ACTA UNIVERSITATIS BRUNENSIS

IURIDICA No 432

SPISY PRÁVNICKÉ FAKULTY
MASARYKOVY UNIVERZITY V BRNĚ

řada teoretická
Svazek č. 432

ARGUMENTATION 2012

Law and Literature
Workshop Proceedings

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Brno 2012

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The Argumentation 2012: International Conference on Alternative Methods of Argumentation in Law and the publication of this proceedings have been funded by the Masaryk University, School of Law, research project MUNI/B/0970/2011 Argumentation 2012 – Law and Literature.

ISBN 978-80-210-6019-7

Preface

'Law and literature' represents a field that is becoming increasingly significant for the study of legal argumentation and methodology. Although this field is more established in the United States where methods of persuasion in legal argumentation enjoy more prominence, it is impossible to deny its growing importance in Europe. Thus the workshop entitled 'Law and Literature' formed a special part of the ARGUMENTATION 2012 conference that took place on 26 October 2012 at the Faculty of Law, Masaryk University in Brno.

The link between literature and law is an evident one, legal texts—or indeed the appearances of practising lawyers—have a dimension that is best understood using the methodologies of literary studies and related disciplines. The aim is to engage—to convince an opponent, a court or the public about the flawlessness of arguments, views or procedures. The common scientific conceptualization prevalent in natural sciences can hardly be applied to law as it does not work according to objective rules that would equal the regularities and laws of nature. Rather, the narrative model of scientific inquiry that is used for researching and describing individual events appears more suitable. Hence literature does not represent an addition to legal education and legal practice, rather it represents a possible direction in which legal thinking can develop.

Vanessa Duss' 'The Correlation of Text and Normativity in Law and its Impact on Society' opens this edited volume. Her contribution explores limitations that are imposed on law by text itself. Text—a basic means of legal communication—acts as a normative element that must be sufficiently explored in order to understand law itself.

Katarzyna Mikołajczyk-Graj's contribution 'Is the Concept of Rationality of Legal Reasoning Useful?' may seem to be slightly less related to the volume's main concerns, however, explorations of the concepts of ra-

tionality and legal reasoning represent an intersection between the general theory of argumentation and the narrative approach to the study of law. It is always key to establish which mode of argumentation is the 'rational' one or which conceptualization of rationality is the correct one.

In 'A Matter of Coherence' Terezie Smejkalová discusses the coherence of legal argumentation. Coherence is a significant term that helps achieve the appearance of correct legal procedure or of flawless argumentation or the accuracy of a judicial decision. However, what coherence represents and how it can be achieved links very closely to researching legal argumentation.

Adam Sulikowski addresses yet another topic in his 'Literary Fiction in Legal Dogmatics in Continental European Constitutional Law'. His contribution brings us directly to the significance of fiction for legal thinking and legal dogma.

The last article in the volume 'Narrative as Part of Legal Methodology' (Martin Škop) offers an assessment of the importance of narrative methods for legal methodology.

Let us conclude by expressing the hope that the first workshop on Law and Literature will not be the last and that the ARGUMENTATION 2013 conference will provide an opportunity for further explorations on this approach to the study of law.

Martin Škop,
workshop chair

Contents

The Correlation of Text and Normativity in Law and its Impact on Society

Vanessa C. Duss[a]

Abstract. The question of the relation between text and normativity is both relevant and of basic importance for jurisprudence: The law has to constantly deal with oral and written texts: the text of the law, of rules, norms, principles, judgements, dogmatic texts, ruling opinions but also contracts are among them. And the law is a normative order: statutory regulations contain constitutive or regulative rules which create and shape the status and behaviour of institutions, social groups and individuals. Texts have a normative effect once they claim validity, in other words, once authority is attributed to them. Law can be seen as an entity of texts with a normative effect. Laws medias are language and writ. Hence law encompasses text and normativity by nature. In the conjunction of both, text and normativity, reliable statements about the effect of normativity and the construction of cultural identities to which the law contributes to as a component become possible. After the 'linguistic turn' and the 'hermeneutical turn'—both 'turns' contributed substantially to differentiating between language and text—it is time to ask for the 'normative power of textuality'.

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Keywords. Text, normativity, decision-making, social practice, genealogy of textual normativity.

1 Text and Normativity in Textual Sciences

The question of the relationship between text and normativity is both relevant and of basic importance for every textual science, i.e. sciences with the research object 'text', and thus concerned with the interpretation of text. With regard to this methodological point of view, normative conditioning, rules of interpretation and conditions of application of texts are far more important than was investigated following the 'linguistic turn' or the 'hermeneutical turn'. Both 'turns' contributed substantially to differentiating between language and text. However, none of them asked for the 'normative power of textuality'. All textual sciences are in manifold ways normed by texts or are bound to the content of normative texts. This includes oral and written forms of legitimacy, ritualisation, canonisation and dogmatisation of texts, but also the formation and stabilisation of traditions conveying identity, such as the 'grand récits'. (Lyotard 1979) Cultures define themselves to a large extent with texts and norms, but only when both elements are correlating, cultural processes are initiated. The language and therefore texts which generate or transport normativity are bound to a dynamic interactional social and cultural context—they reflect the culturally determined "mindedness", change it and itself within it.

2 Text, Normativity and the Law

The law has to constantly deal with oral and written texts: the text of the law, of rules, norms, principles, judgements, dogmatic texts, ruling opinions but also contracts are among them. And the law is a normative order: statutory regulations contain constitutive or regulative rules which create and shape the status and behaviour of institutions, social groups and individuals.

Law can be seen as an entity of texts with a normative effect. Laws medias are language (Vesting 2011) and writ (ibid.).

3.1 Text

On a linguistic level, a text is first of all an entity consisting of grammatical and lexical linguistic norms. In addition, a text also integrates the origin, the development and the stabilisation of linguistic expressions and conventions. The language integrates a certain cultural 'mindedness' and can be understood as a synthetic entity of representations for which no further empiric explanation can be given. (Lear 1982) Therefore, language should not be regarded simply as a system of norms and regulations, but also as a social and cultural practice. Linguistic activities are not simply structures to be analysed in isolation, but have to be understood as being part and parcel of a dynamic, interactive social and cultural context. Moreover, these contexts are being constituted and changed continually by practices of communication.

3.2 Normativity

Texts have a normative effect once they claim validity, in other words, once authority is attributed to them. 'Normative' generally means a norm-giving, i.e. to establish norms and regulations or to prescribe what is being understood as compulsory. Normativity is understood as a bonding force which in different historical contexts transmits oral or written norms to the respective social practice. It does so by regulating and guiding individual actions and human coexistence, be it implicitly, explicitly, consciously or unconsciously. Hence, normativity means legitimation or justification of norms and makes them compulsory in the eyes of their subjects. Normative orders are thus understood as justification orders, as an entity of more or less institutionalised norms, regulations, values etc., which are based on (implicit or explicit) justifications and which in turn need justifying reasons to prevail. Complex modern normative orders are based on diverse historical justifications, which have been achieved and transferred by narratives of justification. These narratives also transfer their inner tensions and conflicts. Thus, normative orders are dynamic and historic at the same time. They appear in various forms: either latently and anonymously emerging as a subtle development or as a revolutionary transformation and regeneration in cases where the intrinsic contradictions unfold their explosive power. Norms hence have to be qualified as contingent.

Normativity as the 'bonding force, which transmits oral or written

norms to the respective social practice by regulating and guiding individual actions and human coexistence', is transporting a concrete normative content that defines the status or the determines the behaviour of groups or individuals.

3.3 The Components of the Correlation of Text and Normativity

Questions rising from correlated existence of text and normativity are such as: how can it be explained, that norms become texts and texts become norms? What are the cultural and social conditions involved in the textualisation of norms and the implementation of normativity in texts?

This can be unfold into three directions: 1) Texts are ruled by normativity if they transport a normative content, meaning when their content is constitutive or regulative rules determining the behaviour of social groups and individuals ('inner normativity'). This rises questions like where does this 'inner normativity' come from? What has it to do with canonisation of texts and text compendias? 2) Texts are normative if there is an authority implemented or when they are transported in certain social practices. Questions arising are e.g. what is the core of this authority? what defines an authoritative way? 3) Texts are ruled by normativity as dealing with them in an interpretative and ritual way is restricted: there are rules on how to treat them which qualify treatment as correct or incorrect. The question inherent are how can such rules be defined and how do they develop?

3 Globalisation of Legal Problems

For law, globalisation, privatisation, and juridification on the one hand versus deregulation on the other, combined with the problems which information explosion, demographic changes of the global society and crossboardering of economical, ecological and technical problems evoke, not only raise a problem of scale, but also cause a transformation of the inner and outer structure of regulation. Not only the nature and form of normative regulations, also the modes of making, implementing and interpreting norms will undergo core changes. Law, bound to serve as a conflict solving mechanism inherent to human culture, fulfils its duty as peacekeeper

only if it manages to authoritatively uphold its monopoly in conflict solution. To regain this monopoly in conflict solution, law has to challenge its present function that has become simple conflict absorption and study a new kind of normativity: not only legislative (positive) law claims to be normative but also non-legislative regulations. (Teubner 1997 and Jansen 2010) The rise of unidentified because non-legislative regulations present new challenges for the law: their aims are realised just as legislative regulations but in a more effective since pragmatic manner. Legal philosophy as well as legal theory in the way they are currently structured fall short on explaining the existence of regulations with a normative effect, law must be thought in new forms in order to answer the question how normativity develops and where it comes from.

Hypothesis is, that only in the conjunction of text and normativity, reliable statements about the effect of normativity can be made. In face of the growing loss of importance of authority, which can be perceived in postmodern society, a reorientation towards normativity will become a necessity for stating anything about the construction of cultural identities to which the law contributes to as a component.

4 State of the Art

Since the 1920, when legal theory as an antipode to legal philosophy evolved from law, legal theory was concerned with law as a system of norms. For decades jurisprudence was concerned with law as a hierarchy of norms and it focussed on the interpretation of law texts terming this the core of juridical labour. This traditional concept of law as a hierarchy of legal norms or legal sources (Buckel, Christensen, and Fischer-Lescano 2006 and Fischer-Lescano 2006) leads to the following: Jurisprudence tried to emerge the normative content from norm-texts by interpretation of norms through superior norms, i.e. it investigated the 'juridical hermeneutics' and developed rules of interpretation. Once reached the top of the hierarchy of norms, law faced the question of the ultimate justification for the existence of that norm as to which a positivistic or non-positivistic answer can be given. The dichotomy of positivism and non-positivism is still state of the art in the incessant debate over the justification of the existence of law in legal philosophy but it is not fruitful to answer the question what law is.

This dichotomy can be seen as the final consequence of the neo-Kantian differentiation of existence and ought to be translated in an unbridgeable difference of legal norms and non-legal facts. This determined a division into a doctrine of two counter-worlds: the world of legal norms—the world of pure ought—and a world of facticity—the world of existence, which was the starting point for this norm-oriented legal theory. (Vesting 2007) While legal philosophy stranded in a fruitless (Lege 2007) dichotomy of positivism and non-positivism when answering the question of ultimate justification for the existence of law, the dichotomy of system theory (Luhmann 1993) and discourse theory (Habermas 1992 and Alexy 1996) is characteristic for the actual situation of legal theory.

5 Law's Function

6.4 Decision-making

Laws function is to serve as a conflict solving (or at least absorbing) mechanism. It is, as such, inherent to human culture and serves as a peace-keeper: conflicts are solved in a law-suit, a performative, ritual act of decision-making.

Hence a functional approach to law seems sensible: Originated in the system theory of Niklas Luhmann in the second half of the 20th century—which is emphasising distinction as the origin of all legal procedure—considers law as a congenital model for decision-making (and the making of a decision is the focal point for creating a distinction).

