legal behaviour.[19]

The professor emphasized that, if the gaps of law exist in the dogmatic system, then the court as one of the mechanisms for filling the gaps with the help of the law or legal analogy creates new rules of the legal system dogmatic that have the power of legal norms.[20]

The monograph "Legal methodology technique in relation to the general doctrine about methodology" serves as an example on how to use legal methodology – it provides the rules for the due way of conducting research and achieving a good result. The rules simultaneously represent a technique and art. They are based on an elaborated study course on the applicable legal science. The course was delivered at the University of Latvia for 20 years, and at the time it was a very rare phenomenon in the West European universities.

Regarding the teaching dedicated to the sources of law, attention should be paid to the professor's explanations about the content of the principle of justice in law – justice as the spirit of norms (*esprit*, *Auslegung*). The very notion of *aequitas* (justice) in addition to being the development principle of the new Roman law, is also the source of justice in the sense of objective justice, which is the opposition to the subjective truth, i.e. the one that has been established by an individual person (an average human being), and which guides him in his actions. Rights have not been awarded to the man to be basely exploited, but rather to protect the just interests of each individual. The term "doctrine" up to a certain extent corresponds to the term "general principles of law" used in the Latvian Code (Section 5, Civil Law). The objective truth expresses itself through judges in the way in which they understand justice, and this is how it is implemented in life.[21] In particular, in respect to law or legal justice two subtypes of justice have to be distinguished: a) justice as objective law, i.e., as already known legal norms (source of law), b) justice solely in its implementation and creation of the norms of justice. The latter, having developed under historic conditions, reflects the seal of the life structure of the society in the respective age and more or less approaches the overall human justice. [22]

Professor Vassily Sinaisky contended that culture was not possible without law. In 1933, Sinaisky expressed the following wish: "May the theory and practice of law fertilize each other". He has indicated that the more the law develops in a casuistic way, the less space there is for the theory of law, i.e., for the targeted creation and development of legal norms. Casuistry in law is inversely proportional to the

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[18] *Sinaisky, V.* Tehnika juridicheskoj metodologii v svjazi s obschim ucheniem o metodologii. Riga: N. V. Sinaiskaya, RGSO, pri sodejstvii Rizhskoj Grebenwikovskoj staroobrjadcheskoj obschiny, 2000, s. 210.

[19] *Sinaisky, V.* Tehnika juridicheskoj metodologii v svjazi s obschim ucheniem o metodologii. Riga: N. V. Sinaiskaya, RGSO, pri sodejstvii Rizhskoj Grebenwikovskoj staroobrjadcheskoj obschiny, 2000, s. 76

[20] Ibid., s. 88.

[21] *Sinaiskis, V.* Taisnības princips Latvijas civiltiesībās [The principle of justice in the civil law of Latvia]. *Jurists*, Nr. 7/8, 1937, 119.–130. lpp.

[22] Ibid., 128. lpp.

theory of law.[23] The professor thereby outlined the role of the interaction between the sources and subsidiary sources of law within the field of law. Professor Sinaisky was close to acknowledgment of the historical school of law. Initially, Professor Sinaisky's opinions seem to some extent similar to those of Savigny, however, the idea of people's spirit is rather rooted in the German classical philosophy (and in Hegel's philosophy of law as in a higher understanding of people's spirit, the absolute spirit, spirit Phenomenology, etc.). In 1807, "The Phenomenology of Spirit *(*The Phenomenology of Mind*)*" is released. Hegel interpreted the philosophy and culture of every single age as the evolvement of the necessary stages and components of the progress of human development, as well as the creation and development of spiritual life as a unified process.[24] Sinaisky separately expresses the views of the historical school of law similar to Friedrich Karl Von Savigny. For example, legal practice and theory cannot be separated without harm to both. Savigny pointed out that the law is the result of a long-term cultural and national historical development, that rights are a product of history, growing out of people's spirit, that rights emerged from the people's beliefs, virtues and habits. Legal norms bind individual collective members without any specific act of justification or realisation.[25]

3. Other Directions of Professor Vassily Sinaisky's Scientific Activity

There is another significant scientific and practical direction in the professor's contribution to legal methodology to be considered. It represents the opinions drafted by him. For example, Opinion No. 30 prepared by Prof. Augusts Lebers as the legal adviser together with Prof. Vladimirs Bukovskis and Vassily Sinaisky following the assignment from the Rector and the Faculty of Economy and Law. In response to the legal question (whether the faculty member, who has been assigned on a sabbatical leave, should be paid the salary or not, similar to the civil service), the following interpretation was offered: "... the principle that the employee who has been awarded a sabbatical leave does not receive the salary as it is in the civil service cannot be applied to the case. ...The faculty staff assigned by the University shall retain the entitlement to their salary".[26] In the opinion, the systemic and teleological methods applied today are used, which Sinaisky named the synthetic goal method in his work "Legal methodology technique in relation to general doctrine about methodology".[27]

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[23] *Sinaiskis, V.* Civiltiesību teorija un prakse [Civil Law Theory and Practice]. *Jurists*, Nr. 4/5, 1933, 97.–103. lpp.

[24] *Hēgelis, V. F. G.* Filozofijas zinātņu enciklopēdija [Encyclopedia of the Philosophy Sciences]. Rīga, Zvaigzne, 1981, 12.–13., 21. lpp.