Decision-making plays a central role on every level within law: on the level of law-making it's the decision of what is to be statutorily regulated and how is it to be done. On the level of the application of law decisions have to be made on the facts, the applicable law hence the set of norms applied onto the case, the interpretation of these norms, the reasoning for the judgement and for the enforcing of law it comprises the decisions on how to enforce it and how to sanction disobedience. On the level of legal doctrine it comprises decisions on qualifying certain interpretations as right, others as wrong (or at least preferable and non preferable), as well as the methodology of the interpretation of legal norms and, last but not least, the interpretation of interpretation.

6.5 Contingency of Decision-making

Every decision is contingent in the sense that a decision can always turn out one way or the other. What has not been decided on remains possible: there are always good reasons for the decision to turn out the way it actually turned out but also for the other way it might have turned out or may turn out next time. Every decision comprises also what not has been decided on—it remains a possibility/the other possible way (not chosen this time).

Every decision is contingent regardless the fact that it needs to be justified. (Fögen 2006) Adjudication—the decision-making in lawsuits—is one of the most apparent examples for decision-making under time pressure and without the option of not deciding. Due to the right to a fair trial (Art. 6 I ECHR) the judge is confronted with the inadmissibility of not deciding—he must take a decision once a legal case is put before the court. A judge is asked to decide to apply certain norms—that includes the non-application of others—onto a case. And the decision-making starts even in the fact-finding process: the circumstances of the case which determine the facts of the case are a double choice determining which legal norms may be applied. The facts of a lawsuit consisting of 'fact-determining' components are the selection of the case-leading judge; he decides upon inclusion and exclusion of evidence from what the parties offer him as evidence out of what they consider it as relevant for the case. The circumstances of the case are constitutive for the facts of the case, which in turn are constitutive for the applicability of certain legal norms. By deciding to apply one norm the judge decides not to apply others. By applying it in a case the judge 'creates' the meaning of a norm in the moment of deciding. Division of powers, understood as the lawmaker (politics) 'making' the law and the judge 'applying' it, is a myth: every judge is lawmaker in unison. (Walter 2010) In the end law is what the courts acknowledge as the applicable set of juridical norms. (Röhl and Röhl 2008) Law-making and jurisdiction conglomerate.

The contingency that is in the nature of decision-making increases the complexity and law with its natural decision-making structure is inevitably affected by the problems contingency brings along. Law has to constantly be aware of the paradox situation of decision-making (Fögen 2006 and Röhl and Röhl 2008) and accept 'prohibition of denial of justice', 'certainty of the law', 'consistency of legal decision-making' and 'duty to give reasons'

as the only warrant for the function of law. They are self-implemented and reduce complexity but only as long as the applied law is in force and its interpretation is considered to be state of the art. To perceive the contingency of all decision-making and the fact that law is affected in a core sense by that contingency induces to accept that arbitrariness cannot be avoided. As a remedy, every decision is to be justified with reasons. And due to 'certainty of the law', all reasons have to be texted—be it in the marginalia of a new statutory law, the considerations of a judgement or in legal doctrine.

6.6 Enforcing Decisions – Social Practice

Since normativity is provided for by implementation of an authority that has the power to enforce what has been decided, the question for all decisions to be answered is the following: features the decision the quality of a legal decision in the sense of a normative decision? Hypothesis is that only what claims validity because it is implemented in social practice can be termed 'normative'.

6 Narratives

Decisions taken claim validity when there are reasons to justify the decision as the 'right'/'correct' decision: Decisions need justifying reasons to prevail. As every decision is to be justified with reasons the decisions depend on a powerful contextual surrounding. The reasons for the decisions are their core and congenital foundation. However, decisions are made on the basis of 'we are so minded'. Justification for decisions can be given in an authoritative or in an argumentative manner. Both implement commonly convincing narrative structures taken from the social context comprising narrative schemes and figures essential for reasoning. This structure implies to qualify both, authority as well as argument, as a conglomerate of contextual narratives. To chose the 'right' narratives as justifying reasons is crucial for the creation of normativity: decisions claim validity only when they are based upon valid narratives. And what claims validity because it is implemented in social practice can be termed 'normative' (hypothesis, see 5.3). Creation of normativity and creation of narratives correlate reciprocally. Hypothesis is, that normativity manifests

itself as an entity of narratives in texts (oral or written) which in a certain culture are achieved and transferred (tradition).

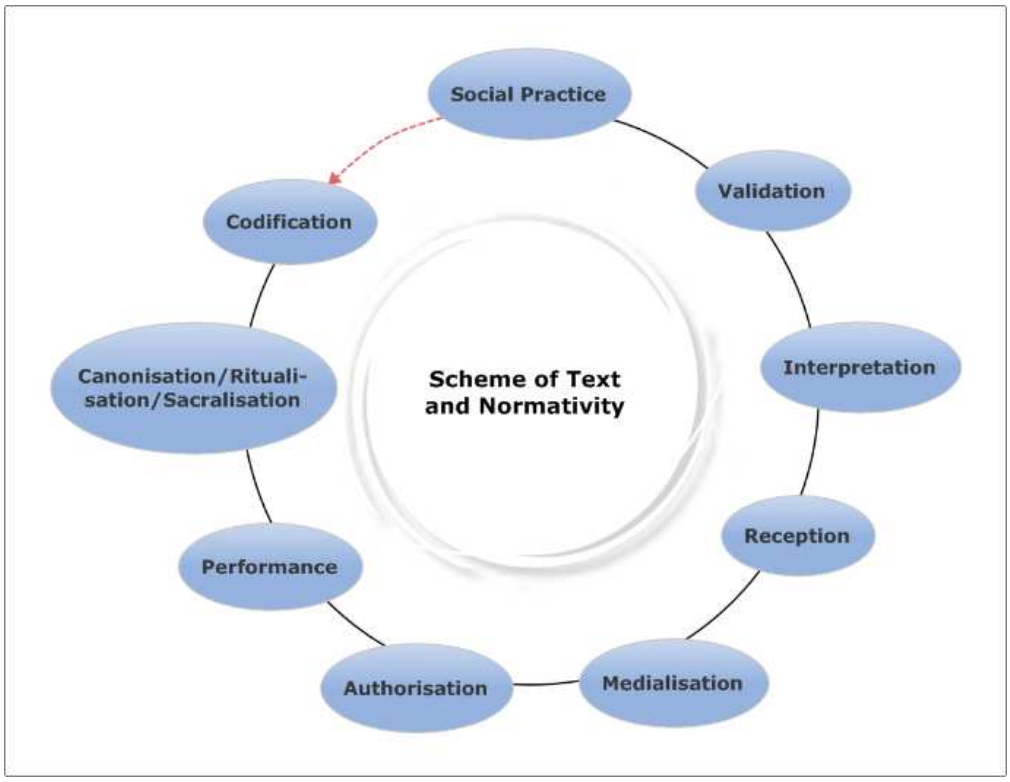

Figure 1: Scheme (Spiral Process) of the Genealogy of Textual Normativity.

7 Proposed Method of Analysis: Scheme for the Genealogy of Normativity in and with Texts

To describe the proposed method of analysis for the genealogy of normativity in and with texts a scheme describing a spiral process can be used: In social discourse norms are being codified continuously in (oral or written) texts. If parts of a text become latent, they are being tested with regard

to their validity. Touchstones for this testing are their potential to be codified, ritualised, canonised and/or sacralised and their qualification for performance, the implementation of authority and to become medialised. If they are still latent, they are subject to reception by listeners/readers and during this process a value is ascribed to them. Thus, a normative text has been created which is used in social practice. Once the text has been created, it is handled in an interpretive or non-interpretive way. The text is being validated constantly and, as a result, an 'intrinsic normativity' will either be ascribed to the text or it will be denied. If it is decided that the text has an 'intrinsic normativity', it will be introduced again into the social discourse and the process of validation restarts.

This scheme of text and normativity is based on the hypotheses that (1) social practice and normativity are interdependent, (2) that normativity is dynamic and (3) that the process never comes to an end (perpetuum mobile). If it is stopped at a certain point of time, this scheme may reflect the 'current set of norms'. This can be read either as a historic reality or as the state of conditions of a certain culture.

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Ostension in law

Markéta Klusoňová[a]

Abstract. This paper deals with the possibility of using ostension in judicial process. It is worth to introduce it to the audience because it is an important part of Czech understanding of semiotics and because this theoretical issue can be used in a very practical way. In the first part of this contribution the Prague Circle, the famous Czech school of semiotics, will be introduced. In the next part the mechanism of ostension will be defined and explained. The main emphasis will be set on Osolsobě's view on ostension. In the final part I would like to focus on the possibilities of the practical use of the theory of ostension in the judicial process.

Keywords. Ostension, semiotics, evidence, Eco, Osolsobě

1 Introduction

Law is naturally connected with language. It is not important now if law is language or if language is just a necessary instrument used by law. Many others have tried to find the answer and it is not the aim of this contribution to judge their work.

Let us just pretend that we all are positive about the conclusion that law is necessarily dependent on communication. Of course there are many ways of understanding communication and I do not want to argue with any

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respected legal scholar or linguist. I just want to propose how to utilize a small part, only one minor idea of the big area of semiotics.

I would like to introduce, explain and recommend you a very fascinating and promising mechanism of communication called ostension.

2 Prague Linguistic Circle

For those who have not studied semiotics I will follow up with a brief summary of work of Linguistic Circle of Prague. First I have to admit that I do not study semiotics but theatrology. But I think that my non-linguistic point of view is actually useful for lawyers too. Maybe this little simplified perspective will be more comprehensive for lawyers than the more detailed one.

In the years before the World War II, in linguistically oriented circles particularly in Czechoslovakia, there were significant attempts to study other sign systems than languages on a more general semiological basis. (Osolsobě 1973)

The work of Otakar Zich can be considered the first decisive factor of this Czechoslovak semiotics. This academician never explicitly used the term 'semiotics' but his work is genuine semiotics without any doubt. (ibid.)

The second and most abundant factor is the Prague Linguistic Circle's activity which naturally developed semiological trends. Names like Mukařovský, Bogatyrev or Jakobson are well known worldwide. Most of the texts written by members of the Prague Lingustic Circle are concerned with the semiotics of theatre. This is natural due to the tight connection of Czechoslovak linguistics with art. (ibid.)

The last factor contains semiological tendencies in the late 20th century and in present. It is necessary to mention the semiotics of visuals, the mathematic approach and last but not the least: Osolsobě's 'anti-semiotic' theory of human communication. (ibid.)

All these trends are probably fascinating but it is Osolsobě's point of view which I will focus on in this contribution concerned with the ostension.

3 Explanation of Ostension

Ostension may be understood as a kind of presentation, demonstration or giving something out. The original Latin word ostendo, ostendere means to show itself. The first use of the word ostendo with this meaning was found in the work of Aurelius Augustinus, but it was used as an adjective later by Bacon, Leibniz, Kant or Russel. It can be said that ostension is a quite common word in philosophy and science. (ibid.)

In semiotics ostension is understood as ostensive communication which means the communication based on communication by non-signs or by specific ostensive signs. (ibid.)

Now I would like to distinguish these two perspectives. It is really important for understanding the whole question of possibility of use of 'ostension' in law. I will start with the communication by non-sign. This conception is supported by Osolsobě and in my opinion this is the more useful one.

4.1 Osolsobě's Theory of Ostension

First definition of ostension in the sense of communication by non-signs is contained in Plato's dialogue Kratylos. Plato explained it as transferring something in front of vision or hearing sensor. The first systematic theory of showing appeared in the tractate written by St. Augustine—dialogue De Magistro (About a teacher). (Osolsobě 2007, pp. 95–97)

We need to know the above-mentioned roots of the theory of ostension to understand the functioning of the whole mechanism of ostension in human communication.

It is absolutely necessary to distinguish signs and non-signs which mean things. When people talk they use signs to communicate, to instruct others or to be instructed by others. Unfortunately signs have to be interpreted so there is always room for misunderstanding.