[25] *Rüthers, B.* Rechtstheorie: Begriff, Geltung und Anwendung des Rechts, München: C. H. Beck, 1999, Rn. 451. In 1815, with his beloved friend, Von Savigny, founded *Zeitschrift für geschichtliche Rechtswissenschaft*, which promoted the views of the school of historical law.

[26] No romiešu tiesībām līdz Hāgas konvencijām. Senatora Augusta Lēbera juridiskie atzinumi (1909–1939) [From Roman law to the Hague Conventions. Senator Augusta Leber's legal opinions (1909–1939)]. Rīga, Latvijas Universitātes žurnāla „Latvijas Vēsture" fonds, 2004, 350. lpp.
Skat. arī: Latvijas Universitāte 1919–1929. Rīga, 1939, 539.–542. lpp.; Latvijas Universitāte divdesmit gados 1919–1939, 2. sēj. Rīga, 1939, 534.–538. lpp.; *Birziņa, L.* Latvijas Universitātes tiesībzinātnieki. Tiesiskā doma Latvijā XX gadsimtā [The Legal Scientists of University of Latvia. The legal thought in Latvia in the 20th century]. Rīga, Zvaigzne ABC, Rīga, 1999, 96.–112. lpp.

[27] *Sinaisky, V.* Tehnika juridicheskoj metodologii v svjazi s obschim ucheniem o metodologii. Riga: N. V. Sinaiskaya, RGSO, pri sodejstvii Rizhskoj Grebenwikovskoj staroobrjadcheskoj obschiny, 2000, s. 93–94.

The Professor's scientific and academic work comprised an extensive field of knowledge. He delivered lectures beyond the civil law, Roman law and methodology of the science of law.[28] In the first years of the University, he as the only doctor of law looked after the raising of the new generation of the faculty. He invited Konstantins Čakste, specializing in civil law, to pursue the doctoral degree, as well as encouraged Arveds Švābe, who specialized in the history of law and Viktors Kalniņš, who specialized in Roman law to join the teaching staff.[29]

His works helped a whole generation of lawyers who had acquired their education in the Soviet law system to re-qualify, and his heritage in theoretical arguments on relations in private law served as a basis for the rulemaking that helped Latvia join the EU. They still have a positive impact on educating future lawyers through reinforcing the rule of law and improving judicial practice.[30]

Conclusions

1. During Vassily Sinaisky's scientific activity until 1922 (the period of Latvia) his scientific interest in the history of the Roman law and civil law prevailed. The period of Sinaisky's scientific activity in Latvia is wide-ranging and versatile, resulting in 96 publications. The legal method ranks the third among the range of his scientific interests (16 publications).
2. The professor's work has a particular role in the reintegration of the legal system of Latvia into the Romano-German law family and for providing the succession in the understanding of law according to the Western legal culture, particularly regarding the transfer of the fundamental issues of legal methodology. Professor Sinaisky substantiated the connection between the objective justice content and correct understanding of a legal norm in interpreting laws and in rulemaking, between the role of legal dogmatic and legal methods for a correct understanding of a legal norm, between the use of the law and legal analogy by showing the content of a legal norm and its compliance with the development stage of public life and within the given legal system, because a legal norm is subject to interpretation within its own content.

   The professor laid the foundations for studying the role of the interaction between the primary and subsidiary sources of law in the field of law. Professor Sinaisky was close to the acknowledgment of the historical school of law.
3. The monograph "Legal methodology technique in relation to the general doctrine about methodology" represents an example of using legal methodology – technique and art, which are based on the applicable study course on the methodology of the sciences of law, which was delivered at the University of Latvia for 20 years and was a rarity in European universities of that time.

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[28] Birziņa, L. Latvijas Universitātes tiesībzinātnieki. Tiesiskā doma Latvijā XX gadsimtā [The Legal Scientists of University of Latvia. The legal thought in Latvia in the 20th century]. Rīga, Zvaigzne ABC, 1999, 96.–112. lpp.

[29] *Švabe, A.* Ievērojama jurista piemiņai. Vasilijs Sinaiskis 1876–1949. Latvija [For the remembrance of a remarkable lawyer's. Vassily Sinaisky 1876–1949. Latvia]. 12. oktobris, 1949. See also *Koval'chuk, C.* 22 goda iz zhizni uchenogo: civilist Vassily Sinaisky v Latvii. Available: http://seminariumhumanitatis.positiv.lv/21%20almanax/21alm%20kovalsuk%20sinaiskij.htm [last viewed 23.03.2017].

[30] *Torgan, K.* Vklad pofessora Vassilya Sinaiskogo v formirovanii pravovoj sistemy nezavisimoj Latvijskoj Respubliki. Zbirnik naukovih pracch. VII Mizhnarodna naukovo-praktichna konferencija Efetivnistch norm prava. Do 140-richchja profesora Vassilya Sinaiskogo (1876–1949) 17 listopada 2016, R. s. 43.

4. Professor Sinaisky invested great efforts in fostering the succession of scholars and faculty by requesting them to serve the practice by analyzing it in science.
5. The Russian Revolution's inheritance includes appearance of the brightest intellectuals, such as Vassily Sinaisky, contributing to the development of cultural space and legal science of Latvia.

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https://doi.org/10.22364/jull.11.11

Biopower as Creator of Ethical and Legal Problems: Case of the Legal Status of a Human Embryo

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The aim of this article is to address the current risk of the increasingly progressive development of biomedicine, which, due to the passivity of the legislator, transforms itself into the form of biopower, which is a new form of regulation of society. However, this type of power is represented by private clinics or companies, which focus their attention primarily on the rapid scientific development and economic prosperity. The result is that, on the one hand, modern procedures in the field of reproductive medicine and prenatal care are presented as rescuing individuals or societies from the problem of low birth rates, but, on the other hand, they lead to the overproduction of human embryos, which are then frozen as biological material that can be used, donated or even destroyed. Consequently, we can assert that the right to life is no longer respected as a basic or sacred value, but as an obstacle to scientific development, whose borders are not restricted even by the protection of life itself and the need of preserving its naturalness.

Keywords: biomedicine, biopower, human embryo, assisted reproduction, human embryo research, surrogacy.

Content

Introduction

As a part of the historical development of society, medicine has always been closely intertwined with the area of law and ethics. It is a natural consequence of the fact that the object of its knowledge is human health, respectively, the therapeutic effect on its physical integrity. However, in the context of the development of science and modern technologies, especially in the second half of the last century, we can talk about an entirely new set of problems of bioethical and then of legal character,

related to the concept of the value of an unborn life and human nature. Knowledge brought by science disciplines such as genetics or embryology allows scientists to influence the previously completely natural process of child's conception and its development during the prenatal period. Under this relatively broad definition, we can then address not only the continuously discussed problem of abortion, but also the manipulation of human genetic equipment in performing assisted reproduction and human embryonic research.

The main problem is that the area of medicine is not properly regulated, which leads to the promotion of biopower, respectively, to spontaneous creation of biomedical rules that replace the legislative activity of the legislator. The aim of this paper is to analyze the specific ethical and legal problems in the conditions of reproductive medicine in order to point out that the concept of the inviolability of human life is thereby questioned. At the beginning of development, contrary to biological status, human life is still degraded to a mere person in a potency, who is not a bearer of human rights, in order to secure the imaginary protection and good of society.

In the following interpretation, we will first focus on defining the basic concept of biopower, which is closely connected to progressive development of biomedicine and which produces new forms as never before. In this context, we will then present the fundamental, ethical and legal problems associated with the current state of prenatal care and reproductive medicine. Our attention will be directed, in particular, to the instrumentalisation of human life, which at the beginning of its development is purposely considered to be merely biological material or an object of a contractual arrangement. This knowledge will then be confronted with the biological status of the human embryo, which is, from our point of view, absolutely crucial in relation to the construction of personal identity and legal protection. Finally, on this basis, we will formulate considerations *de lege ferenda*, which will reflect the need of flexibility of law, which should not only advocate traditional legal doctrines in the area of protection of human life and dignity, but should, on the contrary, effectively reflect the modern findings of scientific development and set certain borders and unbreakable limits.

1. What is Biopower?

If we wanted to find a single-word equivalent or a translation of the word "biopower" in a discourse, it would be very problematic. Therefore, if we look further at the etymology of the term, it is obvious that it is essentially a composition of the terms bio and power. From this, we can conclude that this is a specific form of power, which is closely connected not only with the social but also with the biological life of man. Nowadays, we live in a world holding some form of therapy or treatment for almost every disease. Similarly, human health is generally considered to be a priority not only by individual members of society but also by states and their institutions. This is called the general cult of health which, over time, influences more and more areas of human life and its quality. The consequence of this condition is that it is practically not only an interest, but also the moral or even legal duty of every individual to be a part of medical education and public health care.

This social state, which, in our opinion, has positive, as well as negative consequences, is the result of a long-standing historical and constantly endless

process, which is referred to as medicalization.[1] Its beginnings can be found in the 18th century. Ever since, it is possible to speak about professional development in the field of medical science, which has, far more than previously, been focused on the rescue and individual therapy of a sick individual.[2] As a result, there has been a general change in the approach to the education of medical staff, the education of the society and the creation of specific health facilities, which have not only served as a central place for all patients, regardless of the nature of their disease, but also targeted toward permanent treatment of patients, including consideration of the importance of prevention.[3] In the context of these changes, we can talk not only about the gradual construction of modern medical facilities and the development of healing procedures, but also about the increase in the authority of medical staff and the "politicization" of medicine as such.[4] The growing interest of the state in the public health of the population had its essential reasons associated with the conception of power or, particularly, biopower from the well-known French philosopher and sociologist, Michel Foucault.

From Foucault's point of view, biopower cannot be perceived only in the sense of the traditional concept of power *"as a commodity or a badge of honour supervening on life and the living, something one either has or lacks. Operating in a top-down manner, the bearer of power dictates, on possible penalty of death, what those not in power may and may not do."*[5] Its essence is slightly different. The primary objective is to maintain, respectively to improve life. Therefore, the task of medicine is perfect scientific knowledge of the human body so that it can subsequently be optimized.[6] This approach, in the conditions of modern medicine, cannot be confined to the treatment of the affected part of the body, because we can actually talk about transplantation or even artificial production of human tissues and organs.[7]

Is the protection of the health and life of an individual the primary purpose of that? According to Foucault, this is essentially a tool for achieving the goals of the society or state and its institutions. If we talk, for example, about infectious diseases,

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1 From the modern point of view, we can talk about the transition from medicalization to pharmaceuticalization. See: *Maturo, A.* Medicalization: Current Concept and Future Directions in a Bionic Society. *Mens Sana Monographs*, No. 10, 2012. Available: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3353591/ [last viewed 27.09.2017].