Communication based on non-sign, on things themselves, is complicated but still possible. In Osolsobě's opinion this way of communication is the purest one and therefore it is more important than any system of signs. (ibid., pp. 95–97)

Such a system of non-signs was supported even by Komenskýý who regarded it as a basic principle of didactics as a whole. He explained ostension as a complementary opposite to all the words and all verbal

communication. Komenský proposed to show absent things as if they were present rather than to show them by displaying them by words. He said that the inspection of the substance is worth more than a thousand words and transcripts. I think his opinion is obvious now. (Osolsobě 2007, pp. 95–97)

Osolsobě's definition of ostension continues in Komenský's course and may be seen as a new version of Plato's Kratylos. His theory is conceived in Augustine's sense as a theory of non-signs. (ibid., pp. 95–97)

Osolsobě focuses on the complex theory of communication more than on the theory of signs. He emphasizes on the recipient rather than the originator. He says that when the original is absent we need to solve this situation with the help of another original, with the use of some sign or by communication. During the communication another original is usually showed by a communicating person. This mechanism is called ostension. But there is another option of communication. When all originals are absent some model can be used to represent them. To summarize these two kinds of human communication we should say that the first one is based on the presentation of the original and the second one uses models to show the picture of original thing. (ibid., pp. 95–97)

According to ostension I have to say that this kind of communication is limited by present time, present people and things. Ostensive grammar contains only indicative, three persons denoting 'who, whom and what' and nominative in connection with genitive like in principles 'pars pro toto' and 'totum pro parte'. (ibid., pp. 95–97)

I would like to explain one important detail of this problematic now. It is necessary to distinguish ostension and using gestures. Ostension means communication by showing by the thing itself. On the contrary gestures are qualified as meta-communication and not as the communication in the strict sense. (ibid., pp. 95–97)

There are some things which cannot be showed. On the other hand there are things which must be showed in every case. In fact such things are always showed and it does not matter whether intentionally or not. Now I am talking about presentation of self in everyday life described by Goffman or 'life theatre' in the texts written by Jevrejnov. (ibid., pp. 95–97)

This situation can be explained as the rule of inevitability of ostension. In all communication situations, even the non-ostensive ones, there must

necessarily be something that shows at least the sign itself. In conclusion, even the non-ostensive forms of communication have their ostensive components because such communicative situations may be described as a combination of two parallel messages: one ostensive and second non-ostensive. (ibid., pp. 95–97)

As for language it depends on ostension too. Let me explain it to you.

Language is usually independent of another system of signs. On the contrary it always depends on the ostension. When a child is learning a language, two ostensive acts are necessary: the term and the sound. These two ostensions create one ostensive definition which contains two additional meta-messages. One of these is gestural or mimic, the second is verbal or explicitly performative. (ibid., pp. 95–97)

All ostensive definitions and other experience create a complex called 'world knowledge' which works like a big dictionary used by an individual. This dictionary of our personal language is static. Of course there is also a dynamic part of ostension which contains the act of showing by using pronouns. (ibid., pp. 95–97)

Nowadays the ostension is usually understood as some 'algebra of cognitive situations'. Discovering some possible quantitative viewpoint is often seen as its main purpose. (ibid., pp. 95–97)

Unfortunately the ostension in Osolsobě's perspective is often seen only as a hypothetic option and not a real possibility of communication.

4.2 Eco's Theory of Ostension

Now we have to focus on the second perspective of understanding ostension. We have already met Osolsobě's conception. Now we need to become acquainted with Eco's theory of ostension.

In Eco's point of view ostension is more semiotic. He creates a complex contextual theory of signs. He sees the ostension as one of the 'language games'. Eco says that signs do not work as some substitutes to original things. On the contrary he states that things work as representatives to words. In fact such things are a special kind of signs too. (Eco 1979)

As for Eco the ostension is only another type of producing signs. Eco's definition of ostension always shows the individuals as elements of some classes. The ostension always requires an 'explicit or implicit determination of the field (stipulation of pertinence)'. Sometimes the object works as a mere representative of verbal expression, sometimes as an expression,

sometimes again as an object or part of an object, which it refers to. In the last case, the ostensive sign is similar to its referent. (Eco 1979)

Eco distinguishes examples, samples (both work on the principle of 'pars pro toto') and imaginary samples identical to 'internally coded acts' or 'token:token models'. This second term is used by Osolsobě too. (ibid.)

Eco defines ostension as a mechanism where

> [...] a given object or event produced by nature or human action (intentionally or unintentionally and existing in a world of facts as a fact among fact) is 'picked up' by someone and shown as the expression of the class of which it is a member. (ibid., pp. 224–225)

Eco says that ostension should be understood as the most elementary act of active signification and it is the one used in the first instance by two strangers with different languages. He explains practical ostension as functional objects produced in one moment, so the problem of their type vanishes. On the other hand he reminds us that theoretically speaking the signs constitute a particular category of sign-functions. (ibid.)

As for Eco, ostensive signs can be explained in two ways. It may be characterized as a conventional expression of a cultural unit or as an intentional description of properties of something. Each object can be also used as an example of its class or as a sample. (ibid.)

I believe that Eco's theory is at least compatible with Osolsoběs theory and that they are definitely not exclusive.

4.3 Summary of information about ostension

To understand the information about ostension we need to realize that there are two sets of signs: natural (called 'signa naturalia') and unnatural (called 'signa data'). (Osolsobě 2007, pp. 95–97)

The existential aspect of ostension is full of paradoxes. People are often unable to show something, however, they are often unable to not show the same thing. (ibid., pp. 95–97)

Cognitive and communicative situations cannot be shown purely because every situation, if shown, turns into another, into the situation which is shown. (ibid., pp. 95–97)

If we would like to show something unchanged, we would have to create it artificially, change it into something like theatre. (ibid., pp. 95–97)

The essence of ostension is a message that every act has its ostensive essence. Language and signs are important but that does not mean they are always necessary. Gestures only report that we are just communicating but that does not change the essence of ostension. (ibid., pp. 95–97)

Communication between people is indirect cognition. On the other hand ostension is both direct and indirect. In terms of communication theory communication is the transfer of information, which is the bearer of the message. Ostension is reporting the facts without reports alone. When talking about emotions and ideas, by definition, is not an option. (Osolsobě 2002)

Ostension has a cognitive and social character. Each ostensive act is an elementary particle of sociability which is intentional and inadvertent. Ostension has a simple grammar, but rich and persuasive language. The simplest ostension is the ostension of the original itself because a body, a personality functions as a message too. (ibid.)

In summarize, with the help of ostension can we say more or less than words.

The earliest observers saw the ostension in connection with the theatre. Especially Jevrejnov dealt with this connection in details. In fact, this point of view is unnecessarily reducing the area of use of ostension. (ibid.)

Theatre may be defined as ostension only in the part in which it shows some things. This 'pointing' is a basis of the theatre. We must necessarily add some 'game' or 'model' to create real theatre. (ibid.)

This is the difference between ostension and Brecht's 'everyday theatre': ostension can't be performed, it just 'exits'. This difference between ostension and theatre connects ostension more with the information theory. The information theory sees reality as the only 'message' ever and ostension sees single message as a 'reality' therefore can we see the information theory and ostension as two sides of one coin. This principle is subconsciously used for example in museums. (ibid.)

Ostension which is completely freed from language is rare. It occurs mostly in context with it because they cannot exist without each other. (ibid.)

Relationship of ostension and language is still full of unsolved questions, even if we leave aside the priority of any of them. The primary form of human communication is the use of language, language makes a human. (ibid.)

The theory of ostension complements the communication theory. It is a non-sign communication but every communication has also its ostensive folder. In fact we cannot see the sign itself but we can perceive only its content. (Osolsobě 2002)

The ostension theory allows us to see the whole issue of communication between people.

The ostension can be accessed metaphorically, metonymically or by synecdoche, but metonymically communication from ostension itself cannot be completely distinguished from communication. (ibid.)

There are thus four key issues: the problem of ostension, ostension by model, communication by using the model and communication by language. I think all of them are rather interesting for law. (ibid.)

4 Conclusion: Possibilities of Practical Use of Ostension in the Judicial Process

Communication is a necessary part of each judicial process. Information must be shared, accepted and interpreted. Unfortunately, during the communication some information can be lost because misunderstanding often happens. On the other hand, some facts included in a judicial process must not be lost because of their importance for the final decision of the court. Such information can change lives of parties of a trial so we need to find the most objective possible way of communication.

I propose ostension to you as such an objective tool of communication. I mean ostension in its very basic form, not as a model or as a specific sign for language. In my opinion Osolsobě's theory of ostension explaining ostension as non-sign communication using things to say something objectively is an absolutely appropriate possibility how to make the judicial communication more effective.

There is some information influencing the essence of the dispute. Such information must be provided during the trial and a decision about trustfulness of such evidence is one of the most difficult tasks of every judge.

Judges in the Czech Republic do not have any rule for the measuring of evidence. They have to decide on their own and they do not have any guideline except one very general and very meaningless. It lays down that evidence must be evaluated separately and also in context.

Imagine that evidence can communicate. You could say that things cannot talk. I would answer that things can communicate by ostension. We can use things as primary tools of communication to communicate without words. If language causes misinterpretations, we have to exclude it, of course just in really necessary cases, from providing in judicial process.

Unfortunately I am afraid that this exclusion is impossible because language is still necessary in law. And ostension has only a small grammar and just a concise vocabulary. However, there are some situations where ostensive communication is more suitable than language.

Of course I am talking about providing evidence during judicial process. In context of ostension things are the best evidence. They are more trustful than all testimonies of witnesses because information contained in these testimonies are influenced by language.

To conclude my contribution I would like to propose a procedure which is similar to the dealing with public procurement. If we have at least general knowledge of the case, we can define the areas which we should be evaluating. We can therefore add certain value to each and every area defined. We can link the points from 1 to 10 to each area, multiply them with their value and count the outcome. This outcome can be used as a guide. If the judge wants to distance himself from that outcome, he knows that this particular case is unusual and that he has to explain such a decision with proper arguments.

I hope that the theory of ostension can provide a brand new view on evaluating of evidence. It cannot be used as a primary method, I know. But I think that as a secondary method, only as an inspiration, it could work perfectly.

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Is the Concept of Rationality of Legal Reasoning Useful?

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Abstract. This text aims at answering a question, if different views over the nature of law can offer different views on rationality of legal reasoning. Legal reasoning is usually defined as reasoning referring to law or about law. It seems obvious then, to say that if two philosophers differ in their opinions on idea of law, their opinions on what constitutes rational legal reasoning should be likewise different. My goal is to investigate, whether this intuition is correct and if it brings any new light to what we already know about legal reasoning in practice.

Keywords. Legal reasoning, rationality, argumentation.

1 Introduction

Problems concerning rationality are deeply rooted in reflection on legal argumentation and legal reasoning. In wider sense, this issue is immanently inscribed into thinking about the law itself. Since social groups (or rather societies) started to form, based on non-violence basis, it became necessary to give reasons for demanding from others to act in particular way. The eldest known reason of this kind is religion (or mythology). Modern times introduced new category—reason. Last but not least, a reason for acting can also be law. But law itself also needed an explanation for its persuasive

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role. One of the attempts to do so, was explaining the law based on the rules of rationality. Law can and should be driving force for its rationality.

With the development of societies, law evolved. What also evolved were the attempts to find and describe the 'nature' of law.

This paper aims at answering a question, if different views over the nature of law can offer different views on rationality of legal reasoning and if so—at which stage of legal reasoning they can be used. Moreover, I would like to consider, whether it is possible to find common points in these views and transform them into useful directives for legal reasoning.

2 Rationality and legal reasoning

Apart from a variety of classifications and definitions of 'rationality' developed in the philosophy of science, two approaches to the problems of rationality are interesting in the context of legal reasoning. Established context determines rejecting the whole range of reflections on the rationality in the empirical sciences.

Reflection on the rationality of legal reasoning should start from the definition and delimitation of the concept of 'legal reasoning.' There is also a different approach possible—to start from the concept of rationality and then to draw a corresponding theory of reasoning, but such an attempt would be inadequate. (Grabowski 1999, pp. 161–177)

The simplest and most popular definition of legal reasoning is one stating that the legal reasoning is any form of comprehensive activity referring to law or about law. What does it mean then, that reasoning on law is rational?