2 Part of this process was also the development of a private market in medicine. See: *Foucault, M.* Power/Knowledge: Selected Interviews & Other Writings. New York: Pantheon Books, 1980, ISBN 0-394-51357-6, pp. 166–167.

3 For more information on the development of medical science and the formation of clinics during the 18th and 19th century, see: *Foucault, M.* The Birth of Clinic. Taylor & Francis e-Library, 2003. Available: https://monoskop.org/images/9/92/Foucault_Michel_The_Birth_of_the_Clinic_1976.pdf [last viewed 27.09.2017].

4 Some authors point out that it is not possible to separate medical and technical science in modern society. Therefore, especially in the conditions of computer development and modern technologies, they use the term biomedicalization or biotechnology. See: *Clarke, A. E. et. al.* Biomedicalization: Technoscientific Transformations of Health, Illness, and U.S. Biomedicine. *American Sociological Review*, No. 68, 2003, ISSN: 1939-8271, pp. 161–162. Available: http://www.jstor.org/stable/1519765?seq=1#page_scan_tab_contents [last viewed 27.09.2017].

5 *Cisney, Wernon W., Morar, N.,* Biopower: Foucault and Beyond. Chicago: University of Chicago Press, 2015, ISBN 9780226226620, p. 1.

6 Foucault spoke about a new form of anatomical policy that produces "obedient bodies". See: *Foucault, M.* Discipline and Punish. New York: Vintage Books, 1995, ISBN: 978-0679752554, p. 138.

7 For this purpose, research is currently under way to create hybrids made up of both human and animal cells. See: *Blakemore, E.* Human-Pig Hybrid Created in the Lab – Here Are the Facts. *National Geographic*, 26.01.2017. Available: http://news.nationalgeographic.com/2017/01/human-pig-hybrid-embryo-chimera-organs-health-science/ [last viewed 27.09.2017].

they pose a danger not only to the individual but also for a wide circle of people in his or her surroundings. Of course, this is related to the potential threat of spreading disease and disability of a large part of the population, as in the past.[8] The consequences of these situations influence not only the health of the population and the mood in society, but also the functioning of the state and economic prosperity. It is, therefore, in the logical interest of the state to prevent these situations. This leads to an increased effort to obtain as much data about the health of our own citizens as possible, including the processing of this data. This is related to strengthening of the normative concept of medicine in form of compulsory medical examinations, vaccination, health documentation, etc. In this context, Foucault talked about biopolitics, which expresses the fact that human health and the health of the society as a whole become a part of government programmes. The aim is to ensure the existence of a healthy population and individuals, who can be beneficial and productive for society.[9]

We can see that Foucault perceived biopower as a specific form of power vested in the hands of the state. In this concept, extensive medical regulation is used as a public tool to control the population and cultivate the physical health of an individual to ensure its productivity and the benefits for the system. It is not medicine, but it is a state, which creates restrictive rules and interferes with the areas of human life that in the past have been the part of his private life and discretion, without the involvement of state power. Foucault criticized this approach as leading to the restriction of autonomy of the will and freedom of the individual, who can no longer make independent decisions regarding his physical integrity. Thus, in line with the concept proposed by Foucault, biopower was understood as a way to instrumentalize a person whose health had become an object of interest to political concepts or an object of extensive legal regulation.

From our point of view, however, it is also possible to define the concept of biopower in another way. In this regard, we must first point out that our approach is only based on the current state of medicine and science. Foucault, of course, lived in a time when we could talk about the development not only of standard medical care, but also of specific areas of biomedicine, such as genetics, embryology and biotechnology, etc. Revealing the nature and significance of DNA in the second half of the 20th century was a crucial step, which has progressively led to the use of this knowledge for the purposes of prevention and diagnosis. Then, in 1978, we were able to talk about the first successful use of Assisted Reproduction Methods, respectively about the first child who was conceived in a laboratory. Since then, we have been able to see widespread use of this reproductive medicine, not only in relation to

[8] In the context of the historical development of Europe can we talk for example about the plague, which was a societal problem with regard to its infectious and expansive nature. The proof of this was, for example, the Great Plague of Vienna, which in 1679 claimed around 76 000 victims. See: *Alfani, G.* Plague in seventeenth-century Europe and the decline of Italy: an epidemiological hypothesis. *European Review of Economic History*, No. 17, 2012. Available: https://academic.oup.com/ereh/article/17/4/408/499216/Plague-in-seventeenth-century-Europe-and-the [last viewed 27.09.2017].