The term 'rational' (Latin: rationalis) itself can be understood in many ways:

1. as based on reason, belonging to the sphere of reason;
2. as reasonable;
3. as consistent with appropriate method. (Tatarkiewicz 1972)

This approach—though adequate to describe the legal reasoning, does not allow to link it to the multi-threaded reflection on the concept law. It also does not reflect the full three-level structure of legal reasoning. In

this context, it seems more appropriate to follow the Polish philosopher Mieszko Tałasiewicz, who distinguishes 7 types of rationality (Tałasiewicz 1995), i.e.:

1. Conceptual rationality—that is an indication of the conditions for the audience to understand the message;
2. Logical rationality—that is striving for consistency;
3. Ontological rationality—i.e. rational being;
4. Epistemological rationality—that is, the rationality of the process of cognition;
5. Methodological rationality—that is, rational methodology;
6. Practical rationality—relating to the sphere of human activities on nature intentional;
7. Axiological rationality—that is, rational valuation.

The above classifications are, of course, only a small selection of various approaches to this topic. Nevertheless, they can be helpful in the search for a rational model for legal reasoning. According to this distinction, we can distinguish as follows:

1. Rationality (intelligibility) of the statements about law, made by academics and practicing lawyers;
2. Consistency of the statements about law;
3. The rationality of the system of law (postulate of rational legislator);
4. Rationality of the recognition of law;
5. Rationality of the scientific method of jurisprudence;
6. Rationality of adjudication;
7. Rationality of moral evaluation.

Based on the above, we can conclude that adopting outlined above broad definition of legal reasoning, it is impossible to give one definition of its rationality. In fact there will be different criteria referring to the rationality of the scientific method of jurisprudence, or to the legal system as a whole, or to rationality of adjudication. Leaving aside the issue of methodological correctness criteria of legal theory or legislation, I would like to focus on a practice of law in a strict sense, that is judging. By judging I understand a process of judicial decision-making, based on established facts in the process and in accordance with applicable legal rules, and its justification.

For the legal practice, the most important from above-mentioned seems to be: rationality of cognition, rationality of judging and rationality of moral evaluation. Therefore, for the purposes of this study, I will narrow the concept of legal reasoning for the trial application of the law, namely – its specific form that is judging. The sequence of these steps include: establishing the facts of the case, determining the legal status and outcome. These activities are taking place in the course of conventional behavior of different actors, which is a lawsuit.

3.1 Establishing the Facts

At the stage of establishing the facts is essential to determine the facts of the case in accordance to truth, and therefore to make such arrangements for the proceedings to 'create' in the courtroom state of affairs corresponding—as far as possible—to the actual state of affairs. Feature of rationality can be at this stage attributable to the actions that lead to the representations or statements of compliance with the truth. This understanding of rationality is consistent with that presented in multi-threaded reflection on scientific rationality. However, it is rather a postulate towards legislature to establish relevant institutions (eg, evidence, rules of command), which allow to reach the truth in courtroom. As to the judge it is useful only when stating that a rational act will be one, that ensures conducting rational procedures correctly.

The only exception is—known by the law of the continental legal culture—of the presumption of facts (eg art. 231 of the Polish Code of Civil Procedure). It allows the judge to accept the existence of a fact, based on the possessed knowledge of a different fact. It is, in fact, the model of reasoning that occurs in everyday life, transferred to a system of univer-

sally binding law. Rational reasoning will be one in coherence with this presumption of fact. Thus, we are again faced with rationality understood as compatible with the truth. Based on the above it can be concluded that the rationality of reasoning at the stage of establishing facts is the type of rationality based on correspondence of the effects of this reasoning to the real state of affairs. Evaluation of the rationality of action (reasoning) is made by its effects.

3.2 Determining the Legal Status

The next step is to establish the rule of law applicable in the case. Here, judicial reasoning involves determining which rules are binding at the time of the judging. This reasoning is made on the basis of generally accepted rules of conflict, for example, order a temporary rule, hierarchical order, etc. At this stage, rational reasoning will be the one consistent with those adopted rules. Rationality is thus of a procedural nature, ie, the rational is considered, which is consistent with the adopted rules (procedures).

3.3 Ruling the Case

The last step is ruling the case. At this stage most of the problems arise for the rational reasoning of judges. Depending on what view of the concept of law to accept, not only the description of the decision-making by a judge will be different, but also following definition of rationality of the decision-making process, or rather—its justification.

3 The Concept of Law and Rationality

In philosophy and theory of law we find a variety of ways to approach judicial decision-making process. Due to the volume limitations, this issue can be dealt with only briefly.

According hard legal positivism, the decision may take the form of subsuming—i.e. 'automatic' adjustment to the facts of the law. In this perspective, rational decisions will therefore only be a ruling that fit into this model. By the power of the establishment and because of its function, the law is rational, and so is a decision corresponding to the rational law. This perspective does not seem to take into account the possibility that

the same law would be unreasonable or that it can be a contribution of any doubt as to its content.

'Soft positivism' followers, led by H.L.A. Hart present a slightly different approach, where the above-mentioned legal syllogism does not have to be the very essence of legal reasoning, but the solution to the problems of interpretation in the application of the legislation, which also should be justified. (Feteris 2009, p. 308) Then, the notion of rationality will refer both to the process of the decision and its justification.

For a variety of concepts of *ius naturalis* there is a common point of deriving duty from being. If the world is ordered in rational way, it seems obvious to subordinate to its rights. Duty, then, is inevitably inherent in existence and the essence of man. The sole reasoning is the act of the 'discovery' of what is given. There can therefore be no question of a wider reflection on the rationality of reasoning, since it is limited to the discovery of the rational structure of the world, namely its part—the law. Law which is not compliant with the dictates of the law of nature, so—according to the previously adopted definition of legal reasoning—such statutory provisions can not be the object of such reasoning.

The third of the most popular views on the nature of law, i.e. a legal hermeneutics in the context of our discussion seems to be causing the most problems. For the law is not a 'given' to the judge, it is rather made (constituted) in process of interpretation. 'Finding' the law is not equivalent to drawing decisions of the general regulations, but consists in bringing the expected mutual correspondence, draft (Gadamer) pre-standards and specific conditions of life. So once again—as in legal positivism and naturalistic conceptions we are dealing with ontologically grounded interpretation of the law. In case of hermeneutics it can only give a more varied results, because it is not dependent on the 'once for all' of the relationship, and in transition (the question of how this differs from the concept of nature with variable content.

In light of the above (except for soft legal positivism) is worth noting that the judge's decision-making process itself is reduced to a kind of 'automatic' process of converting the rational universe (or rational structure of the universe) to the specific situation. The role of the judge in fact, does not require making any decision, any of his 'creative' role, and only the correct 'reading' what follows respectively: law, the will of God or current social relations in conjunction with other factors, including the law.

The last of the 'big four' philosophical and legal concepts are argumentative-rhetorical concepts of law. Within this framework, there are two trends worth noticing: Topical (proposed by Ch. Perelman and L. Olbrechts-Tyteca) and the communicative, inspired by the work of J. Habermas.

Perelman in his theory focuses on the theory of argumentation, but his reflections seems to be translatable to reflection on legal reasoning. The argument is in fact a necessary consequence of legal reasoning. You may even be tempted to declare that legal reasoning without argument somehow loses its raison d'étre. Model situation of applying legal reasoning, which is the application of law in the judicial process, requires the articulation of the results of the reasoning in the form of specific arguments in favor of the ruling. However, the process of reasoning should not be narrowed to the sole process of argumentation. Perelman's rational argument is not the effective one (for the particular audience), but the valid one (i.e., an argument for a universal audience). This means that the rational argument, and therefore—is a valid argument, which is able to reach all potential audience. So understood, however, rationality is useless as a tool and measure of reasoning. Assuming that the purpose of reasoning (and thus of the decision) will be the widest possible understanding of the public does not describe the entire complex reality of legal reasoning.

In the given context J. Habermas's concept of communicative rationality seems promissing. The first reason for this interest is it's particularly close relationship with the principles of the concept of just, free and open society. In addition, the concept of reason (or rationality) is a moral value, not only is reduced to the role of an efficient tool. (Sarkowicz and Stelmach 1998, p. 118)

Transferring Habermas's concept to the ground of legal reasoning, it can be concluded that if the reasoning is to perform its essential function, ie, as a mean of establishing the procedurea of developing solutions for society, it should satisfy the claims resulting from communication rationality, that is claim to inteligibility, claim to truth and claims to sincerity. This means that under the so-organized legal discourse, is it reasonable to consider the judge's decisions, which are easy to understand, accurate and based on honesty. Excluding the last two criteria, not applicable to the judicial deciding in practice, I would like to focus on the criterion of intelligibility of the decision. In my opinion—on the basis of legal practice—this

criterion can be understood—firstly as the postulate of 'comprehensibility' of the decision on the basis of the existing legal system—and thus its compliance with the law, and secondly—as 'intelligibility' of the interpretive decision 'hard cases'. This means that this interpretative decision, when the legal standards do not allow for a clear outcome of an investigation, it should also meets the other, extra-legal factors. Basically, it should be a decision in accordance with the social sense of justice. The requirement of rationality—in spite of its formal and idealistic character—fulfills the basic function of law, which should be the protection of justice.

4 Conclusion

As you can see in the above examples, the specific concepts of law are facing different visions of rationality. Their application to the practical assessment of the judge's reasoning, however, is questionable. It seems, therefore, that a reasonable point of view in terms of rationality, will assess the rationality of arguments, rather than the reasoning—not only due to the fact that it is easier to evaluate the arguments, but also because the specific reasons it is easier to develop criteria for its rationality.

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A Matter of Coherence

Terezie Smejkalová[a]

Abstract. This paper deals with the concept of coherence in the context of legal argumentation and interpretation. After putting the concept of coherence into a wider context, this paper deals with what MacCormick calls normative coherence, i.e. the unity of principle and value among the rules and their broader normative context. Coherence of the justifications of judicial decisions with the rest of the legal system is a desirable property, and despite its inability to be the sole sufficient argument to justify a judicial decision it may be also understood as a connection of purposive and context considerations that reflects and enables the dynamic nature of a legal system.

Keywords. Coherence, normative coherence, judicial decision-making, interpretation, context.

1 Introduction

Legal positivism may at times lead to rather simplified ideas about the legitimacy of judicial decisions: A judicial decision is legitimate iff it is legal. Legitimacy is equaled to legality. The concept of legality then may be (and especially in the context of the Czech legal system often is) very easily oversimplified.

This is not to say that the dimension of legality should or may be overlooked when discussing the legitimacy of judicial decisions. I believe,

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however, that the decision-making 'according to law' is not a matter of oversimplified legality. A possible answer may lie in the concept of coherence and consequently the 'argument from coherence'. The argument from coherence isolated and used as a sole argument / rationale for the decision taken is, I believe, as weak as the 'argument from legality,' which for the purpose of this paper shall be understood as a reasoning based on formal subsumption of relevant facts under a legal rule, that usually manifests itself in the rationale of the judicial decision as a simple justification that may be formulated as 'because the law says so'.

Firstly, this paper deals with the concept of coherence on a general level. Subsequently, it discusses the issue of whether and to what extent is the argument from coherence able to provide a relevant and sufficient justification to a judicial decision.

2 Coherence in Law

For some scholars, the law represents (or as a system should represent) a unity of general principles and rules, based on a common system of values. For Dworkin, law is a unity that rests in its integrity. His concept of law as integrity asks the judges

> [...] to assume, so far as this is possible, that the law is structured by a coherent set of principles about justice and fairness and procedural due process [and thus create] a community of principle. (Dworkin 1986, p. 243)

Even though the law as integrity is not just a matter of judicial decision-making but also legislation, Dworkin applies it most prominently in the domain of adjudication.[1]

Similarly also MacCormick sees law as a coherent unity. For him, coherence is a matter of relationship between individual legal rules, general principles and values, where the legal rules are concretizations of general legal principles and these are in turn rooted in the system of values shared by the society. (MacCormick 2005) This view of coherence is not anything strictly law-specific: The unity of scientific paradigms and theories may be understood similarly. According to Kuhn, every scientific theory should be

[1] IVR Law as Integrity http://ivr-enc.info/index.php?title=Law_as_Integrity

a part—and judged as a part—of a broader totality—a paradigm. (Kuhn 1970) Every paradigm then reflects and shares the basic understandings and value judgments of the scientific community. A paradigm is then considered fruitful, if the research that is based on this paradigm is able to produce new theories with empirical content. (Peczenik 2007, p. 130) However, when a scientist cannot solve a problem within a paradigm, 'this failure does not falsify the entire paradigm or any of the theories essential to it.' (ibid., p. 130) These relationships between theories and paradigms are not a matter of simple non-contradiction or consistency but rather of coherence based on a different type of connection. Whereas logical consistency should be understood as an absence of logical contradiction between two or more rules, coherence is axiological compatibility among two or more rules, all being justifiable by reference to some common principle or value. (MacCormick 2005, p. 231)

Even though the understanding of the concept of coherence changes from author to author, they often share a common standpoint: the concept of coherence should not be equaled to 'mere' non-contradiction or logical consistency because it is a much broader (See e.g. Peczenik 2007) or even an overarching concept.[2] This is also the case of MacCormick, whose understanding of coherence—and to a certain extent further categorizations of this concept—will be further tackled by this paper.

For MacCormick, coherence is a matter of 'making sense'. He is convinced that rational law and its considerations and argumentation require a certain degree of coherence—a coherence with the rest of the legal system as well as other normative systems which function within given society and a coherence between the facts of the case and legal conclusions based on these facts. He calls these two dimensions of coherence *normative* (in the first case) and narrative (in the latter case). This paper focuses on the first dimension, or instance, of coherence and on the basis of this concept, it shall discuss the role and importance of obvious need of legal grounding of judicial decisions.

I believe that the explanation of the 'argument from legality', or the requirement of 'judging according to law' may be found in MacCormick's

[2]For example for Gianformaggio, coherence is a concept that comprises of consistency, compatibility and congruence, where congruence in her understanding equals MacCormick's normative coherence. (See Gianformaggio 1990). Similarly also for Alexy, the concept of coherence consists of logical consistency, cohesion and comprehensiveness. (Alexy 1998 in Peczenik 2007)

concept of normative coherence. In his understanding, normative coherence is a matter of property of the relationships that exist between individual elements of law, 'a matter of subservience by a set of laws to a relevant value or values.'(MacCormick 2005, p. 192) This means that the legal rules are (or should be) concretizations of a general principle, whereas the general principle fits into a value framework of a society. Therefore, normative coherence points towards a very general idea, that law should make sense within a given social and cultural context. As Bertea very fittingly points out, this 'making sense' is the one of the conditions of intelligibility of a legal system. (Bertea 2006, p. 440) And the intelligibility of the system is in turn one of the preconditions of law's existence as an order.

The vague expression of 'making sense' may be restated in a more precise Peczenik's wording. On a general level, coherence may be explained as a relationship where

> [t]he more statements belonging to a given theory approximate a perfect supportive structure, the more coherent the theory. (Peczenik 2009, p. 132)

Even though this assertion is made in the context of a theory and its propositions, it is possible to use it analogically for a coherence of a legal system in MacCormick's sense: the unity and coherence of a legal system consists in its ideological interconnectedness. The more legal rules/norms are concretizations of a united whole of abstract principles, the more coherent the system is. The legal rules should not merely not contradict each other, but should also hang together purposively. (MacCormick 2005, p. 230)

3.4 Instances of Coherence

The concept of coherence is present in law in many ways: the statutory, argumentative or other basic principle structures reflect coherence between individual elements of the system of law. To list them all would be far out of the scope of this paper. Let me focus on a few of chosen ones that are connected to the judicial decision-making: In which argumentative situations in the rationales of judicial decisions may be observed elements of coherence?

1. *Logical arguments.* Even though it is not possible to equal coherence with logical consistency, there are scholars who are convinced that logical consistency falls within the scope of the concept of coherence. (See for example Gianformaggio 1990) However, MacCormick seems to be convinced that despite the fact that these two concepts overlap, a perfect logical consistency is not a necessary precondition for coherence: (MacCormick 2005, p. 190) whereas consistency is a matter of logical exclusion, coherence is a matter of degree. MacCormick even claims, that in the case of witness testimonies, perfect consistency may lead to the suspicion that an untruthful story is being told. (ibid., p. 190) Nevertheless, logical argumentation in law is based on the assumption that legal system represents a unity, which is intrinsically consistent, and therefore, coherent.

2. *Analogy.* The use of analogy is a similar example of coherence in legal thinking. Analogy is based on recognition of similar patterns and structures in various narratives, which is closely related to the human ability of abstraction.[3] Analogy as a structure recognition is just a step away from a principle that is in law expressed by a phrase 'treat like cases alike', which in turn is essentially one of the expressions of a general principle of fairness/justice. This requirement finds its way into various scholars' writing. Most predominantly for Fuller, for example, it represents one of the basic elements of 'morality of law', that is, a necessary condition for any authority's commands to be called 'order'. (Fuller 1958, p. 644ff) It may be also considered to be a part of another principle – a principle of exclusion of arbitrariness from judicial decision-making: the judge is bound by a certain normative totality and her decisions must be coherent with it – she is not allowed to base her decisions on her own discretion only. When the legal system does not offer a concrete legal rule on which she can base her decision, she is still required to decide within the normative system. Analogy thus serves to widen the effect of a legal rule or a principle in such a way that it covers (or shows how it could cover) a new, yet unregulated, situation,[4] in coherence with the standing

[3]This direction of thinking stems from the structuralists as well as a later development of the concepts in terms of narrative analysis. Compare for example Jackson 1988, p. 207.

[4]See MacCormick 2005, p. 206; In this particular passage, MacCormick refers to and

legal order.

3. *Stare decisis* and *the Doctrine of Precedent.* These concepts are related to the above-mentioned maxim of 'treating like cases alike' and their representations in various legal systems acquire different form. In the Czech Republic, for example, it is a matter of 'unification of the case law', one of the statutory tasks of the Czech supreme courts. All these represent on a general level the ideal of stability of law in time, which then further manifests itself in the principle of foreseeability of judicial decision-making. As claimed by Peczenik in the context of theories and paradigms—and as can be analogically claimed for the case of the legal system—the stability in time is yet another manifestation of coherence of a system. (Peczenik 2007)[5]

4. *Constitutionally-comform interpretation.* This principle of interpretation has been formulated by the Czech Constitutional Court[6] and it very fittingly reflects the principle and value coherence of a system. When judging the constitutionality of a legal provision, the Court seeks whether among all the possible interpretations of the provision there is at least one that is in conformity to the constitutional order. If this is the case, such a provision shall not be abolished, but the judges are required to read, interpret and apply this provision in this constitutionally conform manner only. Constitutionally-conform interpretation is a special instance of constitutional coherence of a system on a very practical level.

5. *Legal validity.* The concept of legal validity as a special instance of existence of legal rules stems from an idea that legal rules and principles must come from a legitimate authority, or a legitimate source. Thus, validity of an individual legal rule, or legitimacy of an individual judicial decision, is a matter of validity of other legal rules and principles from which the authority to decide or to legislate stems. On a theoretical level, the unity of legal validity is for example a matter of Kelsen's Grundnorm. Judicial decision-making is dependent on legally valid norms and rules. The unity of the decision based on

discusses Raz.

[5]Another example of the necessity of unity of legal system is Dworkin's concept of law—and case law in particular—as a chain novel.

[6]Decision of the Constitutional Court of the Czech Republic No. Pl. ÚS 48/95.

a valid rule with the system is reflected in the concept of validity of the rule itself. Depending on the width of the understanding of the term (as well as on the concept of law), it can be claimed that the legality is a matter of consistent and/or coherent legal system and its application.

3 Coherence of (and in) Judicial Decision-making and Interpretation

Theories of coherence distinguish between coherence in law and coherence in decision-making.[7] This difference may be illustrated by an example of solving a problem on a level of legal theory and on a level of a dispute. Legal problem is such that allows for more than one solution, whereas in case of a legal dispute only one solution to the problem must be found. (Gianformaggio 1990, p. 402) As Peczenik points out, once a legal case is identified as routine, no values and no choices are needed to solve it; (Peczenik 2007, p. 123) the case may be solved by simple subsumption of factual findings under a given legal rule. The coherence of such a decision with the legal system is given by the coherence of the rules applied with abstract principles and values (see MacCormick above). The issue of coherence of a decision with the legal system acquires much more intriguing dimension when the judge faces a so called hard case (in Dworkin's terminology) and is required to *de facto* formulate a new legal rule based on application and balancing of abstract legal principles against each other. The coherence of such a decision does not rest in the coherence of a valid legal rule with the rest of the legal system, but on the degree of coherence of this newly formulated rule (or, the *ratio decidendi* of the case) with existing legal principles of the system.

Apart from deciding hard cases, the notion of coherence (or incoherence) of the judicial decision with the legal system may be observed in the process of interpretation of legal rules.

As Peczenik claims,

> [...] a coherent justification of legal norms and interpretation

[7] ee the entry on Interpretation and Coherence in Legal Reasoning in Stanford Encyclopaedia of Philosophy. Viewed on 1 July 2012 http://plato.stanford.edu/entries/legal-reas-interpret.

> facilitates social control over lawmaking and law-implementing institutions, and this is an important requirement of democracy. (Peczenik 2007, p. 137)

Nevertheless, even when it comes to understanding coherence in interpretation, there is little general agreement among scholars. For Raz, interpretation is such a particular and discrete activity that perfect coherence of an interpretation of a legal rule with the rest of the legal system is not and cannot be the main task of the interpreter.[8] On the other hand, for Dworkin, in the context of his concept of law as integrity, interpretation has a broader, more global character. (Dworkin 1986, pp. 87–88) Coherence considerations in a legal system may thus be understood in two ways: globally and locally. Global coherence means that chosen solution to a problem or a legal dispute is in accordance with the rest of the legal system on a level of principle and values. Local coherence covers such situations where the chosen solution is in accordance only with a branch of the system. (CompareBertea 2006, p. 439)

The judge is required to adhere to the existing law and that puts her into a role different from that of a lawmaker. Coherence of her decision-making with the rest of the legal system is an essential requirement of her activities. MacCormick however, goes even further when he claims that in the process of judicial decision-making,

> [...] the courts should first of all interpret the existing law in order to establish a coherent view of some branch of the law; they should do this by showing how this branch is justified according to some coherent set of principles or values which underlie it. (See MacCormick 1984)

However, as mentioned earlier, there are scholars who speak against this idea of coherence in law and claim that a tension necessarily exists between law and the ideal of coherence. According to Raz, law does not establish and cannot establish coherent rational system, because it is rather a

> [...] higgledy-piggledy assemblage of the remains of contradictory past political ambitions and beliefs. (Raz 1994, p. 440)

[8] See the entry on Interpretation and Coherence in Legal Reasoning in Stanford Encyclopaedia of Philosophy. Viewed on 1 July 2012 http://plato.stanford.edu/entries/legal-reas-interpret.