[9] Health policy thus concentrates not only on individuals but also on the entire population. See: *Nilsson, J., Wallenstein, S.* (eds.). Foucault, Biopolitics, and Governmentality. Stockholm: E-print, 2013, ISBN 978-91-86069-59-9, pp. 85–86.

the treatment of infertility, but also in the use of redundant embryos for research purposes.[10]

So why are we talking about biomedicine in a different sense than Foucault? We believe that these very fundamental advances in science cannot even be sufficiently reflected at present by law and its regulation. As a result, many modern medical practices are only generally regulated, or we can even talk about the absence of legal regulation, which is associated with the considerable legal uncertainty and problems of application. Therefore, it is science, not the legislator, which determines the precise course and conditions of procedures that fundamentally influence the beginning of human life, including its nature. This leads to the disruption of the traditional concept of law, which should produce binding and enforceable regulations of social relations, especially when we discuss the concept of a man as a moral person, who is the bearer of the right to life and human dignity. The risk lies primarily in the fact that most clinics operating in the area of reproductive medicine are currently in the hands of private owners or companies, which, unlike the state or public institutions, are also motivated by their own interest in achieving a high financial profit, which logically follows from the nature of the business.[11]

Consequently, our concept of biopower is based on the fact that the state no longer completely uses medicine as a tool for cultivating human health and its use for the benefit of society. On the contrary, the state is unable to fully reflect and control the progressive development of modern biomedicine technologies, as it has been in the past. As a result, it is a biomedicine that sets its own rules and determines what will be banned and allowed. Of course, it cannot be said that there would be a formal transfer of power from the state to a doctor or scientist, but there is undoubtedly much more discretion in the field than in the past. This is the fundamental difference between Foucault's approach and ours, because ours is based on the fact that biomedicine should be far more regulated in some areas that directly affect the genetic essence and nature of man. We think that the state should regulate clear and unbreakable borders that will prevent man from being used only as a tool for the development of science and knowledge, even though he is the holder of indisputable human rights and fundamental freedoms. These issues are mainly concerned with the field of prenatal medicine because genetic modification and scientific use of human potential takes place mainly at the stage of embryo development, which is so often the object of scientifically beneficial, but destructive and undignified, medical procedures.

2. Reproductive Medicine: Human Embryo as a Commodity?

If we want to demonstrate the risks associated with the progressive development of biomedicine, it is then appropriate to talk about the specific parts of medicine which, in general terms, deal with the issue of conception and development of the unborn child during the prenatal period. This, of course, is a broad definition that can further be specified. Specifically, we can talk about assisted reproduction, whose definition and application depends on the particular medical, cultural or legal environment. Therefore, we cannot talk about the existence of a binding definition,

[10] Immediately after that, the use of assisted reproduction expanded to other countries. See: *Cohen, J. et. al.* The early days of IVF outside the UK. *Human Reproduction Update*, No. 11, 2005, ISSN 1355-4786, pp. 439–440.

[11] *Frith, M.* You're big business now, baby. *Telegraph*, 19.10.2014. Available: http://www.telegraph.co.uk/women/womens-health/11171311/Youre-big-business-now-baby.html [last viewed 27.09.2017].

but from an authoritative point of view, we can quote a definition from the World Health Organization, which considers assisted reproduction as *"all treatments or procedures that include the in vitro handling of both human oocytes and sperm, or embryos, for the purpose of establishing a pregnancy."*[12]

From the above definition, it is clear that assisted reproduction cannot be referred to as one particular procedure. On the contrary, this is a complex medical process, which can be implemented in several ways.[13] They all have a common goal, namely, the treatment of infertility, which is currently perceived as a very serious societal problem that affects particularly advanced areas of the world.[14] However, we will only deal with the artificial fertilization method, which is often called fertilization in the tube. This process includes increased egg production, which are further removed and artificially fertilized. As a result, a zygote or fertilized egg is formed, which is further cultivated and transferred into the womb of a woman.[15] What is the fundamental ethical and legal problem of this procedure? It should be recognized that, at present, some problems with pregnancy cannot be solved in a natural way. From our point of view, however, the implementation of these procedures is crucial.

We have already said that artificial insemination involves the targeted overproduction of human embryos in order to increase the treatment's success. Therefore, a large number of embryos are often implanted into the female organism, which brings many health risks and complications. In particular, a multiple pregnancy may occur in a woman resulting in a targeted termination of the development of one of the embryos in order to protect the woman's life or to resolve a developmental deformity.[16] This is, from our point of view, a somewhat paradoxical situation, because the goal is conception, not the termination of human life. In this context, however, we are talking about the situation where embryos are used for assisted reproduction. Another case occurs when they are not used and become redundant. How can we deal with them further? This is, of course, a question, the answer to which is related to national legislations, which vary, as in

[12] *Zegers-Hochschild, F. et. al.* The International Committee for Monitoring Assisted Reproductive Technology (ICMART) and the World Health Organization (WHO) Revised Glossary on ART Terminology. In: *Human Reproduction*, No. 11, 2009, ISSN 0268-1161, pp. 2683–2684. Available: http://www.who.int/reproductivehealth/publications/infertility/art_terminology.pdf [last viewed 27.09.2017].

[13] Sometimes, surrogate motherhood is also included in the list of these methods. See: *Desai, A. et. al.* Assisted Reproductive Technology (ART): Combating Infertility. *Asian Journal of Pharmaceutical and Clinical Research*, No. 4, 2011, ISSN-0974-2441, pp. 19–22. Available: http://www.ajpcr.com/Vol4Issue1/204.pdf [last viewed 27.09.2017].

[14] This, of course, is mainly related to the way of life, such as smoking, overweight, stress, or the formation of a family at a later age, also for the purpose of building a working career and so many other examples. See: *Kubo, H.* Epidemiology of Infertility and Recurrent Pregnancy Loss in Society with Fewer Children. *Japan Medical Association*, No. 52, 2009, ISSN 1346-8650, pp. 25–28. Available: https://www.med.or.jp/english/journal/pdf/2009_01/023_028.pdf [last viewed 27.09.2017].

[15] For a more detailed description of IVF fertilization process see: *Hoeger, K. et. al.* In Vitro Fertilization Process, Risk, and Consent. In: UR Medicine. Available: https://www.urmc.rochester.edu/MediaLibraries/URMCMedia/fertility-center/documents/In-Vito-Fertilization-4-29-15-updated.pdf [last viewed 27.09.2017].

[16] *Launslager, D.* Multiple Births: The Possible Risks. Multiple Births Canada, 2011. Available: http://multiplebirthscanada.org/mbc_factsheets/FS-PN_RisksforMothersPart1.pdf [last viewed 27.09.2017].

the area of abortions or other biomedical interventions.[17] Therefore, we can meet different conditions for the use of reproductive medicine tools. Essentially, the current knowledge of science allows us to freeze embryos for storage purposes. Already at this moment, in our opinion, human life is deprived of dignity and degraded to mere biological material. However, the legislation in some European countries is even more liberal, especially in relation to redundant embryos, which were not used during the statutory period and were provided for research purposes.[18]

This type of research is something like an ethical dilemma. Its aim is to protect society by acquiring new knowledge for the development of healing practices and methods. On the other hand, it is demonstrable that the embryos are destroyed during their execution. The reason is that the object of interest of this scientific knowledge is not the human embryo itself but embryonic stem cells, which have a unique property of pluripotency up to the stage of development of human life at the level of the blastocyst, and which have the ability to develop themselves in any type of adult tissue. Therefore, they are very attractive in relation to the implementation of cell therapy, which is currently a very popular branch of medicine.[19] Despite the existing positive aspects, we still point to the unethical killing of human embryos, especially because we can now see the successful development of treatment with adult stem cells, which are obtained from, for example, the skin of a potential patient.[20] It is clear, therefore, that the issue of assisted reproduction and research on human embryos is very closely connected. This situation perhaps motivates some states to regulate these areas only in a framework manner. The result is the spontaneous development of biomedicine, where the clinics of assisted reproduction alone decide how many embryos will be generated, how many embryos will be used, and how many embryos will only serve as consumables for destructive research.[21]

However, this is not the only problem of ethical-legal nature, which is currently associated with the application of reproductive medicine. The phenomenon in the form of surrogate motherhood is also considered very current. We can say with exaggeration that it is a specific form of assisted reproduction, because it uses artificial fertilization methods. The essence of the whole process is that a woman cannot become pregnant or carry the child up to the time of childbirth. For this reason, another woman called the surrogate mother is involved, who, on the basis of a prior agreement, undergoes the conception of a child and agrees to

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[17] *Präg, P., Mills, M. C.* Assisted reproductive technology in Europe. Usage and regulation in the context of cross-border reproductive care. *Families and Societies*, No. 43, 2015, pp. 9–12. Available: http://www.familiesandsocieties.eu/wp-content/uploads/2015/09/WP43PragMills2015.pdf [last viewed 27.09.2017].

[18] *Eckman, J.* The Ethical Dilemmas Associated with Frozen Embryos. Issues in Perspective, 30.05.2015. Available: https://graceuniversity.edu/iip/2015/05/the-ethical-dilemmas-associated-with-frozen-embryos/ [last viewed 27.09.2017].

[19] *Douglas, T., Savulescu, J.* Destroying unwanted embryos in research. Talking point on morality and human embryo research. EMBO reports, No. 10, 2009, pp. 307–312. Available: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2672894/ [last viewed 27.09.2017].

[20] However, scientists are already considering the future use of these cells for reproduction purposes. See: *Murray, K.* Could we one day make babies from only skin cells? CCN, 09.02.2017. Available: http://edition.cnn.com/2017/02/09/health/embryo-skin-cell-ivg/index.html [last viewed 27.09.2017].

[21] Srov. World Health Organization. Assisted reproduction in developing countries. Progress newsletter, No. 63, 2004, p. 2. Available: http://www.who.int/reproductivehealth/publications/infertility/progress63.pdf?ua=1 [last viewed 27.09.2017].

renounce the rights of a parent in favour of the ordering couple.[22] Of course, once again, it depends on specific legislation, which is inconsistent in the European legal environment. Unlike abortions, however, we can find a somewhat restrictive approach in this area. This is due to the fact that in the context of international law, this issue raises many unresolved problems. In particular, it is called "baby tourism", meaning that the infertile couple travels to another country, where the legislation is more liberal. Traditionally, India, Russia, Ukraine etc. even allow the commercial form of surrogate motherhood.[23] The problem often occurs after childbirth and a return to the birthplace. A couple wanting to return to their home country have a different nationality from their child. As a result, the European Court of Human Rights has already dealt with these cases. The consequence was that no travel documents were provided to the child,[24] parents were not enrolled in the register of birth,[25] or the child was removed from the couple and placed in alternative care in another family due to a breach in the adoption conditions.[26]

However, we believe that these issues cannot only be resolved *ex post* by the case law of the European Court of Human Rights. Surrogate motherhood is based on the fact that it considers the unborn child to be an object of a commercial or courtesy contractual arrangement. In this context, it is not possible to speak about one particular type of contract that would be valid across the international community, because each country has its own conditions for the implementation of surrogate motherhood. However, it is fundamentally at least a *sui generis* contractual relationship, which is carried out on the basis of a contractual freedom in the area of private law. The main problem with this issue is that an unborn child does not have the status of a subject but of an object of legal relationship.[27] This is the same situation as in the case of other biomedical interventions, where we can see the signs of instrumentalisation of human life, which is inconsistent with the current conception of law, because the legislator differentiates between things and persons in the legal sense.