In his opinion, interpretation contains—rather then retrospective and coherent approaches—innovative and prospective aspects. (Peczenik 2007, p. 124)

Adherence to legal principles in the process of interpretation, that is the interpretation 'in light of' certain legal principles may in its extremes lead to two opposite claims: On the one hand, it may lead to a re-formulation of wording of legal rules (and thus a *de facto* novelization of the legal rule), on the other hand, the emphasis on coherence may point to the refusal of creative, or innovative role of judges in interpretation (compare Levinson 1982, p. 392–402) and a tendency towards originalism and conservation of a standing legal order.[9]

It is possible to claim that the emphasis on normative coherence is the evidence of predominance of the retrospective element in judicial decision-making: during her decision-making, the judge focuses rather on the conformity of her decision with valid legal rules and values of a given legal and social system than on the possible future impacts of such a decision on the legal system. I believe, however, that placing the emphasis on coherence does not exclude changes in legal system, even by means of creative interpretation of legal rules during the process of judicial decision-making, because (as Bertea similarly points out) the ambivalent character of the concept of coherence—and the argument from coherence—eludes to a certain degree our grasp. It allows a significant degree of creativity (Bertea 2006, p. 442) and thus does exclude neither innovative dimension of interpretation, nor innovative aspects of the case law.

I share Peczenik's opinion that coherence is a structure so rooted in the human thinking that there is no alternative: Human thinking is a quest for coherence. (Peczenik 2007, p. 147)[10] Accepting the idea of a legal system as a coherent system does not make the system rigid by excluding change; it only implies that any future change must be delimited by adherence to certain rules, principles or values.[11] Should we accept the idea that

[9]See the discussion within the entry on Interpretation and Coherence in Legal Reasoning in Stanford Encyclopaedia of Philosophy. Viewed on 1 July 2012 http://plato.stanford.edu/entries/legal-reas-interpret.

[10]For similar reasoning see MacCormick's concept of narrative coherence, or Turner's conception of human thinking in narratives. (Turner 2005)

[11]Even though I do not consider myself a proponent of a strictly positivistic image of law, this idea is in accordance with imagining law as a system that is closed to a certain degree and thus produces rules for its own change. See for example Hart

coherence of individual propositions with the totality of the system is a factor thanks to which the system 'makes sense', then it must be concluded that the matter of persuasiveness of judicial opinion and argumentation contained therein is dependent on this coherence. Moreover, on a higher level of abstraction, the notion of coherence refers to a claim that the more is the law in accordance (coherent) with other normative systems that bind the society, the more effective it is.

Different understandings and approaches to the concept of coherence covered above speak of a rather ambivalent character of this concept. For Bertea, coherence is a matter of establishing context: the argument from coherence is a context establishing argument. (Bertea 2006, p. 438) When a judge makes her decision, she is making it in a certain context of value and principles, which is not necessarily of a strictly legal nature and this context should restrain her from deciding in an overly formalistic manner.[12] If during interpretation of a provision of a legal rule, a relevant context is excluded or overlooked and by application of such a rule good manners are compromised or a law is circumvented, such an interpretation and subsequent application of the rule is faulty and incoherent in the broad context of a *Rechstaat*. (See Smejkalová 2010 and compare Pulkrábek 2007, p. 42 and p. 115) I believe it is possible to agree with Lasser, who is convinced that an interpretation of a text should not be only a one-way of application of a literal and grammatical reading, but should also contain a meaningful interaction of a text with outside policy considerations. (Lasser 1997, p. 764)

The Czech case law defines a misuse of law as such an activity the aim of which is not directed at finding the purpose and meaning of the legal rule in question but such activity that is discrepant with the good manners and lead by a direct intent to cause harm to another.[13] It follows from this definition that the relevant context for interpretation of legal texts is among other the purpose and meaning of the interpreted provision. The

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and his differentiations between primary and secondary rules, or to a certain degree also Luhmann and his concept of law as an autopoietic system that generates its own legitimacy. (Hart 1994 and Luhmann 2008)

[12]For a more close discussion of the issues of misinterpretation of law and formalism in the context of postmodern understanding of law as a text see (Smejkalová 2010)

[13]See the decision of the Czech Supreme Court, No. 25 Cdo 1302/2008; further compare decisions of the Czech Supreme Court No. 21 Cdo 992/99, or No. 22 Cdo 1265/2007.

courts use this purpose and sense to find the real legal meaning of the text next to other possible semantic meanings. (Barak 2005, p. 182)

From this point of view, a coherent interpretation and application of law is such that is in accordance with its purpose and it is possible to agree with Bertea, who claims that argument from coherence represents such a kind of argumentation that connects teleological and context considerations, and this combination reflects and enables the dynamic nature of a legal system. (Bertea 2006, p. 438)

4 Can Argument from Coherence Justify?

Can 'accordance with law', or coherence with a given legal system, be the only prerequisite of a legitimate judicial decision? Is coherence a *conditio sine qua non* of a legitimate rationale of a judicial decision or is it 'only' a desirable component of judicial decision-making? According to Levenbook, coherence is a necessary condition: it is absolutely crucial for a legitimate judicial decision to cohere with a standing part of law. (See Levenbook 1984, pp. 355–374) MacCormick (MacCormick 1984, p. 244) speaks in this context of the normative coherence as a means to ensure a relatively stable and structured normative environment, but which by itself is unable to ensure a just or fundamentally correct order.[14]

However, the fact that a decision is coherent with the value and principle background of the totality of a system may serve—and does serve—as a means of argumentation. The argument from coherence is useful when choosing one from several possible solutions in such a way that it argues with the context of the chosen solution (similarly as the historical, logical or comparative method of interpretation); (Bertea 2006, p. 438) while this context in the *Rechstaat* should be considered to be a matter of value and principle framework of the legal system. Arguing with context is thus a matter of strengthening the overall perception of the coherence of the system.

[14]This very fitting explanation of MacCormick's concept of weak derivability comes from Bertea 2006, p. 440

5 Conclusions

It should be concluded that the argument from coherence cannot be used in isolation, without other means of argumentation, because in itself is not capable of justifying a decision. Its importance lies in the context of other argumentative structures. (Bertea 2006, p. 441)

Strengthening of the meaningful structure of existing statutes or case law by means of heeding the coherence of such a system is one of the goals of application of law or enactment of justice in general. (Roermund 1997, p. 93)

If the judicial decision does not cohere with the legal and value system in question, it (in MacCormick's words) fails to make sense. (MacCormick 2005, p. 189) In the context of the concept of normative coherence, this 'making sense' should be understood more narrowly: it is influenced by the surrounding environment of a given legal system and its rules. However, the rationality of the discursive and argumentative nature of law is conditioned also by other, non-legal requirements. Coherence of a judicial decision with the legal system should be regarded as a necessary, but not sufficient condition in order for such a decision to be a legitimate one.

Judges should make such decisions that cohere with the total image of principles of justice, because there is a mutual relationship between them and the law: judicial decisions help to create this image of law, while at the same time this image of law provides a background for the decision, and thus helps to justify it and make it more persuasive. Moreover, as Peczenik claims, a decision coheres with the totality of legal system if it can be justified on the basis of a wider set of general premises of the system. (Peczenik 2009, p. 278) This does not necessarily mean that this justification must appear in the text of the decision itself. In this sense, the concept of coherence does not require an explicit reference to a value or a principle in order to be applicable. What it requires is that any decision should not be made without taking into consideration its context, which is provided by the totality of the legal system. Thus, in the context of the Reschstaat, a legitimate judicial decision cannot be justified simply by means of the 'argument from legality' ('because the law says so') without taking into consideration also the results such an application of law would lead to.

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Literary Fiction in Legal Dogmatics in Continental European Constitutional Law

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The possibility of applying conceptual tools developed and used by theory of literature in legislation as well as in relation to products of, so-called, legal studies i.e. academic discourses connected with schools of law at universities is an important trend in contemporary interdisciplinary studies referred to as 'Law and Literature'. Although I am not a specialist in literary studies I have spent many years on the critique of legal discourses using Foucault's 'toolbox'. My critical activity involves, to a large extent, applying conceptual tools developed by other disciplines of knowledge to products of jurisprudence. This text is an original and amateurish attempt at applying critically some concepts pertaining to literary fiction to quite typical narratives created by contemporary dogmatics in constitutional law understood to be systems of organised academic discursive practices founded on the ideological premises of legal positivism. I will concentrate especially on their ideological and pragmatic aspects.

Terminology related to 'fiction' derives from the Latin word fictio. According to historians of Latin the terms fictio, factor and fingo originally meant respectively 'creation', 'creator' and 'create' and were used to translate the Greek word poiesis. Later, in the final centuries of the Roman Empire, the word 'fiction' began to be used chiefly as a synonym of confabulation, non-realistic creation, the opposite of realistic description. In theory of literature the definition of 'fiction' raises a lot of problems and

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controversy. (Łebkowska 2001, passim) The most widely accepted, mainstream definition is that offered by the Dictionary of Literary Terms. According to that source literary fiction is that quality of the universe of a work of literature which relates to its being an author's 'invention', untrue of unable to be verified by comparing it to the external reality. This meaning of the word 'fiction' is related to the, so-called, mimetic theory of literature (or art in general) which defines the function of literature as reflecting the extra-linguistic reality. Usually what we mean by 'fiction' is directly or indirectly related to our concept of truth.

In relation to logical concepts of truth we word fiction has takes on the meaning of co-relation and correspondence. Ever since Th. Adorno launched his critical aesthetic theories, a third meaning of the word, based on the idea primacy and supremacy of art over extra-linguistic reality, is gaining popularity. Art, according to Adorno,

> expresses the ineffable by revealing the aesthetic 'truth' thanks to concentrating on the 'appearance'. It reveals itself in the constant tension between the mimetic contact with the irreducible sensuality of the reality contained in natural beauty [...]—and constructivist impulse towards the unity in the work of art, being its moment of 'illusion'. (Humphries 2000, p. 176)

The 'truth' as it is understood by a member of Frankfurt School has nothing to do with the truth of propositions as it is understood by logicians, it is not a logical quality, neither it is in any sense related to the correspondence theory of truth and, consequently, to the mimetic concept of the work of art. Art—Adorno writes in a convoluted way:

> is not [...] nature, but it wants to realise that of which art is a promise. It can do that only when it breaks that promise by retreating within itself. (Adorno 1994, p. 121)

Here fiction would be just another form of truth. Implicit in it is conviction important in hermeneutics of suspicion that the unconscious is more important than the conscious. In spite of my respect for the critical concepts of the members of the Frankfurt School such a refined and sophisticated approach is of limited use in the context of this paper. Mimetic approaches seem much more appropriate, naturally with the reservation

that they are not based on the notion of Truth, as Rorty wrote, with capital 'T', i.e. on 'general' trueness but on localised trueness, assuming (a this is a great simplification) its existence. Localised trueness accidentally prevailing in that time and place vision of what is real which does not take into account the factors shaping that vision. In other words, I will treat the use of literary fiction as formulating, more or less deliberately, in a text (legal or otherwise) a narration incompatible with what the audience regards as real. The purposes of such a move can be as varied as writer's motives. Fiction can be used to suggest (as in utopias and anti-utopias), a means of achieving irony, a source of legitimising or de-legitimising arguments.

Talking of literary fiction in relation to a text or an act of law is quite legitimate in as much as we take into account the ideological self-determination of legal positivism. The law seen from a positivist perspective by definition describes an idealised, possible world, and, in spite of sentence construction, suggests rather than describes. The sentence in the Polish constitution which says that the Republic is a democratic state based on the rule of law realising the principles of social justice means, according to positivists, that a postulate of attempting to achieve a desired state of affairs called a state based on the rule of law has been formulated. The same can be said about the sentence which says that the Polish Republic protects property. The justification of the use of literary fiction in the narrations of constitutionalists appears all the more problematic when we take into account the opinion of a Polish constitutionalist K. Wojtyczek who says that the teaching of constitutional law presupposes that the law is one of the elements of social reality; constitutionalists study social phenomena connected with states and certain legal institutions. (Wojtyczek 2010, p. 26) This raises the question about the character, purpose and sources of using fiction in narrations of constitutionalists. Before attempting to answer that question I shall briefly outline what is the content of such fiction.