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[22] In addition to commercial forms, altruistic forms can also be distinguished, if the surrogate mother is genetically related to the child. See: *Söderström-Anttila, V. et. al.* Surrogacy: outcomes for surrogate mothers, children and the resulting families – a systematic review. Human Reproduction Update, No. 22, 2016, ISSN 1460-2369, p. 261. Available: https://academic.oup.com/humupd/article-lookup/doi/10.1093/humupd/dmv046 [last viewed 27.09.2017].

[23] On the contrary, we can see a significantly restrictive approach in Germany, Italy, France and Sweden, as well as in other countries. See: *Armour, K. L.* An Overview of Surrogacy Around the World. *Nursing for Women's Health*, No. 16, 2012, ISSN 1751-486X, p. 234. Available: http://www.familiesthrusurrogacy.com/wp-content/uploads/2015/12/Overview-of-Surogacy-Around-The-World.pdf [last viewed 27.09.2017].

[24] Compare: Judgment of the European Court of Human Rights of 8 July 2014, *D. and others v. Belgium,* No. 29176/13.

[25] Compare: Judgment of the European Court of Human Rights of 26 June 2014, *Labassee v. France,* No. 65941/11 a Judgment of the European Court of Human Rights of 26 June 2014, *Mennesson v. France,* No. 65192/11.

[26] Compare: Judgment of the Grand Chamber of the European Court of Human Rights of 24 January 2017, *Paradiso and Campanelli v. Italy,* No. 25358/12.

[27] Surrogate Motherhood: A Violation of a Human Rights. European Centre for Law and Justice, 26.04.2012, p. 5. Available: http://icolf.org/wp-content/uploads/Surrogacy-Motherhood-ECLJ-Report.pdf [last viewed 27.09.2017].

3. Unborn Child: Someone or Something?

In the previous explanation, we pointed out specific areas of medicine that in essence degrade unborn life as a mere means of realizing the right to family life or the development of scientific knowledge. However, is it in line with the current state of scientific knowledge and with the values of a democratic state, when human embryos are degraded to mere biological material? The answer to this question cannot only be sought in the field of law but primarily in the fields of genetics and embryology. These sciences give us empirical knowledge about the beginning and development of human life in the prenatal period.

So, when does human life begin? In general terms, we can say that each person's life begins at the moment of conception, but that can be realized at present not only in the natural way, but also by the methods of assisted reproduction. Theoretically, we could also think about the artificial creation of human beings through reproductive cloning, which is currently considered not only ethically but also legally unacceptable.[28] We can say that human life begins when the maternal and paternal sex cells are mixed and a zygote or a fertilized egg is created. This is a crucial moment because from this instant we can talk about the creation of a completely unique combination of genetic information that will never be repeated.[29] This fact in itself disproves the often-used argument that an unborn child is, especially at the beginning of development, only a part of the mother's body, and she is the only one who decides about her body through abortion. An unborn child has its own genotype since the moment of conception, which determines all the further development. From a biological or genetic point of view, it is hardly questionable that conception leads to the creation of a unique being belonging to the human species. However, problems arise when we want to establish whether a human embryo is already a person in a philosophical sense. This is a question that does not fall within the field of empirical sciences, for which it is typical to verify the results from a methodological point of view. As a part of the discourse, we can distinguish the perception of the person in the ontological and functional sense. If we first focus on an ontological approach, this refuses to take into account psychological arguments in forming the moral status of an unborn child. This means that this approach is based on the fact that each human life has evolved naturally and continuously, not only during the prenatal period but throughout its existence. In this sense, the human embryo already has the presence of consciousness or ability to establish interpersonal relationships but only within the meaning of possibility, which will become reality over time.[30] From the legal point of view, in the context of these conclusions, we can say that the embryo is not only the bearer of the right to life but also of other human rights and freedoms. It is true that it is not temporarily able to exercise them if we talk for example about the right of freedom of expression or association, but it does not mean that it is not the same bearer of these rights and freedoms as a newborn or a person in a coma.

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[28] Compare the prohibition of reproductive cloning contained in Additional Protocol to the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, on the Prohibition of Cloning Human Beings.

[29] *Scott, F.* When Does Human Life Begin? In: Gilbert's Site on Developmental Biology. Available: http://science.jburroughs.org/mbahe/BioEthics/Articles/Whendoeshumanlifebegin.pdf [last viewed 27.09.2017].

[30] *Hubert, J. P.* Defending Human Embryonic Life. In: *CatholicCulture.org*. Available: https://www.catholicculture.org/culture/library/view.cfm?recnum=7183 [last viewed 27.09.2017].

Supporters of the functional approach who, in relation to the concept of a person, demand that he/she must be the bearer of certain qualities, are of the opposite view. Thus, they differentiate between a man and a moral person, who must have the specific qualities that are related to the question of individuality and autonomy.[31] In this regard, a number of arguments are used, such as the absence of the embryo's nervous system, the potential formulation of twins, the course of embryogenesis or dependence on the mother's body.[32] From our point of view, it is necessary to formulate the moral and legal status of an unborn child at all stages of development in the context with empirically verifiable knowledge which, in the genetic sense in particular, shows that we can talk about a unique human being from the moment of conception. Within this context, we can also take into account the natural law concept of human rights, which in a certain sense is built on the fact that human rights, and in particular the right to life, belongs to a person regardless of positive legal regulation simply because he is a human being.[33] It is considered discrimination, when a state legalizes the killing of human embryos or their undignified use occurs for science only because they are at an early stage of natural development, despite these facts. This treatment with human embryos are then in conflict with the basic democratic requirement for equality of all people in dignity and rights without any exemptions. In fact, there is no reason why an unborn child, at every stage of development, should have a lower legal status than an already born human being.

4. Right to Life versus Right to Use Life

The title of this chapter might seem controversial because the respect for human rights and freedoms and especially for the absolute protection of human life and its dignity is declared and guaranteed in a number of international treaties and constitutional laws of democratic states.[34] On the other hand, it does not correspond to the current state in biomedicine, which demonstrably uses some human beings as a means of achieving scientific progress in the field of assisted reproduction and cell therapy, only because they are at early stages of development. It is clear, therefore, that the prohibition of any destructive and undignified interference with the natural development of a person in the prenatal period could produce a reasonable concern that this scientific development will slow down or even stop. It is a crucial argument, because these medical procedures can provide society with new procedures or medications which can possibly be solutions or prevention to many different types of illness.[35]

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[31] According to this approach, the embryo is only a potential person. See: *Wildman, J.* Substance, Nature, and Human Personhood. CedarEthics: *A Journal of Critical Thinking in Bioethics*, No. 7, 2007, pp. 1–3. Available: http://digitalcommons.cedarville.edu/cgi/viewcontent.cgi?article=1035&context=cedarethics [last viewed 27.09.2017].

[32] An overview of the most common functional access arguments can also be found in the publication *Pascal, I.* Le zygote est-il une personne humaine? Paris: Pierre Téqui, 2005, ISBN 978-2740311592 (available also in Czech language).

[33] *Raymond, G. et. al.* The Global Future: A Brief Introduction to World Politics. Boston: Cengage Learning, 2013, ISBN 9781285605852, p. 224.

[34] Compare, for example, the preamble to the Universal Declaration of Human Rights of 1948, which was the basis for further codification: "*Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.*"

[35] On the other hand, we know that scientists are already able to use adult stem cells for these purposes.

In this context, it is possible to work on the theory that this fact or concern motivates legislators to provide ample space to biomedicine for "self-regulation" and "self-realization". Thanks to the absence of detailed legal regulations, scientists can flexibly decide as to how to implement the relevant experiments or assisted reproduction procedures. However, this is associated with the risk of the uncontrolled development of biopower, which interferes with many areas of human life and its naturalness. Ultimately, by this approach, we may come to a stage where certain areas of social relations or situations will not primarily be regulated by the law but by the spontaneous development and application of medicine. This would not only be a denial of the primacy of the law in the field of binding and enforceable regulation of social relations but would also threaten the existing democratic values in society. Human life would no longer be protected as a sacred and inviolable value[36] but would be used as a mere tool to gradually create the "ideal" prototype of a person, who will be able to face any health barriers with the help of genetic modification. In fact, it is the purpose of medical science to act preventively and to achieve the maximum possible level of a healthy population.

The question remains, whether this goal is realistic or not, especially if it is necessary for these purposes to disrespect the right to life of an unborn child or to use human embryos as spare parts. From our point of view, this approach violates the fundamental value of the democratic concept of society, which also consists of protecting the right to life and human dignity without any form of discrimination. We therefore believe that it is first necessary to change the approach of the legislator, who should reformulate the legal status of an unborn child in accordance with modern biological knowledge and take this fact into account when amending the relevant legal regulations. In our opinion, the legislator should allow only those therapeutic treatments that respect the dignity and right to life of every human being. Therefore, there must be unbreakable borders, which may motivate scientists to seek or develop morally and legally more acceptable ways of protecting the individual and society as a whole.

Conclusions

The legislator is actually not able to reflect the very progressive development of biomedicine which is uncontrollable. There is a general regulation, but this regulation does not set clear boundaries, which must be respected. The consequence is not only the risk of instrumentalisation of human life, but sometimes also his destruction during the implementation of various types of biomedical research. This fact has a major impact on the level of legal protection of the unborn child, who is used as an object of a (surrogacy) contract or as an instrument which can be used or even destroyed for the potential good of the whole society. We showed, that also Michel Foucault has pointed out the risks of uncontrolled development and abuse of medicine in the field of public control of the society. It is a paradox, that many years later the situation is not better, but even worse, because scientists are able to influence the beginning and the development of a human life more then ever before. After some time, we will see if the legislator will change his reserved approach or if he will understand, that the respect for a human life and its dignity is one of the essential aspects of democracy.

[36] To the question of the sacredness of human life compare: *Dworkin, R.* Life´s Dominion: An Argument about Abortion, Euthanasia, and Individual Freedoms: New York: Knopf, 1993, ISBN 9780394589411.

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