M. Atienza, a Spanish theorist who has been studying the western liberal-democratic constitutionalism, its transformation and expansion for years came to the conclusion that, as a result of a 'long process of evolution' the canon of constitutionalism, characteristic the continental approach to the subject, has become generally accepted. According to Atienza the following are the dogmatic pillars on which the constitutionalist narration rests:

1. A constitution is a binding positive law of a sovereign state governing *a priori* all its applications; the contents of a constitution is not merely a program but the regulations by which public authorities are bound.

2. Obeying the constitution is guaranteed by the courts of law having the power to annul laws and verdicts which violate the constitution. Constitutional control is devoted to that task and all its other functions are auxiliary and subordinate.

3. Constitution is rigid and can be amended as a result of special procedures (the change by court decision is seen as unusual and pernicious) and its amendments are more difficult than those of other pieces of legislation.

4. The constitution is the basis for interpreting other elements of the legal system.

5. The constitution is enacted directly, like any act of parliament, because it is usually regarded as an act of parliament of a special kind.

6. The constitution influences politics but, apart from a situation of formal change, politics should not have an impact on the constitution. (Aguiló, Atienza, and Manero 2007) Of course, this set of basic assertions could be treated as a subjective projection. The emphasis could be placed on other elements of constitutional thinking. After all, their meaning—as I said earlier—depends on cultural and historical circumstances. However, similar sets of assertions can be found in comparative studies of other highly respected researchers. (Maus 2009, p. 88)

The standard narration about the state and the law offered by contemporary constitutionalists is adapted to the ideological dogmas of liberal democracy and theorems of modern philosophy. Thus, homogenous people of a constitutional state usually concentrated around ethnological factors, through the ballot influence the form and the activity of the organs of power functioning in the political game whose object is the law bound a priori by an inflexible constitution. The constitution limits the political activity by forcing it to obey rational rules. The law, made rational by virtue

of including experts in the process of legislation, is an adequate reaction to the societal needs and, although it emanates from the political process, the political character of legislative activity is limited by rationality of experts and of constitution (which are, in principle, compatible). The created in that way is them applied by essentially passive law courts (both general and administrative)—effective and independent agents controlling power; agents who can count on the support and benevolent control of dogmatics. All of the above is being supervised by the constitutional court—an apolitical body of wise men who are the guardians of constitutionality or rather rationality of those in power, develop and comment on the constitution in the process of a non-discretional and rational reinterpretation of existing *a priori law*. Dogmatics (the branch of knowledge dealing with constitutional law) helps build an apolitical or at least supra-political *acquis constitutionnel*, which is a form of the mythical for the modernity 'heritage of our civilisation' developed in the process of progress. Rigorously academic character of dogmatics' discourse guarantees the rational and objective character of the *acquis*.

If we were to accept the picture I have painted above representative, we would run the risk of a serious dissonance because the constitutional narration appears to be highly problematic when confronted with the political and societal *status quo*, and, since those who study constitutions and constitutionality define their branch of knowledge as institutionalised, objective and the sole source of what is true and just, the fictional character of their dogmas might have very serious consequences.

Literary fiction in the works of constitutionalists becomes increasingly apparent and evident and that puts the authority of their academic activity in jeopardy. The sources of problems and the factors causing cracks to appear on the whole edifice of dogmatic structure are as follows: firstly, overoptimistic approach to the institutions of liberal democracy: critical analyses by theorists of politics view politicians as a cartel of power rather than as a representation of the political aspirations of the people (of course the categories of both 'people' and 'aspirations' are nowadays problematic from the point of view of their adequacy and utility because they presuppose a stable identification of individuals and groups within the body of voters as well as excessively static, systematic and binary character of contemporary political convictions). Secondly, broadly diagnosed , especially by so-called crits, indeterminacy (nebulous character, dependency

on ideological interpretations) of constitutions amplified by the activity of constitutional courts, presupposes some quite awkward questions. Thirdly, the problematic character of the axiology well entrenched in petrified concepts of classical metaphysics, which constitute a significant component of the allegedly *a priori* content of the constitution, becomes apparent (especially in the processes of social change) and undermines the sense of hitherto accepted justifications and constructs. Fourthly and lastly, the attachment to the 'language of the state' becomes a burden in the era of globalisation. In other words, the democratic narration confronted with experience shows the malevolent face of metanarration. Activism forced upon us by modernity and related to the reactive management of the law leads to uncomfortable situations in which verdicts do not sit well with the accepted dogmatics of truth, which makes its achievements more questionable; the courts of law begin to use languages other than the language of dogmatics and the dogmatics itself becomes dependent on ideological convictions about the 'commonality' of language and the 'empirical' nature of testing of court's decisions.

Assuming the essentially apologetic role of dogmatics in relation to legislation and violation of that alliance by either side evidently threatens the referential character of the language of dogmatics. On the other hand, the crisis of the axiological basis which constitutes an important component of the linguistic 'concrete' of dogmatics weakens the foundations on which multileveled edifices of arguments are built, especially those related to the rights of the individual. Using many different competing languages when talking about human rights can engender many awkward dilemmas. The fourth problem area—the way in which modern constitutionalism approaches the question of the state—also threatens discursive habits of dogmatics. It can be said the quasi-platonic attachment to the opinion that the notion of nation-state ought to be included in both descriptive as postulating assertions of the discourse is a clear legacy of the age of Enlightement to contemporary constitutionalism. In other words, modern constitutionalists must consider 'naturalness' of the state as the foundation of their opinions and the state terminology as the staring point in many conceptual constructs, including those dealing with structures outside of the state. Sometimes, especially in this part of Europe, such a 'statocentric' approach can be explained not only by the power of tradition and mnational martyrdom, but also by the aforementioned trauma

after the internationalist (in theory rather than in practice) Marxism. For various reasons, especially of ideology and habits, the state is portrayed in constitutions and constitutional law, as sovereign state having real power 'within' as well as 'without', based on relatively stable and homogenous values, a state where the constitution is the supreme law, a state functioning within recognisable structures, a state which participates in the, so-called, integrating processes but does so in a controlled and describable manner based on current academic methods.

In my opinion the prevalent use of literary fiction in narrations of constitutionalists can be explained not only by the power of habits and of the tradition but also by the structures of both formal and informal power within those discourses. That power, in the language proposed by M. Foucault, normalises and produces the regimes of formulating the constitutional 'truth'. (Foucault 2002, pp. 7–8) It is sufficiently strong to limit the influences of other truths, those which are external and closer to the dominant observations of laymen. What is quite significant here is the, more or less deliberate legitimising manipulation aiming at reinforcing in society the conviction about the legitimacy of those who are currently in power. K. Wojtyczek, whom I have quoted before, studied in depth the internal mechanisms of functioning and development of constitutional thought as well as various forms in which the society influences academic research. His studies resulted in formulating a diagnosis explained the causes of supporting fiction in Poland, his home territory.

Modern Polish intelligentsia—Wojtyczek writes—is under the powerful influence of liberalism which is also quite visible in teaching of constitutional law. That branch of knowledge favours, as a rule, political and economic reforms which are liberal and free market oriented. I approaches with scepticism the more critical trends in the modern social philosophy, which regard the state and the law above all as instruments of domination and exploitation guaranteeing certain social groups the share in the national product which is out of proportion to their contribution to that product. Polish theorists and researchers working in the area of constitutional law defend the western model of constitutional liberal democracy by limiting their critique to the rationality of solutions in particular cases and proposing ways of improving them. However they avoid a broader critical reflection on the subject of social functions of some legal institutions, not to mention a broader reflection oh the idea of constitutional democracy

itself. (Wojtyczek 2010, p. 25)

Even if the aforementioned critique seems to force a growing dissonance between the constitutionalists' narration and what they 'know' and claim to be real external discourses (including the discourse of the theorists of politics the affinity with which the constitutionalism seems admit), constitutionalists are inclined to cultivate fiction transforming their practice into Rorty's hall of mirrors reflecting the image which is no longer there or, perhaps, has never been there.

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Narrative as Part of Legal Methodology

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Abstract. This paper is focused on possible utilization of literature (and literary theory) in law and legal practice. It focuses on narrative as a possible part of legal methodology. In this paper the narrative is treated as one of possible advancement in legal interpretation and argumentation. It deals with presupposition that law is a narrative and legal methodology uses the narrative as one of the possible methods to describe legal rules and to argue. This paper concentrates on narrative as part of legal methodology. It describes what narrative is and how it works and how it should be used in legal practice and legal science.

Keywords. Legal interpretation, narrative, law and literature, legal argumentation, truth.

1 Introduction

Literary representations of law can offer a useful insight into legal institutions and legal argumentation. Literature can reveal stories (narratives) present in law and legal science. Similarly, the literature helps lawyers to improve their stories and their argumentation. This paper focuses on stories. Narratives can help lawyers to improve their interpretation and

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argumentation since good and meaningful narrative creates audience to be convinced that the information (message) is likelihood. It deals with presupposition that *law is a narrative* and legal methodology uses the narrative as one of the possible methods to describe legal rules and to argue. This paper will concentrate on narrative as part of legal methodology.

Some examples of narratives can be found in trial with scientists in case of L'Aquila earthquake. Scientists have been sentenced by Italian regional court to six years of imprisonment for giving a falsely reassuring statement before the quake. The BBC informed about stories (narratives) used by prosecution: 'In the closing statement, the prosecution quoted one of its witnesses, whose father died in the earthquake. It described how Guido Fioravanti had called his mother at about 11:00 on the night of the earthquake—straight after the first tremor. I remember the fear in her voice. On other occasions they would have fled but that night, with my father, they repeated to themselves what the risk commission had said. And they stayed.' (Amos 2012) This is a typical example of narrative used in court proceedings. On the other side—on the side of defendants—can be found nothing more than objective scientific methodology: They were not able to predict the major earthquake. Or on their side is the grand narrative (Lyotard 1984) of the science—the science is objective and offers an objective predictions.

In this case it seems that narrative approach—describing the story of real people—prevailed over objective scientific methodology. Narratives described by prosecution convinced the court. Or the narratives of individual people together with grand narrative of science led judges to a particular decision. Although without full text of the judgment we can only speculate about its reasons, narratives in this case can serve as a test case of narrative methodology in law.

2 What is narrative?

German philosopher Walter Benjamin in his 1936 essay *The Storyteller* (*der Erzähler*) announced the decline of narratives. He thought that the ability to tell stories is disappearing. No one wants any advice and/or experience which are communicated only through stories. No one is interested in stories. Benjamin thought that the art of storytelling disappears because the truth loses its *epic dimension*. (Benjamin 1988, p. 87) What

remains is only information without any moral or value dimension—such information has no benefit for recipient. The Benjamin's approach is little bit skeptical. Some years after Benjamin offered the optimistic variant French linguistics *Roland Barthes*. His approach is more inclusive—he said that the narrative has many forms, in every period, in every society. (Barthes 1977, p. 79) Narrative is timeless, international and transcultural. (Barthes 2002, p. 9) Narrative enables to communicate individual stories with general meaning.

Benjamin narrowed the narrative only to oral tradition and connected it to some qualities and conditions; Barthes was very open and connected narrative almost with every possible form of speech: photography, picture, song, etc. We can add that all these forms are used by lawyers before the court. E.g. the realistic animation can offer to court specific form of information – with many semantic layers. (Fiske 1996, pp. 921–922) There are two positions we can insert narrative within: exclusively oral tradition (Benjamin said that narrative communicates some advices) and any kind of speech (Barthes). This paper is situated more closely to Barthes's position. We accept that the narrative can bear many forms but we think that important is also the content. It has no importance if it is without values or hidden instructions for interpretation. Narrative instigates the recipient how interpret presented information. Narrative can be characterized as oral or written communication of a story (narration). Through narrative shall be given to recipient knowledge or experience in form acceptable to him/her. The narrative contains elements of interpretation and argumentation. In above mentioned test case narratives used by prosecution communicate stories about bereavement which have a universal explanatory value. Perhaps, the court can understand the loss of the bereaved more than the impossibility of the scientists to predict major earthquake.

I think that in modern law there is still a space for storytelling (or narrative) contrary to Benjamin's incredulity. Without narrative the law should lose its character. The reason is the special nature of the law which is closely intertwined by knowledge, interpretation and argumentation. Professor of comparative literature Peter Brooks asserts that

> 'Narratives do not simply recount happenings; they give them shape, give them a point, argue their import, proclaim their results.' (Brooks 2002, p. 4)

The narrative connects facts with theory or ideas. It prepares infor-

mation for effortless acceptance. This is reason why the law is based on stories. (Brooks 2002, p. 1) At least, every legal norm is a story about good and bad behavior. American legal philosopher Robert Cover pointed out that law (set of legal norms) is a specific world connected to stories.

> 'Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live.' (Cover 1997, pp. 4–5)

Stories are essential for understanding the law and to incorporate it into real world—without stories (Cover called these stories myths) it is impossible to combine normative (ideal) world with the real world. Without narratives the law becomes inoperable.

As a method, the narrative can be understood as a kind of manners by which people organize and share their experience. (Sherwin 1996, p. 891)

> Narrative is a different kind of organization and presentation of experience, a different kind of "language" for speaking the world. (Brooks 1998, p. 23)

Even, as Richard Rorty claims, that life is story. (Ward 1997, p. 81) Without story-line, the life is just a set of discrete events or randomness. In addition, the narrative is closer to man's experience due to his experience in childhood: no one handles social reality immediately (from birth) like a little scientist, but organizes his/her experience through different narrative forms. (Bruner 1991, p. 4) There is no reason to believe that such thinking missed law or justice. If the legal argument is presented in a narrative-from it can remind something known.

Literary critic Joseph Hillis Miller argues that the story gives to our experiences the form and organization. (Miller 2008, p. 32) People organize their knowledge through narratives and make them understandable. The narrative has a fixed structure, which, although it sounds banal, consists of: *introduction*, *middle*, and *end*, and the *plot* or *theme*. By organizing experience or facts into a story we can brighten links between elements: It sounds like a scientific method. Through narrative human being organizes his/her experience into a meaningful form. These elements represent firm structure that every narrative has to meet. Without them the story becomes unintelligible. The prosecution in test case should present a credible

narrative about suffering of victims. And it should prove that convinced scientists caused by their statement following terrible consequences. It is very difficult to present these facts through objective methodology—but if it is presented as a narrative it may have a greater chance of success.

To understand legal norms needs to adopt interpretation. (Caudill 2011, p. 138) According to Ronald Dworkin, interpretation is a political activity. (Dworkin 1982, p. 527) Interpretation is fundamental to every legal activity. We can see that legal methodology is very close to legal interpretation. Sometimes the legal methodology is presented as methods of interpretation. Dutch legal philosopher *Bert van Roermund* asserts that legal science or doctrine creates and transforms situations of real life into set of legal cases. (Roermund 1997, p. 2) The recipients understand legal narratives just because they know similar stories with similar elements. (Tait and Norris 2011, p. 20) Although the legal narrative communicates individualities, its form is rigid. Its form is determined and determines what can be communicated. It is up to storyteller to create a credible story from given facts. Each narrative consists of facts. Facts represent pieces of reality that every story has to contain. But, it is interesting that two persons can present different stories composed of the same facts.

For presenting a good story is important the constructive ability of narrator:

> 'The cornerstone for the construction of narrative image is a historical event, the facts associated with it and constructive ability of narrator; how he can create narrative sentences of the 'stones' and link them to the temporally and logically plausible whole.' (Ochrana 2009, p. 116)

The bases of each narrative are facts which should be connected to original or conventional story by storyteller. The facts—in the context of the story—are subjected to critical examination, which only makes sense to empirical knowledge. (Tait and Norris 2011, p. 2) This interpretative schema can slightly complicate the objective concept of a legal science. American legal philosopher *David S. Caudill* asserts that law is based on rhetoric, social and institutional practices, contains ethical and cultural values and is full of interpretations. The same is the science. (Caudill 2011, p. 140) So, the methods in law are subjective as is subjective the law itself.

For example Bulgarian linguistic *Tzvetan Todorov* denies the opposition between objective science and subjective literature. There is no reason that science would necessarily have to be objective opposition to subjective interpretations of literature or narrative. (Todorov 1969, p. 72) Also the social sciences (ibid., p. 72)[1] are, in his opinion, burdened by subjective elements at least in the sense that the researcher must decide which theory will use for the interpretation of his/her findings. (Bruner 1991, p. 3) However, without interpretation of results in accordance with any particular theory (albeit created only for a specific case) obtained data are useless. Their importance will be reflected only through interpretation. These findings are in agreement with assumption of Spanish sociologist José Ortega y Gasset, who assumes that science deals with system of signs representing things. (Gasset 2000, p. 296) It is the social construction of scientific knowledge or episteme. (Caudill 2011, p. 140)

3 Narrative as a Construction

The narrative is not only description. It is also the way we create a world. American literary critic *Joseph Hillis Miller* asserts that story is the way we influence the reality through words. (Miller 2008, p. 32) Constitutional lawyer Stephen L. Winter is convinced about constructional ability of narrative.

> When someone tells us a story, he or she invites us to enter a constructed world. Because we share basic cultural assumptions about how that world is constructed, we know that we are being asked to view that constructed world from a very particular point of view: that of the protagonist. (Winter 1989, p. 2272)

It is world constructed by protagonist, the narrator. It is his/her world. The better the storyteller is more we forget that, we know that it is his/her world. In the test case it is prosecution which construes world where scientists can precisely presume the future. Peter Brooks believes that the story can be seen as one of the categories in which we construct reality. (Brooks 2002, p. 1) The same position shares psychologist Jerome

[1] Todorov asserts that by subjectivity are burdened also natural sciences.

Bruner, who claims that the story not only represents reality, but directly establishes it. (Bruner 1991, p. 5) This opinion is supported by idea that the language is rather constitutive than reflexive. (White 2010, p. 35) Metaphorically can be used Salman Rushdie's book *Haroun and the Sea of Stories* (Rushdie 1990) where the stories construct whole world. The same we can see in law where world is created through language of law.

Particular narrative form is the official protocol. It appears as an objective record—it objectively records what was: what the observer saw, heard or otherwise experienced empirically. Protocol is used to transfer the experience gained empirically to the official form with minimal loss of significance in the transmission. However, in doing so, our observations are distorted of what protocol must contain according to different rules, which affects how the event is captured and described how these are favorable. Even legal case is a construct that is created (composed) of testimony or other evidences. (Roermund 1997, p. 37) Officer knows what to expect from the protocol, and what should be there. But do not imagine that anything to be falsified. The officer only subordinates description to expectations.

Important is that these distortions follows every methodology in law. No matters if it is objective methodology or narrative. Above we mentioned that narrative contains elements of construction. But the same we can observe also in other explanatory methodology. Different is, that narratives have a distinctly subjective elements. But this is understandable in law where subjective elements, e.g. values, represent a meaningful part of it. It is impossible to imagine law without values. But are not these elements (subjectiveness and constructionism) something that excludes narrative from legal methodology? We can accept narratives as inseparable part of law. But should we accept it as a part of legal methodology? The answer is simple: yes.

For instance Guyora Binder and Robert Weisberg problematize the sentiment contained in narratives. (Binder and Weisberg 2000, p. 207) But the life is full of sentiment. (Barthes 2002, p. 9) And law should reflect real life. There is no reason why law should be without sentiment. Of course there should not be too much of sentiment. On the other hand, the narrative allows denaturalizing some stories. It can uncover the stories that are constructed excessively and follow only sentiment. Some stories are presented as objective facts as something that is natural. Through nar-

rative methodology lawyers can gain sensitivity to these attempts covering the difference between objective facts and stories.

4 Semantic Structure of Narrative

Above we mentioned parts of the structure of narrative: *introduction*, *middle*, and *end*, and the *plot* or *theme*. But each narration has also to bear some elements that create the semantic structure. Each of narratives is to provide assurance of the story and its connection with the current requirements of the audience. Important is also *context*, which is an important element in shaping the meaning. Only the context admits the correct meaning of words and shifts narrative to the intended target. Next to the context, we can distinguish among elements constituting the semantic structure of narrative also the audience or the form of discourse. In addition to these elements *Richard K. Sherwin* assesses narrative strategy. (Sherwin 1994, p. 718) This includes the choice of a semantic schema, the choice of narrative genre that will affect the expectations or standards imposing clarity and the role of the audience. Whether the audience is passive recipient of standards, facts, or other elements that story involves, or whether their own standards shape the message of the story. These elements constitute a narrative—if someone wants to succeed with his/her story must adopt them. The fixed structure opens narrative to critical investigations and allows revealing exaggerated subjective elements. The fixed structure enables to identify narrative and to reveal its subjective potential.

The importance of the narrative is emphasized by the *plot*. It is part of structure and also the part of *semantic structure* of narrative. The plot is a formal organization of time and action and helps to structure experience, so it makes sense and puts it into the space-time continuum. This continuum allows people to interpret the world around narrative. (Todorov 1969, p. 72) Since the legal rule regulates human behavior, it can be seen as a story. Therefore, it is essential to tell a specific case so as to coincide with the story narrated by legal rule. If the two plots coincide, it is clear that a particular case must end in a manner anticipated by legal norm. Legal regulation assumes that if both of them match in the plot, it must lead to the same consequences.

When evaluating the outcome of interpretation of legal rules or evalu-

ation of the evidence, we must realize that they must agree with the generally accepted requirements. Not with a fixed and unchanging criterion. The results must be involved in the formation of generally accepted discourse. (Brooks 1998, p. 20) Scientific and logical techniques are subject to falsification—but narrative does not have the ambition to be true or false. Test example is not truth: it is impossible to subject these stories to criteria of truthfulness. The criterion becomes *validity* or *authenticity*, which are defined more by *social conventions* than clear and objective rules. (Bruner 1991, p. 4) French philosopher of literature *Michael Riffaterre* understood credibility similarly: Credible will be what reflects social consensus about what is real. (Riffaterre 1981, p. 107) Here we can see social acceptance of what can be considered real. As a credible will recipient accept the stories (as a whole and in its details) corresponding to reality. Simply, the story will be credible if it will look quite normal. (Riffaterre 1994, p. 5) Italian semiotic Umberto Eco connects normality with moderateness:

> Being moderate means being within the modus—that is, within limits and within measure. (Eco 1990, p. 146)

There is no reason why in usual cases the legal interpretation should not be moderate or normal. It mean accepted by critical audience.

In treating the consistence of the narrative the accordance between the details and the whole is necessary. The biggest credibility of a story will be achieved if there is a line between form and content (Riffaterre is talking about compliance and mimetic image index—if the word has also the literary and figurative description). (Riffaterre 1981, p. 115)

Such credibility can be marked as the truth, especially if we accept the perception of the truth by John Fiske:

> Truth is the product of a series of socially located decisions about what to treat as true, and what we know as reality is as much a matter of social experience as it is universal nature. (Fiske 1996, p. 918)

Truth is social experience, which really is not too far away from the credibility value. This is of course reflected in the law: for example, the authoritative interpretation will be affected by what the judge considers in assessing human behavior as normal. What is it for him the *normal*

human behavior. (Brooks 1998, p. 11) Judge adapts her decision to the vision of the world, in a style that is *how it could happen*—telling gains cultural legitimacy. (Bruner 1991, p. 15) A good story connects with the general concept of law, justice and truth. (Sherwin 1996, p. 897)

In paper presented I tried to explain that narrative is a part of legal methodology. Although narrative contains subjective and constructive elements, it can serve as a useful tool for organizing legal knowledge and information. Because of its rigid structure, narrative helps lawyers to understand presented information and connect them with values.

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ARGUMENTATION 2012

Law and Literature Workshop Proceedings

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Jaromír Šavelka
Martin Škop (eds.)

Published by Masaryk University, 2012
Faculty of Law Publications No. 432

Printed by: Tribun EU, s.r.o., Cejl 892/32, 602 00 Brno
1st edition, 2012
ISBN 978-80-210-6019-7